APPENDIX B

ARBITRATION AND FEDERAL RIGHTS UNDER COLLECTIVE AGREEMENTS IN 1968*

EDGAR A. JONES, JR.** AND DAVID G. FINKLE ***

The year 1968 was one in which significantly fewer cases involving assertion of rights under collective bargaining agreements were reported than in prior years.[1] The U.S. Supreme Court rendered only one decision relevant to this report. However, some important determinations were made at the circuit level.

I. THE RIGHTS OF EMPLOYEES UNDER SECTION 301

Employees who attempted to bring suit on the collective bargaining agreement of the union and the employer (see *Smith* v. *Evening News Ass'n,* 371 U.S. 195, 51 LRRM 2646 (1962)) con-

* Report of the Committee on Law and Legislation for 1968, National Academy of Arbitrators.

The members of the Committee for 1968-69 were: Joseph Brandschain; David L. Cole; Clair V. Duff; I. Robert Feinberg; Sandford H. Kadish; J. Keith Mann; Whitley P. McCoy; Herbert L. Sherman, Jr.; Clyde W. Summers; Jerre S. Williams; Edgar A. Jones, Jr., Chairman.

This Report was prepared for the Committee by Edgar A. Jones, Jr., Professor of Law, University of California, Los Angeles, and David G. Finkle, Member of the California Bar, associated with O'Melveny & Myers, Los Angeles. The Report is based upon a reading of all reported state and federal cases, but only those which presented facts and reasoning are used here, a number of cases being too sparse in factual statement to be helpful. By early January 1969, there were about 81 cases reported for 1968. Often cases are delayed in being reported and for that reason we make no representation that this report is exhaustive.

** Professor of Law, University of California, Los Angeles. Member of the Board of Governors and Chairman, Law and Legislation Committee, National Academy of Arbitrators.

*** Member of the California Bar, associated with O'Melveny & Myers, Los Angeles, Calif.

[1] In the year 1967 there were 130 cases reported, while in 1966 and 1965 there were 120 and 150, respectively. However, there were only about 81 decisions reported by January 1968.

tinued in the year 1968 to be confronted with the requirement set out in *Republic Steel Corp.* v. *Madox,*[2] that the contractual grievance and arbitration procedure must be complied with before an action can be brought.[3]

The rule applies whether or not the employee is a member of the union,[4] and one circuit court went so far as to state that the employee's failure to exhaust the grievance procedure deprives the district court of subject-matter jurisdiction.[5]

Under this rule certain consequences may ensue for a complaining employee with regard to the merits of the suit. Thus if the grievance procedure of the collective bargaining agreement provides for a final determination of the merits of the complaint, an employee may be barred from his suit under Section 301 if the matter has been settled or determined.[6]

In one such case, the grievance procedure provided that the matter would be considered settled 30 days from the date of the company's answer at the third step. Arbitration of two types was provided: arbitration as a matter of right and arbitration of certain grievances by mutual consent. It was determined that the issue involved the latter of the two types. The union did not offer to arbitrate it, and the Seventh Circuit, reasoning that the resolution of the grievance occurred 30 days from the date of the company's answer at the third step even though there was no right to arbitration, held that the unarbitrated third step barred a class action by employees against the employer for breach of the collective bargaining agreement.[7]

A "private decision" in the grievance and arbitration proceedings may bar subsequent suit even if it was limited to a procedural issue. Where a grievance was not considered on its merits by an

---

[2] 379 U.S. 650, 58 LRRM 2193 (1965).
[3] *Bsharah* v. *Eltra Corp.,* 394 F.2d 502, 68 LRRM 2255 (6th Cir., 1968); *Durham* v. *Mason & Dixon Lines, Inc.* 69 LRRM 2898 (6th Cir., 1968); *Fleenor* v. *Teamsters, Local 249,* 67 LRRM 2468 (Mich., 1968); *Billings* v. *Levitt,* 159 N.W. 2d 376, 68 LRRM 2767 (Mich., 1968).
[4] *Billings* v. *Levitt,* 159 N.W. 2d 376, 68 LRRM 2767 (Mich., 1968).
[5] *Durham* v. *Mason & Dixon Lines, Inc.,* 69 LRRM 2898 (6th Cir., 1968).
[6] *Ford* v. *General Electric Co.,* 395 F.2d 157, 68 LRRM 2374 (7th Cir., 1968); *Chambers* v. *Beaunit Corp.,* 69 LRRM 2732 (6th Cir., 1968); *Rothlein* v. *Armour & Co.,* 391 F.2d 574, 68 LRRM 2109 (3rd Cir., 1968).
[7] *Ford* v. *General Electric Co.,* 395 F.2d 157, 68 LRRM 2374 (7th Cir., 1968).

