APPENDIX B

ARBITRATION AND FEDERAL RIGHTS UNDER COLLECTIVE AGREEMENTS IN 1967

REPORT OF THE COMMITTEE ON LAW AND LEGISLATION FOR 1967 *

EDGAR A. JONES, JR. AND PETER M. ANDERSON

During 1967 the federal and state courts continued their process of further developing and refining the body of federal substantive law governing collective bargaining agreements. Although 10 years have now elapsed since this process was formally begun, the courts are still being faced with fundamental, yet unanswered, questions. In 1967 some of these questions were explored by the courts and one was determinately answered.

I. THE RIGHTS OF INDIVIDUAL EMPLOYEES UNDER SECTION 301

Since the Supreme Court's 1962 decision in *Smith* v. *Evening News Assn.*,[1] it has been clear that Section 301 encompasses suits

* The members of the Committee for 1967–68 were: Joseph Brandschain; David L. Cole; Clair V. Duff; I. Robert Feinberg; Charles O. Gregory; Sanford H. Kadish; J. Keith Mann; Herbert L. Sherman, Jr.; Clyde W. Summers; Jerre S. Williams; and Edgar A. Jones, Jr., Chairman.

The Report of this Committee of the National Academy of Arbitrators was prepared by the Committee's Chairman, Edgar A. Jones Jr., Professor of Law, University of California, Los Angeles, and Member of the Board of Governors of the Academy; and Peter M. Anderson, Member of the California Bar, associated with O'Melveny & Myers, Los Angeles, California.

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. By early December there were over 130 reported decisions to be analyzed in the preparation of this Report. Of course, decisions sometimes are late in being reported because they are delayed in filing by the court. Therefore, we make no representation that "all" cases have been encompassed by this Report.

[1] 371 U.S. 195, 51 LRRM 2646 (1962).

by individual employees to enforce collective bargaining agreements. However, the Court in *Smith* found it unnecessary to describe the circumstances under which these suits could be brought. In the 1964 case of *Humphrey* v. *Moore*[2] the Court again failed to articulate guidelines in this troublesome and controversial area of the law. Some guidance was provided a year later in *Republic Steel* v. *Maddox*,[3] where the Court held that an individual employee must attempt to exhaust the contractual grievance procedure before seeking judicial relief. However, it was not until the past year that the Court attempted in *Vaca* v. *Sipes*[4] to detail in a comprehensive manner the judicial rights of an employee under a collective bargaining agreement.

The *Vaca* case involved a suit by an employee against his union for failure to process his grievance to arbitration. The employee had been discharged by his employer on the ground of poor health after his return from a medical leave of absence. The union had taken the discharge grievance through the fourth step of the contractual grievance procedure but had refused to invoke arbitration after a doctor selected by the union had also found the employee physically unfit to resume his former work. The employee thereupon brought a damage action in a Missouri state court against the union alleging that the union had thereby breached its duty of fair representation. A jury returned a verdict in favor of the employee, but the verdict was set aside by the trial judge on the ground that the action arguably involved an unfair labor practice and was therefore within the exclusive jurisdiction of the National Labor Relations Board. The Supreme Court of Missouri disagreed with the trial judge on this preemption issue and reinstated the jury's verdict.

After the U. S. Supreme Court granted certiorari, it was apparent that the Court's decision would be an important one. Few, however, expected the comprehensive discussion of the rights of individual employees under Section 301 which resulted. It appeared that Justice White in writing the opinion of the Court deliberately went out of his way in order to clarify the confusion which had heretofore existed with respect to this subject and which had been partially caused by his own opinion in the *Humphrey* case.

---

[2] 375 U.S. 335, 55 LRRM 2031 (1964).
[3] 379 U.S. 650, 58 LRRM 2193 (1965).
[4] 386 U.S. 171, 64 LRRM 2369 (1967).

The Court in *Vaca* held that the judicial enforcement of the duty of fair representation was not preempted. It first noted that courts had been deciding duty-of-fair-representation cases since 1944 and that it was doubtful that the NLRB possessed a substantially greater expertise in this area than the courts. It also observed that if the Board were granted exclusive jurisdiction, the rights of individual employees might suffer by reason of the general subordination of individual to collective rights under the NLRA and the unreviewability of decisions of the NLRB's General Counsel relating to the issuance of complaints. The primary reason for not finding preemption, however, was the Court's conclusion that the duty of fair representation plays an integral part in actions by individual employees to enforce collective bargaining agreements and that the latter are obviously within judicial cognizance. The Court then proceeded to describe the rights of individual employees under Section 301 and the role played by the duty of fair representation with respect to such rights.

The Court first reiterated the requirement established in *Maddox* that employees must attempt to exhaust the contractual grievance procedure before seeking judicial relief under Section 301 where such a procedure was intended by the parties to the contract to be the exclusive remedy. To this, the Court now added a second requirement. If the failure of the employee to secure relief through such grievance procedure was due to the union's failure to process his grievance, the employee must in addition prove, as a prerequisite to a judicial action on the contract, that the union thereby breached its duty of fair representation.

The Court then proceeded to discuss a union's duty of fair representation with respect to the processing of grievances. It squarely rejected the view, represented by *Donnelly* v. *United Fruit Co.*,[5] that every employee should have the right to have his grievance taken to arbitration. The Court indicated that it was doubtful that a collective bargaining agreement could be administered successfully unless the union did have the power to settle grievances short of arbitration. The Court further noted that the Supreme Court of Missouri had found a breach of duty solely on its finding that the evidence supported the employee's claim. Such second-guessing by a judge or jury was found by the Court in *Vaca* to be reversible error. The correct standard which should

[5] 40 N.J. 61, 190 A.2d 825, 50 LRRM 2856 (1963).

have been applied by the Missouri court was whether the union had acted arbitrarily or in bad faith. The Court then concluded that as a matter of law the union in *Vaca* had not breached its duty of fair representation.

Although the Court could have concluded its opinion at this point, it proceeded to find an alternate ground for setting aside the judgment of the Supreme Court of Missouri. The latter court had assessed the union with the total amount of damages resulting from the failure of the employer to reinstate the employee. Even assuming a breach of duty, such an assessment according to the Court was incorrect. If indeed the employer had breached the collective bargaining agreement, the employer, not the union, should bear the basic cost of such a breach. The union's liability should be limited to any increase in damages caused by the union's failure to process the grievance. In short, damages should be allocated between the union and the employer in accordance with their respective fault.

The effect of the *Vaca* decision clearly was evidenced during the year in the opinions of other courts. For example, the Court's discussion of allocation of damages led one federal district court to conclude that the employer is an indispensable party to an action brought by an employee against his union for failure to arbitrate his wage and discharge grievances.[6] In another decision an action against a union was dismissed by the court after the employer had entered into a settlement with the employee-plaintiff. The court could find no evidence that the union's inaction had increased the employee's damages.[7]

In many cases[8] actions were dismissed, stayed, or remanded for failure of an employee to seek relief through the contractual grievance and arbitration procedure. In order to fulfill the duty to exhaust such procedures, the employee must not merely seek the union's assistance but must himself file a grievance if the con-

[6] *Kress* v. *Local 776, Teamsters,* 65 LRRM 2337 (M.D. Pa., 1967).
[7] *Dessingue* v. *S. Klein Department Stores,* 275 F. Supp. 272, 66 LRRM 2569 (D.N.J., 1967).
[8] *Boone* v. *Armstrong Cork Co.,* 384 F.2d 285, 66 LRRM 2075 (5th Cir., 1967); *Williams* v. *Pacific Maritime Assn.,* — F.2d —, 66 LRRM 2145 (9th Cir., 1967); *Brown* v. *Truck Drivers,* 264 F. Supp. 776, 64 LRRM 2574 (D.Md., 1967); *Wade* v. *Crown Cork & Seal Co.,* 66 LRRM 2025 (D. Md., 1967); *Richardson* v. *International Minerals Corp.,* 64 LRRM 2241 (M.D. Tenn., 1967); *Storck* v. *Quaker Oats Co.,* 228 N.E.2d 752, 66 LRRM 2318 (Ill. App. Ct., 3d Dist., 1967).

tract grants him the right to file.[9] Where the employee alleges in his complaint that he was prevented from exhausting the grievance procedure because of a breach of the union's duty of fair representation, the courts will not dismiss the complaint on exhaustion grounds.[10] However, if such employee is subsequently unable to prove such arbitrary or bad-faith conduct on behalf of the union, judgment will be entered against him.[11]

Courts have varied as to the specificity required by an employee in pleading a breach of a collective bargaining agreement. Two federal district courts have found complaints defective which did not plead the specific provisions breached and how these provisions were breached.[12] On the other hand, a decision of a court of appeals appears to be less demanding in this regard.[13]

Another interesting development this year involved the increase in the number of cases in which individual employees sought judicial relief after an adverse award of an arbitrator or a labor-management board. Here again, the courts usually applied a good-faith standard with respect to the union's participation. In six such cases[14] the employees' judicial actions were unsuccessful. In only one case did an employee score a partial victory—the court

---

[9] *Desrosiers* v. *American Cyanamid Co.*, 377 F.2d 864, 65 LRRM 2557 (2d Cir., 1967); *Steen* v. *Local 163, UAW*, 373 F.2d 519, 65 LRRM 2135 (6th Cir., 1967); *Bsharah* v. *Electric Autolite Co.*, 64 LRRM 2231 (N.D. Ohio, 1967).

[10] *Desrosiers* v. *American Cyanamid Co.*, 377 F.2d 864, 65 LRRM 2557 (2d Cir., 1967); *Richardson* v. *Communications Workers*, 267 F. Supp. 403, 65 LRRM 3133 (D. Neb., 1967); *Williams* v. *Wheeling Steel Corp.*, 266 F. Supp. 651, 65 LRRM 2080 (N.D.W. Va., 1967).

[11] *Ball* v. *Eastern Coal Corp.*, 415 S.W.2d 650, 66 LRRM 2343 (Ky. Ct. App., 1967); *Meola* v. *Bethlehem Steel Co.*, 288 A.2d 254, 65 LRRM 2040 (Md. Ct. App., 1967). Two cases departed from those general principles. In *Hostetler* v. *Quimby Holsum Bakery*, 227 N.E.2d 818, 66 LRRM 2252 (Ohio Ct. Comm. Pleas, 1967), the court did not require an employee to exhaust the grievance procedure in an action for vacation pay for the sole reason that the employer had discontinued its business. In *Simmons* v. *State Marine Lines*, 207 F. Supp. 384, 65 LRRM 2137 (E.D. Pa., 1967), the court indicated that it would consider the merits of an employee's claim irrespective of whether the union's refusal to process the claim was in good faith.

[12] *Brown* v. *Truck Drivers*, 264 F. Supp. 776, 64 LRRM 2574 (D.Md., 1967); *Amador* v. *Fitzgerald*, 64 LRRM 2437 (S.D. N.Y., 1967).

[13] *Chasis* v. *Progress Mfg. Co.*, 256 F. Supp. 747, 66 LRRM 2163 (3d Cir., 1967).

[14] *Thomas* v. *Consolidation Coal Co.*, 380 F.2d 69, 65 LRRM 2660 (4th Cir., 1967) (neutral arbitrator); *Balowski* v. *UAW*, 372 F.2d 829, 64 LRRM 2397 (6th Cir., 1967) (neutral medical arbitrator); *Allessandrini* v. *CBS*, 64 LRRM 2841 (S.D. N.Y., 1967) (union board); *Health* v. *Central Truck Lines*, 195 So.2d 588, 65 LRRM 2136 (Fla. Dist. Ct. App., 1st Dist., 1967) (labor-management board); *Fischer* v. *Guaranteed Concrete Co.*, 151 N.W.2d 266, 65 LRRM 2493 (Minn. Sup. Ct., 1967) (neutral arbitrator); *Guille* v. *Mushroom Transportation Co.*, 229 A.2d 903, 65 LRRM 2524 (Pa. S. Ct .,E. Dist., 1967) (neutral arbitrator).

merely denied a motion for summary judgment in favor of the union.[15] An employee was also unsuccessful in a case where the union refused to resort to the last step of a grievance procedure which did not provide for arbitration or a labor-management board, but rather gave the union the right to strike.[16]

In conclusion, it can be seen that the individual employee who seeks to remedy a breach of a collective bargaining agreement through judicial action has numerous hurdles to cross before the court will consider the merits of his claim.[17] First, he must usually attempt to exhaust the contractual grievance procedures. If these procedures are exhausted, he is bound by the results, absent unusual circumstances. If these procedures are not exhausted by reason of the union's action or inaction, he must prove that the union thereby acted arbitrarily or in bad faith. In short, his chances of success are generally not great. Nevertheless, it can reasonably be assumed that employees will continue to find such suits a useful device to compel unions to bring their claims to arbitration or to force a settlement from a reluctant employer.

II. GENERAL JUDICIAL PROBLEMS UNDER SECTION 301

A. Actions Cognizable Under Section 301

The vast majority of cases arising under Section 301 involve actions by employers, unions, or employees for alleged breaches of collective bargaining agreements. However, the scope of Section 301 is not so limited. For example, courts have held that trustees of pension and welfare plans can bring actions under Section 301 for employer contributions, even though the trustees are not parties to the collective bargaining agreements under which the plans

[15] *Catanzaro* v. *Soft Drink Workers Union*, 65 LRRM 2092 (E.D. N.Y., 1967).
[16] *Rothlein* v. *Armour & Co.*, 268 F. Supp. 545, 66 LRRM 2266 (W.D. Pa., 1967).
[17] The merits of a contractual claim were considered in only a few cases. In *Sweeney* v. *Hiltebrant*, 373 F.2d 491, 64 LRRM 2832 (6th Cir., 1967), the court found against the employees on both the merits and the duty of fair representation issues. The court in *Thyer Mfg. Corp.* v. *McDaniel*, 200 So.2d 477, 65 LRRM 2592 (Miss. S. Ct., 1967), found it unnecessary to consider the exhaustion issue as it found the contractual claim itself was unmeritorious. An employee lost on the merits in *Norfolk-Portsmouth Newspapers* v. *Stott*, 156 S.E.2d 610, 66 LRRM 2394 (Va. S. Ct., App., 1967), but another employee prevailed in *Hostetler* v. *Quimby Holsum Bakery*, 227 N.E.2d 818, 66 LRRM 2252 (Ohio Ct. Comm. Pleas, 1967).

were established.[18] Suits involving the "Plan for Settling Jurisdictional Disputes" are likewise covered by Section 301.[19] On the other hand, an action by an employee against a union for failing to provide promised strike benefits during a recognitional strike was dismissed by a federal court for lack of subject-matter jurisdiction.[20] The same was true of a cause of action in which an employee charged his supervisor with malicious interference with his contractual rights.[21]

In line with the recent judicial trends, a federal district court held that Section 301 also encompassed an action for specific enforcement of an agreement to arbitrate the unresolved terms of a future collective bargaining agreement.[22] The court found that the rationale of the 1957 *Potter Press* case,[23] which had refused to compel such a "quasi-legislative" arbitration, had been undermined by subsequent Supreme Court decisions.