arbitrator because of untimeliness in its filing, for example, a subsequent suit by an employee to recover damages for breach of the collective bargaining agreement was held barred by the Sixth Circuit.[8]

There are certain narrow grounds, however, upon which an employee may escape being bound by a grievance-procedure decision.[9] The Third Circuit, for instance, reversed a district court's summary judgment against employees suing for breach where the court had granted summary judgment because the matter had been finally determined in the grievance procedure. The circuit court conceded that employees will rarely escape being bound by grievance-procedure decision on the merits of their complaint. But it insisted that a court should accept a contractual "merits" determination as a basis for granting summary judgment only if the judge is satisfied that the quality of the contractual grievance procedures has been commensurate with the substantiality of the claim or dispute presented.[10]

As noted in last year's report, the Supreme Court's 1967 decision in *Vaca* v. *Sipes* [11] produced an increase in the number of cases in which individual employees sought judicial relief after an adverse award of an arbitrator or labor management board.[12] An instance of this occurred this year in the case of *Acuff* v. *United Paper Makers,*[13] in which a union had sued to compel arbitration, the company had eventually stipulated to arbitrate, and the court had retained jurisdiction. After the arbitrator's decision, some employees sought to intervene to have the awards vacated. Their motion for intervention was denied, and the Fifth Circuit upheld the district court, citing *Vaca* v. *Sipes* and observing that for the benefit of the system the interest of individuals is often required to be subordinated to that of the group. For the union to function, according to the court, it must be empowered to decide which cases to arbitrate and then how the arbitration shall be conducted

[8] *Chambers* v. *Beaunit Corp.,* 69 LRRM 2732 (6th Cir., 1968).
[9] See *Vaca* v. *Sipes,* 386 U.S. 171 (1967), and *Rivera* v. *NMU Pension Plan,* 288 F.Supp. 874, 69 LRRM 2249 (E.D. La., 1968).
[10] *Rothlein* v. *Armour & Co.,* 391 F.2d 574, 68 LRRM 2109 (3rd Cir., 1968).
[11] 386 U.S. 171, 64 LRRM 2369 (1967).
[12] See "Arbitration and Federal Rights Under Collective Agreements (1967)," in *Developments in American and Foreign Arbitration, 21st Annual Proceedings* (Washington: BNA Books, 1968), 201 at 204.
[13] 404 F.2d 259, 69 LRRM 2878 (5th Cir., 1968).

since arbitration arises out of the collective bargaining relationship. In passing, courts may also be presented with the converse of that situation when employees bring suit to enforce an arbitration award.[14]

II. GENERAL JUDICIAL PROBLEMS UNDER SECTION 301

A. *Actions Cognizable Under Section 301*

In *Atkinson* v. *Sinclair Refining Co.*,[15] the Supreme Court concluded that although a union may be liable for damages for breach of a collective bargaining agreement, its officers and members are not liable for those damages. In 1968, several courts faced claims for damages against union officials or members.[16] As might be expected, the claims against the individuals failed. One case also included a claim for punitive damages against the union officials, but the court held that punitive damages could not be awarded in an action under Section 301.[17] It relied on Chief Judge Biggs' reasoning in *Shoe Workers, Local 127* v. *Brooks Shoe Manufacturing Co.*,[18] in which he concluded that Section 303 indicated that Section 301 did not contemplate the imposition of punitive damages. As he saw it, in dealing with tortious conduct prohibited by the Act, Congress clearly limited recovery to compensatory damages and costs since Section 303b provides that the injured employer "shall recover the damages by him sustained and the cost of the suit." [19] An intention to authorize punitive awards for contractual causes of action arising under Section 301 should not be attributed to Congress, he reasoned, when it had so clearly precluded punitive damages for causes of action arising under Section 303, concerned with tortious conduct. Of course, it could also be argued, perhaps more persuasively, that inclusion of such a limitation in Section

---

[14] *Espino* v. *Volkswagen De Puerto Rico, Inc.*, 289 F. Supp. 979, 69 LRRM 2364 (D. P.R., 1968) (denial of motion to remand on removal to federal court).
[15] 370 U.S. 195, 50 LRRM 2420 (1962).
[16] *Navajo Freight Lines, Inc.* v. *Teamsters, Local 961*, 69 LRRM 2523 (D. Colo., 1968); *St. Clair* v. *Teamsters*, 67 LRRM 2728 (E.D. Tenn., 1968); *Jersey Farms Milk Service, Inc.* v. *Meat Cutters*, 69 LRRM 2409 (M.D. Tenn., 1968).
[17] *Navajo Freight Lines, Inc.* v. *Teamsters, Local 961*, 69 LRRM 2523 (D. Colo., 1968).
[18] 298 F.2d 277, 49 LRRM 2346 (3d Cir., 1962).
[19] 29 U.S.C. §303b.