B. Existence of Contract

Courts in a number of cases were called upon to determine whether the parties had actually entered into a collective bargaining agreement. Even in suits to compel arbitration, such determinations were made by the courts and were not referred to the arbitrator.[24] In two cases[25] it was found that a mere agreement to pay union wages and fringe benefits for employed union members did not obligate the employer to comply with all the provisions of the collective bargaining agreement between the union and other employers in the area. In other cases the courts looked

---

[18] *Trustees* v. *Wachsberger Roofing Works,* 66 LRRM 2047 (E.D. N.Y., 1967); *Schlecht* v. *Hiatt,* 65 LRRM 2009 (D. Ore., 1967); *Hann* v. *Korum,* 64 LRRM 2862 (D. Ore., 1967).
[19] *Wood, Wire & Metal Lathers* v. *Dunlop,* 382 F.2d 176, 65 LRRM 3027 (D.C. Cir., 1967).
[20] *O'Rear* v. *Teamsters,* 65 LRRM 2083 (M.D. Tenn., 1967).
[21] *Richardson* v. *Communications Workers,* 267 F. Supp. 403, 65 LRRM 3133 (D. Neb., 1967).
[22] *Printing Pressmen* v. *Piedmont Co.,* 263 F. Supp. 952, 64 LRRM 2337 (M.D. N.C., 1967).
[23] *Boston Printing Pressmen's Union* v. *Potter Press,* 241 F.2d 787, 39 LRRM 2524 (1st Cir., 1957).
[24] *Warrior Constructors* v. *Engineers,* 383 F.2d 700, 66 LRRM 2220 (5th Cir., 1967); *Rubber Workers* v. *Lee Rubber & Tire Corp.,* 269 F. Supp. 708 (D.N.J., 1967), *In re Zarick, Inc.,* 66 LRRM 2175 (N.Y. Sup. Ct., 1967).
[25] *Wagor* v. *Kovens Construction Corp.,* 382 F.2d 813, 66 LRRM 2014 (5th Cir., 1967); *Hann* v. *Harlow,* 271 F.Supp. 674, 65 LRRM 2012 (D. Ore., 1967).

to such factors as the authority of the negotiators[26] and the completeness of the contract[27] in determining the existence of a contract. Lastly, a court held that parol evidence was admissible to show the nonexistence of a contract but could not be used to vary express contractual terms.[28]

C. *Application of Contract to Events Preceding Its Execution or Subsequent to Its Expiration*

Generally speaking, a collective bargaining agreement is not applicable to events preceding its execution unless by its terms it is given retroactive effect. In *Boeing Co.* v. *IAM*[29] a union sought to compel arbitration of the discharge of several striking employees who had allegedly engaged in acts of misconduct. The misconduct had occurred after the expiration of the previous contract but before a new agreement was reached. The employer, however, had not discharged the employees immediately but had waited until after the execution of the new contract when the striking employees applied for reinstatement. The Fifth Circuit compelled arbitration of the discharges since the grievance arose only after the disciplinary action had been taken and this occurred during the term of the new contract.

It is also true that a collective bargaining agreement does not necessarily become inoperative upon the expiration of its term. This was again demonstrated during the past year in *Upholsterers' Union* v. *American Pad Co.*[30] Here the Sixth Circuit found that a collective bargaining agreement granted life-insurance coverage to certain retired employees for the rest of their lives. Such a right was enforceable even though the contract had expired and the plant had moved to a different state.

D. *Obligations of Successors*

In 1967 courts were again required to determine how a basic change in ownership or business structure affects an existing collective bargaining agreement. Determinations were made by

[26] *Warrior Constructors* v. *Engineers*, 383 F.2d 700, 66 LRRM 2220 (5th Cir., 1967); *Executive Board* v. *Order of Elks*, 64 LRRM 2288 (E.D. Wash., 1967).
[27] *Teamsters* v. *Clearfield Cheese Co.*, 64 LRRM 2748 (W.D. Pa., 1967).
[28] *Local 509, ILGWU* v. *Annshire Garment Co.*, 65 LRRM 2769 (D. Kan., 1967).
[29] 381 F.2d 119, 65 LRRM 2961 (5th Cir., 1967).
[30] 372 F.2d 427, 64 LRRM 2200 (6th Cir., 1967).

the courts in a number of interesting and varied factual settings. All involved an application of the principles set forth in the landmark decision of *John Wiley & Sons* v. *Livingston*.[31]

Three decisions by courts of appeals are of special interest. In the first of these, *Teamsters* v. *Red Ball Motor Freight, Inc.*,[32] the employer combined two of its terminals into an integrated operation at a single location. The employees at each of the two former terminals had been represented by a different union and had been covered by a different collective bargaining agreement. Both groups of employees were subsequently employed at the one location. Beset by conflicting representation claims, the employer agreed with the two unions that an NLRB election would be sought and that the contract of the union which was certified would be applied to all employees of the combined operation. During the pendency of the NLRB proceedings, one of the unions obtained favorable rulings on several grievances from a joint labor-management committee. The union then sought judicial enforcement of these awards. The Fifth Circuit refused enforcement for two reasons. First, it found that under the NLRA the employer has a duty to remain strictly neutral during the pendency of a representation proceeding involving two competing unions. The resolution of grievances during this period, even though done in an evenhanded manner, might well result in more favorable results for one union than for the other. This in turn would violate the employer's duty of neutrality. Secondly, the enforcement of an award for one union might adversely affect the members of the other union. This, according to the court, would produce industrial strife rather than prevent it.

The same circuit faced a different problem in *U. S. Gypsum Co.* v. *Steelworkers*.[33] In this case the business in question had been sold and the union which had a collective bargaining agreement with the seller had subsequently been decertified by the NLRB. In spite of the decertification, the union sought to compel arbitration as to the obligations of the purchaser under the seller's collective bargaining agreement. The court first found that a substantial continuity of identity existed after the sale and that the

[31] 376 U.S. 534, 55 LRRM 2769 (1964).
[32] 374 F.2d 932, 64 LRRM 2545 (5th Cir., 1967).
[33] 384 F.2d 38, 66 LRRM 2232 (5th Cir., 1967).

purchaser therefore would normally have a duty to arbitrate claims arising under the seller's collective bargaining agreement. With respect to the decertification, the court held that matters involving events arising prior thereto were definitely arbitrable. As to the arbitrability of events arising after the decertification, the court found it unnecessary to express an opinion, since it was not clear that the question was involved in the case. The court did indicate, however, that many of the substantive terms of the contract conceivably could remain in effect for the full term of the contract despite the fact that the union was no longer the exclusive bargaining representative.

In the third case, *Monroe Sander Corp.* v. *Livingston*,[34] the employer had closed its plant on Long Island and transferred its functions to a newly acquired subsidiary in Newark, N. J. The newly acquired subsidiary was not organized and had a full complement of employees whose employment predated the acquisition. The employees at Long Island were, however, covered by a collective bargaining agreement, and their union claimed that this agreement had been breached by the failure of the employer to transfer the Long Island employees to Newark. The union thereafter sought to arbitrate this claim not only against the employer at Long Island but also against the subsidiary in Newark. In considering the question, the Second Circuit found that the subsidiary was indeed obligated to arbitrate under the Long Island contract, in that it possessed a "substantial continuity of identity" with the Long Island enterprise.[35] The court did indicate, however, that if the resulting arbitration award required the displacement of the nonunion employees at the subsidiary, the award might well be vacated for violating national labor policy. Furthermore, Chief Judge Lumbard observed in dissent that the unorganized employees' lack of representation seemed to foreclose them from effective participation in any arbitration, referring to multiparty arbitral joinder remedies otherwise available, thus making it even less likely that their interests could be properly accommodated.

---

[34] 377 F.2d 6, 65 LRRM 2273 (2d Cir., 1967).

[35] The court relied on the fact that both plants were in the New York metropolitan area, were in the same line of business, had similar jobs, and would service many of the same customers.

Collective bargaining agreements have not always survived a change in business structure or ownership. In one case[36] a company employed draftsmen at its main facility and also at a wholly owned subsidiary. Both groups were represented by the same union but were covered by different collective bargaining agreements. The corporate structure of the company was then changed so as to eliminate the separate corporate existence of the subsidiary. Although no operational changes were made, the court held that this change brought all the draftsmen under the coverage of the main-facility agreement and in effect eliminated the agreement for the subsidiary. In a second case[37] a court disallowed arbitration when it found that a purchased enterprise did not maintain its "substantial continuity of identity" after the sale. The court relied primarily on the fact that the purchaser hired only seven of the 110 former employees and that the new employees had chosen to be covered by an agreement with a different union.

E. Parties to the Agreement

There were a number of cases in 1967 in which a union sought to compel arbitration of its claim that a certain business operation was in fact an *alter ego* of an employer covered by a collective bargaining agreement and that therefore such business operation should likewise be included in the coverage of the agreement. Where the disrupted business operation is ostensibly a separate legal entity, the courts have been faced with a dilemma. On the one hand, they have been reluctant to compel the disputed business to be a party to an arbitration proceeding when it was not a signatory as such to the arbitration agreement. On the other hand, they have been concerned about the binding effect of an arbitration proceeding in which the disputed business was not a party.

The courts have taken diverse approaches to the problem. In a Ninth Circuit decision[38] the union had sought a court order to arbitrate directed to both the disputed business and the signatory employer. After concluding that the obligation of a specific em-

[36] *Bath Marine Draftsmen's Assn.* v. *Bath Iron Works Corp.*, 226 F. Supp. 710, 65 LRRM 2013 (D. Me., 1967).
[37] *Owens-Illinois, Inc.* v. *Retail Store Union*, 276 F. Supp. 740, 66 LRRM 2024 (S.D. N.Y., 1967).
[38] *Culinary Workers* v. *Hacienda, Inc.*, 383 F.2d 667, 66 LRRM 2351 (9th Cir., 1967).

ployer to arbitrate was one for judicial determination, the court held, after considering the facts of the case, that the disputed business was not so obligated. Although the signatory employer was clearly under a duty to arbitrate, the court found that its arbitrability determination with respect to the disputed business had also answered the question to be arbitrated. In short, by determining that the disputed business was not obligated to arbitrate, the court had determined that it was not covered by the collective bargaining agreement. The court therefore ordered neither party to arbitrate.

The Pennsylvania Supreme Court had occasion to take a different tack. In this case[39] the union had requested only the signatory employer to arbitrate the coverage question. The disputed business, a separate corporation, nevertheless sought to enjoin the arbitration proceedings. The court refused to enjoin the arbitration between the union and the signatory employer. However, it added that if the arbitrator subsequently held the disputed business to be covered, the award would not in itself be binding upon the disputed business. The union would thereafter be obligated to bring a judicial action on the award against the disputed business, at which time the latter could challenge its validity. The court did not consider what the effect would be if the arbitrator were to open the arbitration to the participation of the other corporation by offering to make it a party or setting in motion a trilateral joinder proceeding.

In a third case[40] the court was unconcerned about such subtleties and simply ordered the signatory employer to arbitrate the coverage question. Here the union had not sought to compel the disputed business to arbitrate.[41]

---

[39] *Schoellhammer's Hatboro Manor* v. *Hotel & Restaurant Employees,* 65 LRRM 2805 (Pa. Sup. Ct., 1967).

[40] *Future Motors, Inc.,* v. *Local 259, UAW,* 65 LRRM 3104 (N.Y. Sup. Ct., 1967).

[41] For an earlier case involving a similar problem, see *Local 770, Retail Clerks* v. *Thriftimart, Inc.,* 59 Cal.2d 421, 380 P.2d 652, 52 LRRM 2935 (1963). *Compare,* Bernstein, "Nudging and Shoving All Parties to a Jurisdictional Dispute into Arbitration: The Dubious Procedure of National Steel," 78 *Harv. L. Rev.* 784 (1965), *with* Jones, "On Nudging and Shoving the National Steel Arbitrator into a Dubious Procedure," 79 *Harv. L. Rev.* 327 (1965). See Jones, "A Sequel in the Evolution of the Trilateral Arbitration of Jurisdictional Disputes—The Supreme Court's Gift to Embattled Employers," 15 *UCLA L. Rev.* 877 (1968).

F. Exhaustion of the Grievance and Arbitration Procedure and Judicial Decisions on the Merits

As has previously been discussed, individual employees generally have a duty to exhaust the grievance and arbitration procedure of a collective bargaining agreement before seeking a judicial determination on the merits of their contractual claim. Employees and unions likewise have a similar duty prior to seeking judicial relief provided the grievance and arbitration procedures are available to them and are applicable to the dispute in question.[42]

The exhaustion question frequently arises when an employer brings a damage action against a union for the breach of a no-strike clause. In two such cases the courts refused to stay the actions pending arbitration. The grievance procedures in the first case did not encompass employer grievances.[43] In the second case there was a specific contractual provision that stated that nothing in the contract should prevent legal proceedings by the employer for breach of the no-strike clause.[44] A third case involved a similar court action against an international union.[45] Here the court denied a motion to stay pending arbitration because it was not clear whether the international, as opposed to the local, could be a party to the arbitration procedures specified in the contract. This was to be determined later by the trial court.

On the other hand, in a case with an interesting twist, an employer's breach-of-contract action was stayed pending arbitration where the employer sought damages against the union for failure to attempt to organize other employers in the same industry. According to the court, such a claim by the employer was subject to the arbitration procedure.[46]

A somewhat different situation arises where the contractual procedure does not provide for a final determination such as arbi-

---

[42] *Drake Bakeries, Inc.* v. *Local 50, American Bakery Workers,* 370 U.S. 254, 50 LRRM 2440 (1962).
[43] *Boeing Co.* v. *UAW,* 370 F.2d 969, 64 LRRM 2208 (3d Cir., 1967).
[44] *Stillpass Transit Co.* v. *Teamsters,* 382 F.2d 940, 66 LRRM 2152 (6th Cir., 1967).
[45] *Teamsters* v. *Stillpass Transit Co.,* 386 F.2d 983, 66 LRRM 2491 (D.C. Cir., 1967).
[46] *Electric Alarm Trade Assn.* v. *IBEW,* 271 F. Supp. 720, 66 LRRM 2044 (S.D. N.Y., 1967).

tration. In one such case[47] the contract provided that the type of grievance in question would be subject only to "discussion" and would not be subject to the arbitration procedure. When the union sought to bring a court action on the merits of the grievance, the employer argued that the union's sole remedy was "discussion." The court disagreed, refusing to infer from such language that the union had thereby agreed to waive judicial enforcement of its rights under the clause involved.