303 and its omission in Section 301 is indicative of an intent to allow punitive damages under Section 301, since Congress was apparently mindful of the problem and had dealt with it explicitly in Section 303.

In another interesting case, the Fourth Circuit upheld a lower court's ruling last year that Section 301 enables an action for specific performance of an agreement to arbitrate the unresolved terms of a future collective bargaining agreement.[20]

B. *Plant Removal*

This year the Second Circuit got around to overruling *Zdanok* v. *Glidden Co.*,[21] in which one of its three-judge panels had held that, notwithstanding a seniority provision expressly limited geographically to a specific plant, seniority could be invoked in another plant to which equipment from the first plant had been moved. The reasoning was that the reasonable expectations of the parties would be fulfilled by construing the contract to transfer the employees' seniority rights with them to the other plant. *Zdanok* provoked considerable debate, mostly condemnatory.[22] And in *Local 1251 UAW* v. *Robertshaw Controls Co.*,[23] the Second Circuit wrote the final chapter, at least in that circuit and under those circumstances. The court held there that a union was not entitled to damages against a company that laid off employees when departments were transferred to another plant operated in another state. The collective bargaining agreement did not provide for transfer of seniority to other plants. In reversing *Zdanok,* the Second Circuit recognized that "seniority is wholly a creation of the collective agreement and does not exist apart from that agreement." [24] It went on to recall that *Zdanok* had stated that it was adopting the more rational, not to say humane, construction of the agreement and that a contrary construction would be irrational and destructive. But in *Robertshaw Controls,* the court relied instead on the dissent in *Zdanok,* which counseled that the court is

[20] *Printing Pressmen* v. *Piedmont Pub. Co.*, 393 F.2d 221, 67 LRRM 2939 (4th Cir., 1968).
[21] 288 F.2d 99, 47 LRRM 2865 (2d Cir., 1961).
[22] See Citations to law review commentary at *Local 1251, UAW* v. *Robertshaw Controls Co.*, 68 LRRM 2671 at 2672 (2d Cir., 1968).
[23] 405 F.2d 29, 68 LRRM 2671 (2d Cir., 1968).
[24] 68 LRRM at 2674.

called upon to construe the contract upon which the parties have agreed and not to substitute for it one more palatable to the court.[25]

In another plant-removal case decided this past year, the union sued for damages for breach of the collective bargaining agreement when the employer threatened to move its plant, and it also sought an injunction against removal. But the court held that a plant location is a management prerogative and that nothing in the particular agreement prohibited the removal.[26]

C. *Existence of Contract*

Whether a collective bargaining agreement may be said to exist between the parties was examined in three cases this past year.[27] In one, the issue involved the existence of a collateral agreement which provided for 10 days' notice before a strike would occur, but the appeal in the action for declaratory judgment was dismissed for mootness when the collective bargaining agreement expired by its own terms while the matter was pending on the docket.[28]

In a second case, an employer sued a union for damages for breach of a no-strike provision when the defendant's members were told that whether or not they crossed the picket lines of another striking union was up to them. The defense that there was no agreement in existence was rejected by the court. A verbal agreement had been entered into, although a written one had not yet been executed. The court held that the verbal agreement bound the parties, the written one being intended merely as a memorial.[29]

The third case will be discussed in a later section of this report.[30]

---

[25] 284 F. Supp. 125, 68 LRRM at 2674, citing 288 F.2d 105. See also *Neal* v. *Reliance Elect. Co.*, 231 N.E. 2nd 882, 67 LRRM 2320 (Ohio Ct. App., 1968).
[26] *Auto Workers* v. *Hamilton Beach Mfg. Co.*, 162 N.W.2d 16, 69 LRRM 2563 (Wisc. Sup. Ct., 1968).
[27] *Steelworkers* v. *C.C.I. Corp.*, 395 F.2d 529, 68 LRRM 2059 (10th Cir., 1968); *General Electric Co.* v. *Local 761, IUE*, 68 LRRM 2499 (6th Cir., 1968); *Smith* v. *Pittsburgh Gage & Supply Co.*, 388 F.2d 983, 67 LRRM 2446 (3d Cir., 1968).
[28] *General Electric Co.* v. *Local 761, IUE*, 392 U.S. 364 [No. 399] 68 LRRM 2449 (6th Cir., 1968).
[29] *Steelworkers* v. *C.C.I. Corp.*, 395 F.2d 529, 68 LRRM 2059 (10th Cir., 1968).
[30] *Smith* v. *Pittsburgh Gage & Supply Co.*, 388 F.2d 983, 67 LRRM 2446 (3d Cir., 1968) (See Section IV. B. of this report).

D. *Application of Contracts to Events Preceding Its Execution or Subsequent to Its Expiration*

In only two instances in the year 1968 were courts confronted with the effect of the expiration of an agreement as a defense to an action under Section 301.

In one case, under a collective agreement that had expired, the union sued to compel arbitration of the employer's discontinuance of payments to a health and welfare fund. The court ordered arbitration because the welfare agreement itself contained an arbitration clause which was operative for an additional three years.[81]

In contrast, a court in a second case held that contributions to a trust fund under an expired three-year collective bargaining agreement were not required beyond the expiration date of the contract, there being no ancillary agreements affecting the right to arbitrate.[82]

E. *Obligations of Successors*

John Wiley & Sons v. *Livingston*[83] is the leading case for the proposition that the surviving company of a merger may be bound by a duty to arbitrate grievances against the absorbed company. *Wackenhut Corp.* v. *United Plant Guard Workers, Local 151*,[84] and *United Steelworkers* v. *Reliance Universal, Inc.*,[85] extended the principle announced in *Wiley* to cover the situation of a purchase of a business. Although *Wackenhut* was limited to a holding that a successor purchaser could be compelled to arbitrate under the predecessor's collective bargaining agreement, the court used broader language to observe that the entire agreement was binding upon the successor. It has since been asserted that such a conclusion is not warranted by *Wiley* and is not expressive of federal labor policy.[86] Nonetheless, this past year the Ninth Circuit again used

---

[81] *Rubber Workers* v. *Lee Rubber & Tire Corp.*, 394 F.2d 263, 68 LRRM 2082 (3d Cir., 1968).
[82] *Teamsters, Local 222* v. *Hatch Co.*, 436 P.2d 790, 67 LRRM 2445 (Utah Sup. Ct., 1968).
[83] 376 U.S. 543, 55 LRRM 2769 (1964).
[84] 322 F.2d 954, 56 LRRM 2466 (9th Cir., 1964).
[85] 335 F.2d 891, 56 LRRM 2721 (3d Cir., 1964).
[86] *Retail Store Employees, Local 954* v. *Lane's of Findlay, Inc.*, 260 F.Supp. 655, 63 LRRM 2445 (N.D. Ohio, 1966).

the same approach in *Teamsters, Local 524* v. *Billington*,[37] a suit brought for specific performance of an arbitration provision. A series of collective agreements had been negotiated by the employer's attorney, and while he was again in negotiations, the employer incorporated its business. The court held that the previous collective bargaining agreement was in effect at the time of the incorporation and that the new corporation was therefore bound by it. It reasoned that the new corporation was bound as a successor and cited *Wackenhut* and *Wiley*.

Two other courts this past year also held that successors were bound by the arbitration provisions of the predecessor's collective bargaining agreement. In one case, there was a merger of two companies into a third. The officers and directors of one of the predecessors were identical with the surviving company, which was held to be the successor.[38] In the second case, successorship was attributed to a third business entity. A company which failed to make payments to a welfare and pension plan thereafter went into receivership. The receiver continued to operate the business and executed another collective agreement to expire upon the sale at a foreclosure. This provided that any claim or defense arising out of the outstanding obligations of the original company would not be deemed waived. The creditor who purchased the business at the foreclosure sale was held to be a successor bound to the arbitration provisions of the agreement of the defunct corporation.[39]

On the other hand, successorship was not found in a case this past year where the same union represented employees at both facilities under different agreements. One facility merged into the other, and the court held that the agreement of the would-be predecessor was eliminated.[40]

F. *Parties to the Agreement*

The single most significant development this past year in multiparty arbitration was the decision late in 1968 of the district court

[37] 402 F.2d 510, 69 LRRM 2637 (9th Cir., 1968).
[38] *Mates & Pilots* v. *American Oceanic Corp.*, 67 LRRM 2951 (S.D. N.Y., 1968).
[39] *In re Liquidation Holding Corp.*, 68 LRRM (N.Y. Sup. Ct., 1968).
[40] *Bath Iron Works Corp.* v. *Draftsmen's Ass'n.*, 393 F.2d 407, 68 LRRM 2010 (1st Cir., 1968).

in *CBS* v. *Broadcasting Ass'n*,[41] in which a court for the first time ordered trilateral arbitration of a jurisdictional work dispute.

The American Recording and Broadcasting Association claimed that certain work should be assigned to it under its contract with CBS and demanded arbitration. CBS had already assigned the work under another collective agreement to the Radio and Television Broadcasting Engineers Union. CBS demanded arbitration with that union and joined it as a party defendant in the action to compel arbitration brought by the Association. The latter objected to the consolidation and moved to dismiss the complaint for failure to state a claim and for lack of jurisdiction. Each collective bargaining agreement had broad arbitration provisions.