In a number of cases the courts did reach the merits of the contractual dispute. For example, a court held that an employee was not entitled to fringe benefits pending final determination of his discharge grievance, where he had been discharged for breaching the no-strike pledge.[48] Another court found that carpenters building a ramp for an airport were covered by the union's highway contract rather than its building contract.[49] A third court refused to follow *Zdanok* v. *Glidden*[50] and held that the seniority provisions of a contract covering a Connecticut plant did not apply to a Tennessee plant to which part of the operations of the former plant had been transferred.[51]

III. SUITS TO COMPEL ARBITRATION OR TO REVIEW AWARDS

A. Suits to Compel Arbitration

Because of the presumption favoring the arbitrability of labor disputes,[52] courts have continued to compel arbitration in most cases where the arbitrability of the dispute has been challenged. Where arbitration has not been ordered, it has generally been on such grounds as the nonexistence of a contract, lack of a successor relationship, or conflict with other legislation. On the other hand,

---

[47] *Aughenbaugh* v. *North America Refractories Co.*, 231 A.2d 173, 65 LRRM 2968 (Pa. S. Ct., 1967).
[48] *Truck Drivers* v. *Roadway Express, Inc.*, 65 LRRM 2543 (3d Cir., 1967).
[49] *Carpenters* v. *Phelps Construction Co.*, 376 F.2d 731, 64 LRRM 2385 (10th Cir., 1967).
[50] 288 F.2d 99, 47 LRRM 2865 (2d Cir., 1961).
[51] *Local 1251, UAW* v. *Robertshaw Controls Co.*, 271 F. Supp. 373, 65 LRRM 2983 (D. Conn., 1967).
[52] *See United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960).

claims that a specific type of dispute is excluded from the arbitration provisions have generally not been successful.[53]

Arbitration of a manning dispute was, however, denied where the court found that such a dispute was expressly excluded from arbitration and subject only to negotiation.[54] In another case[55] an employer sought to compel arbitration of whether a certain employee participated in or was responsible for an unlawful work stoppage. The employer sought such an arbitral determination prior to taking any disciplinary action against the employee, a novel step which would have protected the employer against needless damages and the employee against needless loss of wages pending the final decision on the merits. The union argued that if arbitration were ordered, the arbitrator should also rule on whether such a prior determination was permissible under the contract. The court granted the employer's request but denied the union's, thereby sanctioning an arbitral declaratory remedy. It found that under the language of the no-strike clause, the only question subject to arbitration was an employee's participation or responsibility.

Questions of procedural, as opposed to substantive, arbitrability have been referred by the courts to the arbitrator.[56] Not unexpectedly, however, there was one exception. In *Harshaw Chemical Co.* v. *McGuffin*[57] an individual employee sought to compel arbi-

[53] *Oil Workers* v. *Southern Gas Co.*, 379 F.2d 774, 65 LRRM 2685 (5th Cir., 1967); *Palestine Telephone Co.* v. *Local 1506, IBEW*, 379 F.2d 234, 65 LRRM 2776 (5th Cir., 1967); *Typographical Union* v. *Publishing Co.*, 384 F.2d 881, 66 LRRM 2528 (5th Cir., 1967); *Sheet Metal Workers* v. *Barber-Colman Co.*, 379 F.2d 533, 65 LRRM 2643 (7th Cir., 1967); *UAW, Local 710* v. *Avon Products, Inc.*, 263 F. Supp. 92, 65 LRRM 2147 (W.D. Mo., 1967); *Cooperative Farmers* v. *Milk Drivers*, 64 LRRM 2392 (W.D. Pa., 1967); *Porter Co.* v. *Local 37, Steelworkers*, 264 F. Supp. 203, 65 LRRM 2650 (S.D. W.Va., 1967); *Butchers* v. *Cudahy Packing Co.*, 428 P.2d 849, 65 LRRM 2820 (Cal. S. Ct., 1967); *Fitzgerald* v. *General Electric Co.*, 227 N.E.2d 15, 65 LRRM 2026 (N.Y. Ct. App., 1967); *In re Spotless Stores, Inc.*, 280 N.Y.S.2d 727, 65 LRRM 3008 (N.Y. Sup. Ct., 1967).

[54] *Philadelphia Marine Trade Assn.* v. *ILA*, 265 F. Supp. 246, 64 LRRM 2596 (E.D. Pa., 1967).

[55] *General Foam Corp.* v. *Dist. 50, UMW*, 266 F. Supp. 249, 65 LRRM 2144 (M.D. Pa., 1967).

[56] *Palestine Telephone Co.* v. *Local 1506, IBEW*, 379 F.2d 234, 65 LRRM 2776 (5th Cir., 1967); *UAW, Local 710* v. *Avon Products, Inc.*, 263 F. Supp. 92, 65 LRRM 2147 (W.D. Mo., 1967); *Standard Motor Freight, Inc.* v. *Teamsters*, 228 A.2d 329, 64 LRRM 2773 (N.J. Sup. Ct., 1967); *Hempstead Bus Corp.* v. *Transit Union*, 65 LRRM 3070 (N.Y. Sup. Ct., 1967).

[57] 418 S.W.2d 746, 65 LRRM 2766 (Ky. Ct. App., 1967).

tration of his discharge grievance. A Kentucky court refused to order arbitration because the employee had not filed his grievance within the 10-day time limit specified in the collective bargaining agreement.

The courts have still not agreed among themselves as to whether they may use collective bargaining history in determining arbitrability. Two federal district courts[58] found such evidence admissible, while the New York Court of Appeals did not.[59]

B. Suits to Review Awards

During the past year, the courts enforced the vast majority of arbitration awards which were challenged in judicial proceedings.[60] Nevertheless, in such proceedings the courts have exercised far less restraint about delving into the merits of controversy than in the case of suits to compel arbitration. For example, one trial judge went so far as to disapprove an arbitrator's award of reinstatement and back pay and to substitute therefor an order denying back pay and providing for reinstatement only upon submission of an appropriate written apology to the employer. Needless to say, the case was reversed by the Fifth Circuit.[61]

Other cases have posed more serious problems of displacement of the exercise of arbitral judgment. In *Local 721* v. *Needham Packing Co.*[62] the Iowa Supreme Court disapproved an arbitrator's award because it did not "draw its essence" from the collective bargaining agreement. The arbitrator found that the employees had initially engaged in a strike which violated the no-strike

[58] *Bakery Workers* v. *Hershey Chocolate Corp.*, 266 F. Supp. 276, 65 LRRM 2062 (M.D. Pa., 1967); *District Lodge 751, IAM* v. *Boeing Co.*, 65 LRRM 2950 (W.D. Wash., 1967).

[59] *Fitzgerald* v. *General Electric Co.*, 27 N.E.2d 15, 65 LRRM 2026 (N.Y. Ct. App., 1967).