The Association claimed that there was no jurisdiction to compel joint arbitration because the Radio and Television Broadcast Engineers Union was a "stranger" to the collective agreement between CBS and the Association. The court rejected that argument as without validity since a collective agreement is not definable solely in common-law terms. Recalling the Supreme Court's declarations that a collective bargaining agreement constitutes a generalized code calling into being a new common law of a particular industry or of the shop, the court referred to the right of intervention granted as of right before the circuit courts in appeals from NLRB decisions involving contract disputes [42] and in matters involving obligations of successors [43] and multilateral bargaining situations.[44] The court found support in the requirement that work-assignment disputes under the Railway Labor Act growing out of a railroad's bargaining agreement with several unions must be submitted to a single panel of arbitrators even though one union does not consent to trilateral arbitration.[45] The court also looked to the fact that if the NLRB were to resolve the question as a jurisdictional dispute, all three parties would have to appear before the Board.

In addition, the district court noted that, as a practical matter, the Association had not demonstrated that any prejudice would re-

[41] 293 F. Supp. 1400, 69 LRRM 2914 (S.D. N.Y., 1968).
[42] *Auto Workers* v. *Scofield*, 382 U.S. 205, 60 LRRM 2479 (1965).
[43] *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 55 LRRM 2769 (1964).
[44] *General Electric Co.*, 173 NLRB No. 46, 69 LRRM 1305 (1968).
[45] *Transportation-Communication Employees Union* v. *Union Pacific R.Ry.*, 385 U.S. 157, 63 LRRM 2481 (1966); 45 USC §151 *et seq.*

sult from consolidation. Moreover, according to the court, to compel all three parties to the dispute to submit their grievances in the same arbitration would be practicable, economical, and convenient for the parties and the arbitrator since it not only avoided duplication of effort, but also the possibility of conflicting awards.[46] The court might instead have adopted the approach of another district court which in 1966 ordered a trilateral hearing but left it to the arbitrator to determine whether the dispute should then proceed as a bilateral or a trilateral matter under the particular collective bargaining circumstances involved, thereby enabling the arbitrator to assess the viability of a trilateral proceeding.[47]

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

Prior to seeking judicial relief based on an agreement, there is a duty to exhaust whatever grievance and arbitration procedures may exist in it. This requirement applies to employees, as we have seen earlier in this report, and to employers and unions as well. So it is that the courts will stay actions on an agreement pending exhaustion of the grievance apparatus.[48] But where the grievance procedure does not apply to employer-initiated grievances, an employer's action for damages for breach of a no-strike clause will not be stayed.[49] Similarly, when a union sued for wages allegedly due under a guaranteed wage provision, it was not required to exhaust the grievance procedure in a case where the collective bargaining agreement had expired.[50]

An interesting situation occurred in *Teamsters* v. *Brasell Motor Freight Lines, Inc.*,[51] in which local unions sued for damages, specific performance, and an injunction against breach, and the employer claimed that the locals were not parties to the collective agreement. Upon finding that a previous arbitration award had de-

[46] See generally Jones, "A Sequel in the Evolution of the Trilateral Arbitration of Jurisdictional Labor Disputes—The Supreme Court's Gift to Embattled Employers," 15 *UCLA L.Rev.* 877 (1968).
[47] *Retail Clerks, Local 1222* v. *Pell Enterprises,* an unreported decision of the federal district court, Southern District of California, detailed in *id.* at 886-887.
[48] *Warehouse Co.* v. *Warehousemen's Local,* 292 F. Supp. 688, 68 LRRM 2055 (2d Cir., 1968); *Cook Valve Co.* v. *Lodge 155, IAM,* 68 LRRM 2814 (M.D. Tenn., 1968).
[49] *G.T. Schjeldahl Co.* v. *Local 168, IAM,* 393 F.2d 502, 67 LRRM 3042 (1st Cir., 1968).
[50] *Thornton* v. *Victor Meat Co.,* 398 F.2d 669, 68 LRRM 2149 (Cal. Ct. App., 1968).
[51] 392 F.2d 1, 68 LRRM 2143 (5th Cir., 1968).

cided that the locals were indeed parties to the agreement, the Fifth Circuit rejected the employer's defense that they had failed to exhaust the grievance procedure since the employer previously had actually insisted that they were not parties to the collective agreement.

Again, a district court in Tennessee held that the arbitration provisions of a collective agreement did not require that a suit for damages for breach of a no-strike provision be dismissed or stayed pending arbitration because the arbitration provision was not compulsory. The provisions stated that disputes "may" be settled by arbitration.[52]

It is interesting to compare the latter case with *Ford* v. *General Electric Co.*,[53] discussed in an earlier section, in which the court affirmed the dismissal of an action by employees against the employer for additional wages on the ground that the matter had been settled by failure to proceed further after the company's answer at the final step of the grievance procedure. There, arbitration was of two types: arbitration as a matter of right or contractual "compulsion" and arbitration by mutual consent. The court held that the issue involved the latter type of arbitration and so was not compulsory.

III. SUITS TO COMPEL ARBITRATION OR TO REVIEW AWARDS

A. *Suits to Compel Arbitration*

The courts continued in 1968 to resolve doubts of arbitrability in favor of arbitration.[54] Nevertheless, even though there was a sub-

[52] *Jersey Farms Milk Service, Inc.* v. *Meat Cutters*, 69 LRRM 2409 (M.D. Tenn., 1968).
[53] 395 F.2d 157, 68 LRRM 2374 (6th Cir., 1968).
[54] *Clanebach, Inc.* v. *Culinary Workers*, 388 F.2d 766, 67 LRRM 2498 (9th Cir., 1968); *H. K. Porter Co.* v. *Steelworkers, Local 37*, 400 F.2d 691, 69 LRRM 2246 (4th Cir., 1968); *I.L.A.* v. *New York Shipping Assn.*, 403 F.2d 807, 69 LRRM 2738 (2d Cir., 1968; *IUE* v. *General Electric Co.*, 278 F. Supp. 991, 68 LRRM 2161 (S.D. N.Y., 1968); *United Rubber Workers* v. *Interco, Inc.*, 289 F. Supp. 215, 68 LRRM 3081 (E.D. Mo., 1968); *Wire Service Guild, Local 22* v. *Associated Press*, 69 LRRM 2413 (S.D. N.Y., 1968); *IAM* v. *General Electric Co.*, 67 LRRM 2817, 282 F. Supp. 413 (N.E. N.Y., 1968); *Jennings* v. *Westinghouse Electric Corp.*, 283 F. Supp. 308, 67 LRRM 2849 (S.D. N.Y., 1968); *In re Liquidation Holding Corp.*, 68 LRRM 2551 (N.Y. Sup. Ct., 1968).

stantial decrease in the overall number of labor arbitration cases before the courts, there seemed also to be an increase this past year in the number of cases in which arbitration was denied on the difficult ground that a particular dispute was excluded from the arbitration provision of the collective bargaining agreement.[55] The hazard, of course, is that the court will interpose its own judgment in place of that of the arbitrator for which the parties bargained, an interposition emphatically disapproved by the Supreme Court.[56]

In *Teamsters, Local 249* v. *Kroger Co.*[57] a Pennsylvania district court held that arbitration of disputes relating to severance pay, pension plan contributions, and profit sharing was not within the contemplation of the parties. According to the court, the trend of the decisional law is that when a collective agreement contains a no-strike provision, all grievances are embraced within its terms. But in collective agreements which do not contain no-strike provisions, a grievance must appear to be within the contemplation of the parties in order to be arbitrable. According to the court, in such a case a close scrutiny of the contract by the court is required. Since the agreement in *Kroger* did not have a no-strike provision, that close scrutiny found no obligation to arbitrate. The fact that the Supreme Court in *Lucas Flour Co.* v. *Teamsters, Local 174*,[58] some years ago had no difficulty in implying a no-strike clause from the presence of an arbitration provision would suggest that the court might better have reached a contrary result.

In another case in which arbitration was denied, the defendant had refused to arbitrate the suspension of 11 employees and the discharge of 11 others. The court, with appropriate citations, con-

---

[55] *General Telephone Co.* v. *Communications Workers*, 402 F.2d 255, 69 LRRM 2557 (9th Cir., 1968); *Teamsters, Local 249* v. *Kroger Co.*, 67 LRRM 2442 (W.D. Pa., 1968); *Mine Workers, District 50* v. *Matthiesen & Hegeler Zinc Co.*, 291 F. Supp. 578, 69 LRRM 2403 (N.D. W.Va., 1968); *Halstead & Mitchell Co.* v. *United Steelworkers*, 69 LRRM 2124 (W.D. Pa., 1968); *Meat Cutters, Local 73* v. *Fred Rueping Leather Co.*, 282 F. Supp. 653, 67 LRRM 3045 (E.D. Wis., 1968).

[56] See *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 46 LRRM 2423 (1960) in which the Court disapproved of the doctrine of post-award judicial determination of the merits in the guise of review, as it had with regard to pre-award displacement of the prospect of arbitral judgment in suits to compel arbitration in *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960). See generally Jones, "The Name of the Game is Decision—Some Reflections on Arbitrability and Authority in Labor Arbitration," 46 *Tex.L.Rev.* 865 (1968).