[60] *See Kroger Co.* v. *Teamsters, Local 661*, 380 F.2d 728, 65 LRRM 2573 (6th Cir., 1967); *Chemical Co.* v. *Rubber Workers*, 383 F.2d 796, 66 LRRM 2241 (6th Cir., 1967); *Salesdrivers* v. *Young's Market Co.*, 66 LRRM 2792 (S.D. Cal., 1967); *Medo Photo Supply Corp.* v. *Livingston*, 274 F. Supp. 209, 66 LRRM 2016 (S.D. N.Y., 1967); *Block Pontiac, Inc.* v. *Candando*, 274 F. Supp. 1014, 66 LRRM 2371 (E.D. Pa., 1967); *Local 1073, IBEW* v. *Porter Co.*, 64 LRRM 2715 (W.D. Pa., 1967); *Local 342, UAW* v. *T.R.W., Inc.*, 65 LRRM 2597 (M.D. Tenn., 1967).

[61] *Typographical Union* v. *Belo Corp.*, 372 F.2d 577, 64 LRRM 2491 (5th Cir., 1967). The case is discussed in Jones, "The Name of the Game is Decision—Some Reflections on 'Arbitrability' and 'Authority' in Labor Arbitration," 46 *Tex. L. Rev.* 865, 877–79 (1968).

[62] 151 N.W.2d 540, 65 LRRM 2498 (Iowa Sup. Ct., 1967), *cert. denied*, 66 LRRM 2308 (1967).

clause. Subsequently, the employer's attorney and the union had agreed on the terms governing the return of the strikers, and the strikers themselves had voted to end the work stoppage. However, before they returned, the employer injected a new condition—the strikers would have to return as new employees without seniority. The arbitrator held that at this point the illegal strike ceased and a violation of the seniority provisions by the employer began. He thus ordered the reinstatement of the strikers with full seniority, together with a certain amount of back pay. The court found that by relying so heavily on the oral understanding between the attorney and the union, the arbitrator had actually based his decision on a source other than the collective bargaining agreement. Thus, the award was vacated and the Supreme Court later denied certiorari.

In a second dubious decision, *Ludwig Honold Mfg. Co.* v. *Fletcher*,[63] an award was set aside when the court found that it violated an express term of the collective bargaining agreement. The grievant in question had originally bid on and obtained the job of Metal Specialist A. A day later a new employee was hired into the same job classification. When the job of Sheet Metal Leader was created two months later, the new employee and not the grievant was selected to fill this opening. The employer justified its selection on the basis of a contract clause that provided that an employee who applied for a new job and was assigned to fill it was not eligible for another posted job for six months. Although the arbitrator did not find this provision convincing under the circumstances of the case, the court did. The award was therefore not enforced.

An award was vacated in a third case where the contract provided for separate grievance procedures for different types of disputes. The state trial court found that the procedure applicable to the dispute in question had not been utilized.[64]

Challenges to awards have also been based on the procedural rulings of arbitrators. For example, in *Harvey Aluminum, Inc.* v. *Steelworkers*[65] the arbitrator excluded certain evidence offered by

[63] 275 F. Supp. 776, 66 LRRM 2458 (E.D. Pa., 1967).
[64] *In re Consolidated Carting Corp.*, 280 N.Y.S.2d 872, 65 LRRM 3069 (N.Y. Sup. Ct., 1967).
[65] 203 F. Supp. 488, 64 LRRM 2580 (C.D. Cal., 1967).

the employer on the ground that the evidence should have been presented in the employer's case-in-chief rather than in its rebuttal. In light of the informal nature of most arbitrations, the court held that the arbitrator should not have applied this judicial rule of evidence without giving advance warning to the parties. As a warning had not been given, the arbitrator's ruling denied the employer a fair hearing and the case was therefore remanded to the arbitrator for the taking of the rejected evidence. On the other hand, awards were upheld where the arbitrator refused to allow the employer to call the discharged grievant as its first witness[66] and where the arbitrator had not rendered his award within the 30 days provided in the collective bargaining agreement.[67]

It is not unusual in an arbitration proceeding for a party first to challenge the arbitrability of the dispute and then to present evidence on the merits of the dispute. In two cases[68] the question was presented as to whether such participation precluded the party from again raising the arbitrability issue in a judicial proceeding to review the award. Courts in both cases held that it did not. The court will be precluded from reviewing the arbitrability issue only where the parties clearly manifest their intention to make the arbitrator's determination on such issue conclusive.

Lastly, it is interesting to note that although an arbitrator may have his awards set aside, he is at least immune from damage actions brought against him by the losing party. A federal district court has reiterated that in such a case the arbitrator possesses the same immunity as the judiciary.[69]

IV. RELATIONSHIP OF SECTION 301 TO OTHER LEGISLATION

A. Norris-LaGuardia Act

In 1962 the U.S. Supreme Court in the controversial *Sinclair* case held that a federal court was prohibited by the Norris-

[66] *Local 560, IBT* v. *Eazor Express, Inc.*, 230 A.2d 521, 65 LRRM 2647 (N.J. Super. Ct., App. Div., 1967).
[67] *Truck Drivers* v. *Acme Markets*, 65 LRRM 2708 (E.D. Pa., 1967).
[68] *Local 719, Bakery Workers* v. *National Biscuit Co.*, 378 F.2d 918, 65 LRRM 2482 (3d Cir., 1967); *Humble Oil & Refining Co.* v. *Local 866, IBT*, 271 F. Supp. 281, 65 LRRM 3016 (S.D. N.Y., 1967).
[69] *Hill* v. *Aro Corp.*, 263 F. Supp. 324, 64 LRRM 2315 (N.D. Ohio, 1967). See also *Cahn* v. *ILGWU*, 311 F.2d 113, 51 LRRM 2186 (3rd Cir., 1962).

LaGuardia Act from enjoining a breach of a no-strike clause.[70] Since that decision courts have been grappling with such still unanswered questions as whether state courts are likewise precluded from enjoining a breach of a no-strike clause, whether such state injunctive actions are removable to the federal district courts, and whether arbitrators' awards enjoining strikes are specifically enforceable in federal courts. All of these questions were at least considered by the courts in 1967.

In *Armco Steel Corp.* v. *Perkins*[71] Kentucky joined the ranks of those states[72] whose highest courts have held the Norris-LaGuardia Act inapplicable to state injunctive actions. A trial court in New York also came to the same conclusion.[73] However, even assuming an injunction is available in a state court, it will be of little avail to the employer if the union can immediately remove the case to a federal district court.