[57] 67 LRRM 2442 (W.D. Pa., 1968).

[58] 369 U.S. 95, 49 LRRM 2717 (1962).

ceded that doubt about arbitrability should be resolved in favor of arbitration. But then it observed that the grievance procedure provision failed to mention arbitration and the arbitration provision referred only to differences as to the meaning of provisions of the collective bargaining agreement, a separation of contractual provisions not at all unusual. Oddly enough, the court then reached the astonishing conclusion that the language excluding the grievances was unmistakably clear.[59]

Aside from those two cases, it may well be that some of the increase in failures of petitions to compel arbitration is a function of the negotiation by the parties of agreements in which express exclusions from arbitration are provided. An example of this is to be found in *Halstead & Mitchell Co.* v. *United Steelworkers.*[60] The court there held that layoffs of less that 15 days and not in accordance with seniority were not subject to arbitration. The collective agreement provided that issues arising out of the exercise of rights reserved to management would not be subject to arbitration. The management-rights clause included the right to lay off employees. And the seniority provisions of the agreement gave the company the right to lay off employees for periods of time not to exceed 15 days without regard to seniority.

In another case, illustrating the presence of specific exclusionary clauses, a union sought to compel arbitration of a grievance involving a change in incentive standards. The collective agreement provided that the arbitrator would have no power to rule upon any grievance concerning standards of production established or changed by management. According to the court, this expressly excluded the grievance from arbitration.[61]

It should be added that questions of substantive arbitrability continued in 1968 to be a subject for decision by the courts in the absence of clear provisions to the contrary.[62]

---

[59] *Mine Workers, District 50* v. *Matthiesen & Hegeler Zinc Co.*, 291 F. Supp. 578, 69 LRRM 2403 (N.D. W.Va., 1968).
[60] 69 LRRM 2124 (W.D. Pa., 1968).
[61] *Meat Cutters, Local 73* v. *Fred Rueping Leather Co.*, 282 F. Supp. 653, 67 LRRM 3045 (E.D. Wis., 1968).
[62] *IAM* v. *General Electric Co.*, 282 F. Supp. 413, 67 LRRM 2817 (N.D. N.Y., 1968); *Meat Cutters, Local 73* v. *Fred Rueping Leather Co.*, 282 F. Supp. 653, 67 LRRM 3045 (E.D. Wis., 1968); *Road Builders Ass'n* v. *Hoisting Engineers, Local 473*, 285 F. Supp. 311, 68 LRRM 2537 (D. Conn., 1968).

B. *Suits to Review Awards*

Again in 1968, the courts enforced or affirmed the majority of arbitration awards challenged in judicial proceedings.[63] All that is required, according to the courts, is that the decision of the arbitrator draw its "essence" from the collective agreement,[64] referring to the Supreme Court's twin statements in *Enterprise Wheel & Car* that an arbitrator's award "is legitimate only so long as it draws its essence from the collective bargaining agreement," but also that "[i]t is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." [65]

Thus in *Anaconda Co.* v. *Smelters Union, Number 16,*[66] the arbitrator was within his authority in applying provisions dealing with return from layoff to a situation involving recall from strike. The company had similarly followed those provisions in an earlier strike.

The court's enforcement of an arbitration decision left the employer in an interesting dilemma in *American Sterilizing Co.* v. *Auto Workers, Local 832.*[67] Two unions had represented different units, and both collective agreements had identical seniority

---

[63] *Anaconda Co.* v. *Smelters, No. 16,* 402 F.2d 749, 69 LRRM 2597 (9th Cir., 1968); *Yellow Cab Co.* v. *Democratic Union,* 398 F.2d 735, 68 LRRM 2812 (7th Cir., 1968); *Textile Workers* v. *Paper Products,* 405 F.2d 397, 69 LRRM 2578 (5th Cir., 1968); *Safeway Stores* v. *Bakery Workers, Local 111,* 390 F.2d 79, 67 LRRM 2646 (5th Cir., 1968); *Lynchburg Foundry Co.* v. *United Steelworkers,* 404 F.2d 259, 69 LRRM 2878 (4th Cir., 1968); *Rubber Workers* v. *Dunlop Tire and Rubber,* 391 F.2d 897, 67 LRRM 2887 (3d Cir., 1968); *Union Hardware Div.* v. *Local 247, IUE,* 67 LRRM 2541 (D. Conn., 1968); *American Sterilizer Co.* v. *Local 832, UAW,* 278 F. Supp. 637, 67 LRRM 2894 (W.D. Pa., 1968); *Cloak, Shirt, and Dressmakers* v. *Senco, Inc.,* 289 F. Supp. 513, 69 LRRM 2142 (D. Mass., 1968); *Transport Workers* v. *Transportation Co.,* 283 F. Supp. 597, 68 LRRM 2094 (E.D. Pa., 1968); *Pipe Trades Council, No. 16* v. *England,* 69 LRRM 2379 (Cal. Sup. Ct., 1968); *Freight Drivers* v. *Braswell Lines,* 68 LRRM 2777 (C.D. Cal., 1968); *Prentice Funeral Home* v. *Operating Engineers, No. 821,* 241 N.E.2d 285, 69 LRRM 2552 (Ohio Ct. App., 1968).