The federal district courts have been fairly evenly divided on the removability of such cases.[74] Before 1967, only one court of appeals had ruled on the question. In this case[75] the Third Circuit held that such a suit for injunctive relief was not removable. During the past year, however, the Sixth Circuit in *Avco Corp.* v. *Aero Lodge, IAM*[76] rejected the reasoning of the Third Circuit and upheld the removal of such a suit. In its opinion the Sixth Circuit found that although the Norris-LaGuardia Act deprived the federal courts of "jurisdiction" to issue injunctions in labor cases, the Act did not deprive the federal courts of original jurisdiction for the purpose of awarding other relief. The court went even further and indicated *in dicta* that state courts might also

[70] *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 192, 50 LRRM 2420 (1962).
[71] 411 S.W.2d 935, 64 LRRM 2439 (Ky. Ct. App., 1967).
[72] See, e.g., *McCarroll* v. *District Council of Carpenters*, 49 Cal.2d 45, 315 P.2d 322, 40 LRRM 2709 (1957); *Dugdale Construction Co.* v. *Cement Masons Local 538*, 135 N.W.2d 656, 59 LRRM 2530 (Iowa S. Ct., 1965); *Shaw Electric Co., Inc.* v. *IBEW*, 418 Pa. 1, 208 A.2d 769, 58 LRRM 2852 (1965).
[73] *John Grace & Co.*, v. *Murray*, 65 LRRM 3076 (N.Y. Sup. Ct., 1967).
[74] *Compare California Packing Corp.* v. *Longshoremen*, 253 F. Supp. 597, 62 LRRM 2264 (D. Haw., 1966), and *Merchants Refrigerating Co.* v. *Local 6, ILWU*, 213 F. Supp. 177, 52 LRRM 2717 (N.D. Cal., 1963) (removal denied) with *Lott, H. A., Inc.* v. *Hoisting and Portable Engineers, Local 450*, of *Int'l Union of Operating Engineers*, 222 F. Supp. 993, 54 LRRM 2402 (D. Tex., 1963), and *Crestwood Dairy, Inc.* v. *Kelley*, 222 F. Supp. 614, 54 LRRM 2162 (E.D. N.Y., 1963) (allowing removal).
[75] *American Dredging Co.* v. *Local 25, IUOE*, 338 F.2d 837, 57 LRRM 2407 (3d Cir., 1964).
[76] 376 F.2d 337, 65 LRRM 2193 (6th Cir., 1967).

be precluded from granting such injunctive relief. It is to be hoped that the removal question will soon be answered as the Supreme Court has granted certiorari in the *Avco* case,[77] and we may see whether, as some have anticipated, the *Sinclair* rule barring no-strike court injunctions is to be linked to the presumed competence of arbitrators to handle these very delicate collective bargaining situations.

Even though federal courts are precluded from directly enjoining a breach of a no-strike clause, it is still arguable that they may indirectly achieve the same result by enforcing an arbitrator's award doing so. Early in 1967 the Supreme Court granted certiorari in a case in which it appeared that this question might be resolved. The case, *ILA, Local 1291* v. *Philadelphia Marine Trade Assn.*,[78] involved an arbitrator's award which upheld the right of an employer association to set back the starting times of longshoremen. Despite the adverse award, the longshoremen's union continued to engage in work stoppages whenever the association sought to exercise this right. The association thereupon obtained a federal district court order directing the union "to comply with and abide by the said Award." Although the district court judge adamantly refused to explain to the union's counsel the meaning of this very cryptic order, he nevertheless held the union in contempt when it engaged in a subsequent work stoppage over the same issue. When the case reached the Third Circuit, one of the major questions presented was whether the district court's order had violated the Norris-LaGuardia Act by enjoining a work stoppage. Although the circuit held that the order had not violated the Act,[79] the Supreme Court expressly declined to resolve this issue. Rather it found the district court's order unenforceable because it had not set forth the acts prohibited in specific terms as required by Rule 65(d) of the Federal Rules of Civil Procedure. It is significant, however, that both Rule 65(d) and the Norris-LaGuardia Act specifically refer to "injunctions." Both Justice Douglas in his concurring and dissenting opinion and

[77] 36 LW 3127 (October 9, 1967). (Subsequent to this Report, the Court on April 8, 1968, upheld the removal. 67 LRRM 27. The case will be discussed in the 1968 Report.)
[78] 389 U.S. 64, 66 LRRM 2433 (1967).
[79] *Philadelphia Marine Trade Assn.* v. *ICA, Local 1291*, 365 F.2d 295, 62 LRRM 2791 (3d Cir., 1966).

Justice Brennan in his concurring opinion were obviously concerned that the use of the same term might later be felt to compel a holding that the Norris-LaGuardia Act is also applicable to the federal enforcement of such awards. Whether this is so remains to be seen.

In another 1967 decision relating to the same issue, a federal district court held that the Norris-LaGuardia Act precluded the enforcement by a federal district court of an arbitrator's award directing a union to make every effort to end a strike.[80] A second federal district court came to the same general conclusion.[81] It entered a partial judgment of $250,000 in damages against the union, but the judgment was to be vacated if the union returned to work by a certain date.

B. National Labor Relations Act

In a number of cases the Supreme Court has held that courts may entertain contractual actions under Section 301 even though the subject matter of such actions involves unfair labor practices or representation matters normally considered within the exclusive jurisdiction of the National Labor Relations Board.[82] Early in 1967 the Court in *C & C Plywood*[83] and *Acme Industrial*[84] held that the NLRB may also construe contractual provisions in its determination of unfair labor practices. The last two cases were discussed in our 1966 Report. However, other cases decided by the courts in 1967 made it abundantly clear that Section 301 actions are nevertheless frequently influenced by the provisions of Section 8 of the Act. In short, although the two sections provide independent remedies, one often cannot be considered without reference to the other.

The foregoing was certainly demonstrated by the *Red Ball*[85]

[80] *Marine Transport Lines* v. *Curran*, 65 LRRM 2095 (S.D. N.Y., 1967).
[81] *Tanker Service Comm.* v. *Masters, Mates & Pilots*, 269 F. Supp. 551, 65 LRRM 2848 (E.D. Pa., 1967).
[82] *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 49 LRRM 2717 (1962); *Smith* v. *Evening News Assn.*, 371 U.S. 195, 51 LRRM 2624 (1962); *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 55 LRRM 2042 (1967).
[83] *NLRB* v. *C & C Plywood Corp.*, 64 LRRM 2065, 385 U.S. 421 (1967).
[84] *NLRB* v. *Acme Industrial Co.*, 64 LRRM 2672, 385 U.S. 432 (1967). See discussion of this case in Jones, "Blind Man's Buff and the NOW," 116 *U. of Pa. L. Rev.* 571, 578–86 (1968).
[85] *Teamsters* v. *Red Ball Motor Freight, Inc.*, 374 F.2d 932, 64 LRRM 2545 (5th Cir., 1967).

and *U.S. Gypsum*[86] cases, which were previously considered in our discussion relating to successors. In the former case the court refused to enforce an arbitration award which it found would violate the employer's duty of neutrality under Section 8 of the Act. In the latter case the same court was very much concerned about the effect of a decertification on a union's petition to compel arbitration.

Two other cases involving Section 301 have gone even further in considering the provisions of Section 8. In *Building Trades Council* v. *Contractors*[87] the parties to a collective bargaining agreement had adopted a subcontracting clause which was to be binding only after a court of competent jurisdiction had adjudicated its validity. Shortly thereafter the union brought a declaratory judgment action under Section 301 for that purpose. In its decision the Fifth Circuit held that the clause was valid and did not constitute an unfair labor practice under Section 8(e) of the Act. Similarly, in *Lewis* v. *Seanor Coal Co.*[88] the Third Circuit upheld a union's action under Section 301 for royalty payments and rejected on the merits a defense that the payments violated Section 8(e).

A somewhat different approach was taken by the Ninth Circuit in *United Association* v. *Judge Foley.*[89] This case involved an action by a union to compel arbitration of the question whether the collective bargaining agreement covered the employer's maintenance and operation employees as well as its construction employees. An NLRB trial examiner in an 8(b)(3) case had found, however, that the maintenance and operation employees belonged to a different bargaining unit and were therefore covered by a different collective bargaining agreement. The trial examiner's decision had not yet been reviewed by the Board itself. In view of the fact that the Board's decision might well be determinative of the question to be arbitrated, the circuit upheld a stay of the action to compel arbitration pending final resolution of the unfair labor practice case.

The mere pendency of NLRB representation proceedings has generally not deterred the courts from compelling arbitration or

[86] *U.S. Gypsum Co.* v. *Steelworkers,* 384 F.2d 38, 66 LRRM 2232 (5th Cir., 1967).
[87] 376 F.2d 797, 65 LRRM 2415 (5th Cir., 1967).
[88] 382 F.2d 437, 66 LRRM 2007 (3d Cir., 1967).
[89] 380 F.2d 474, 65 LRRM 2908 (9th Cir., 1967).

enforcing awards. In one case arbitration was compelled in spite of the pendency of a decertification petition.[90] In another case an award was enforced although the NLRB was then considering whether the status of the employees had been changed from "employees" to "co-owners."[91]

C. Bankruptcy Act

The relationship of the Bankruptcy Act to Section 301 was explored during the past year in *L. O. Koven Bros., Inc.* v. *Local 5767, United Steelworkers.*[92] In this case an employer sought a declaratory judgment that a union's claim for vacation pay was not arbitrable because the claim had been discharged both by an order of confirmation entered in a proceeding under Chapter XI of the Bankruptcy Act and by a general release executed by the union. The Third Circuit held that where the question of recovery turns on an interpretation of the Bankruptcy Act, the question is to be resolved by the courts and not the arbitrator. Interpreting the Bankruptcy Act, the court found that the claim for vacation pay was not barred for the three-month period prior to the filing of the petition and for the period following the order of confirmation. The court therefore held the claim arbitrable insofar as it related to these periods. Furthermore, the effect of the general release did not involve bankruptcy interests and was to be determined by the arbitrator.

V. CONCLUSION

It seems fair to summarize the results of our survey by observing that one major trend of judicial reaction to labor arbitration continues unabated—that of sending disputes on to arbitration which are challenged in court as not being arbitrable. That trend was initiated in 1960 by the Supreme Court's *Steelworkers* trilogy[93] rationales. But a second trend is beginning to take shape—that of courts assessing the "authority" of the arbitrator to act as he did.

---

[90] *Textile Workers Union* v. *Kindor Export Co.*, 65 LRRM 2474 (N.Y. Sup. Ct., 1967).
[91] *Sherman* v. *Tilden-Huntington, Inc.*, 65 LRRM 2474 (N.Y. Sup. Ct., 1967).
[92] 381 F.2d 196, 65 LRRM 2201 (3d Cir., 1967).
[93] *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

Ironically, of course, the Court spoke to that tendency directly in its express disapproval in *American Manufacturing*[94] of the *Cutler-Hammer*[95] doctrine, which had countenanced such a judicial searching of the merits of the contractual dispute and the displacement of the prospect of arbitral judgment by that of the courts. This new line of reasoning would actually strike preemptively far deeper into the resolution of the merits than the old *Cutler-Hammer* anticipatory doctrine. In these review situations the arbitrator has had the benefit of his exposure to the parties and their bargaining relationship in the context of a hearing, but the court nonetheless in the cloister of its chambers rejects his response to it. Unless checked by the Supreme Court, this second trend quite evidently may gain a momentum which could return labor arbitration to the pre-trilogy days of judicial interposition in the merits of disputes more properly resolvable by an arbitrator. Such interposition, moreover, would now take the form of vacating, modifying, or refusing to enforce an award because, in the opinion of the court, the arbitrator lacked the "authority" to issue it.

BIBLIOGRAPHY

Aaron, "Judicial Intervention in Labor Arbitration," 20 *Stan. L. Rev.* 41 (1967).

Coulson, "Labor Arbitration: The Insecure Profession?," 18 *Lab. L. J.* 336 (1967).

Cushman, "Arbitration and the Duty to Bargain, 1967," *Wis. L. Rev.* 612 (1967).

Eaton, "Labor Arbitration in the San Francisco Bay Area," 22 *Arb. J.* 93 (1967).

Finley, "Labor Arbitration: The Quest for Industrial Justice," 18 *W. Res. L. Rev.* 1091 (1967).

Grove, "Removal of Civil Actions for Breach of Labor Contracts—Confusion Reigns," 18 *Lab. L. J.* 278 (1967).

[94] *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960).
[95] *IAM* v. *Cutler-Hammer, Inc.*, 271 App. Div. 917, 67 N.Y.S.2d 317, 19 LRRM 2232, *aff'd* 297 N.Y. 519, 74 N.E.2d 464, 20 LRRM 2445 (1947). See analyses in Jones, *op. cit.* 46 *Tex. L. Rev.* (1968), concerning the interaction among the courts, the NLRB, and the arbitrators.

Heiner, "Express Exclusions from Arbitration—Accommodating the Consensual with the Non-Consensual," 1 *Ga. L. Rev.* 363 (1967).

Miller, "Arbitration of Disputes Over Reopened Wages," 22 *Arb. J.* 24 (1967).

Myers, "Duplication of Arbitration with Other Litigation," 18 *Lab. L. J.* 103 (1967).

Prasow & Peters, "New Prospectives on Management's Reserved Rights," 18 *Lab. L. J.* 3 (1967).

Roberts & Dash, "How to Get Better Results from Labor-Management Arbitration," 22 *Arb. J.* 1 (1967).

Rothchild, "Arbitration and the National Labor Relations Board: An Examination of Preferences and Prejudices and their Relevance," 28 *Ohio St. L. J.* 195 (1967).

Book Review Symposium: Labor Arbitration: T. G. S. Christensen, "Labor Arbitration and Judicial Oversight"; P. Seitz, "Two Faces of Arbitration: Which Book Do You Read?"; A. H. Stockman, "Now Who Shall Arbitrate"; S. C. Vladeck, Labor Arbitration and Consensus," 19 *Stan. L. Rev.* 671 (1967).

Note, "Arbitration of Subcontracting Disputes," 19 *Maine L. Rev.* 55 (1967).

Note, "A Study of Labor Arbitration—The Values and the Risks of the Rule of Law," 1967 *Utah L. Rev.* 223 (1967).

Note, "Enjoining Violations of the No-Strike Clause," 14 *U.C.L.A. L. Rev.* 1130 (1967).

Note, "Judicial Review of Arbitration Awards," 47 *B.U.L. Rev.* 116 (1967).

Note, "Judicial Review of Labor Arbitration Awards After the Trilogy," 53 *Corn. L. Rev.* 136 (1967).

Note, "Judicial Review of Labor Arbitration Awards which Rely on the Practices of the Parties," 65 *Mich. L. Rev.* 1647 (1967).

Note, "Labor Obligations of Successor Employers," 36 *Geo. Wash. L. Rev.* 215 (1967)

Note, "Union Obligation to Arbitrate a Member's Grievance," 3 *Ga. S.B.J.* 340 (1967).

Note, "Section 301(a) and the Employee: An Illusory Remedy," 35 *Fordham L. Rev.* 517 (1967).

Note, "The Availability of Defamation Remedies for Statements Made During the Course of Labor Grievance-Arbitration Proceedings," 15 *Kan. L. Rev.* 553 (1967).

Note, "To Board or Not to Board: NLRB v. C & C Plywood Corp.," 14 *U.C.L.A. L. Rev.* 692 (1967).

Note, "Tort Damages Under Section 303 of the Labor-Management Relations Act: Arbitration or Litigation?", 52 *Corn. L. Rev.* 1002 (1967).