[64] *Anaconda Co.* v. *Smelters, No. 16,* 402 F.2d 749, 69 LRRM 2597 (9th Cir., 1968); *Yellow Cab Co.* v. *Democratic Union,* 398 F.2d 735, 68 LRRM 2812 (7th Cir., 1968); *Safeway Stores* v. *Bakery Workers, Local 111,* 390 F.2d 79, 67 LRRM 2646 (5th Cir., 1968); *Lynchburg Foundry Co.* v. *Steelworkers,* 404 F.2d 259, 69 LRRM 2878 (4th Cir., 1968).

[65] *United Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597, 599, 46 LRRM 2423 (1960).

[66] 402 F.2d 749, 69 LRRM 2597 (9th Cir., 1968).

[67] *American Sterilizer Co.* v. *Local 832, UAW,* 278 F. Supp. 637, 67 LRRM 2894 (W.D. Pa., 1968).

clauses. An employee transferred from one bargaining unit to the other, and an arbitrator held that seniority began to accumulate in the second unit only upon transfer. The union representing employees in the unit whence the employee was transferred sought arbitration, claiming that seniority was plantwide. That bilateral arbitration resulted in the decision that the employer was barred from denying the transferring employee all seniority accumulated prior to the transfer. Thus, in what was latently a multiparty dispute, the employer found himself caught between two opposing arbitration decisions. The court found itself unable to resolve the employer's dilemma, finding no basis to invalidate the decisions, although it might have resolved it, had it been asked to do so, by ordering trilateral arbitration to break the impasse.[68]

Some postaward judicial challenges to arbitration decisions, however, have been successful. In two cases the refusal to enforce or confirm was ascribed to ambiguity or incompleteness of the arbitrator's determination.[69] In a third, the challenger was successful in obtaining a stay of a state court action to confirm an award pending the determination of a federal court action under Section 301 for enforcement of the award.[70]

The more interesting decisions, however, have involved successful challenges on the basis that the arbitrator exceeded his "authority" and that the award did not draw its "essence" from the collective agreement.

In the first of four such cases, the arbitrator was held to have exceeded his authority by an award relating to the time and methods of payment of pension plan benefits. The court held that the arbitration clause of the collective bargaining agreement provided only for arbitration of disputes relating to eligibility.[71]

In another case, enforcement of an arbitration decision reinstating participants in a strike in violation of the collective agree-

---

[68] See analysis in Jones, "A Sequel in the Evolution of the Trilateral Arbitration of Jurisdictional Labor Disputes—The Supreme Court's Gift to Embattled Employers," 15 *U.C.L.A. L.Rev.* 877, 894 (1968).
[69] *Industrial Workers* v. *Aniline Corp.*, 68 LRRM 2383 (S.D. N.Y., 1968); *Electrical Workers, No. 494* v. *Brewery Proprietors*, 289 F. Supp. 865, 69 LRRM 2292 (E.D. Wis., 1968).
[70] *In Re Maniscal Co.*, 67 LRRM 2932 (N.Y. Sup. Ct., 1968).
[71] *Porter Co.* v. *Saw Workers*, 283 F. Supp. 739, 68 LRRM 2202 (E.D. Pa., 1968).

ment was denied. The agreement included a no-strike provision and provided that the company could discipline or discharge participants in such action selectively. Two hundred employees struck in violation of the agreement, and the company discharged seven. The company sent them telegrams informing them that because of their participation they were discharged. It was disclosed at the arbitration hearing that the company based its discharges on the belief that the seven were instigators of the walkout. The arbitrator found only five to be the instigators. The arbitrator also found unfairness in the company's procedures because of the alleged lack of notice to the employees as to the reasons for their discharge. On that basis he reinstated all of the grievants. But the court held in this difficult case that his decision was improper because the agreement provided for their discharge on a selective basis, if the company so chose. According to the court, the company was not required, under the agreement, to prove that an employee instigated the walkout, nor was there any requirement that the employee be informed of the reasons for his discharge. The arbitrator had found that the employees participated in the walkout and that was all that was necessary under the agreement. The court also pointed out that the discharged employees were in fact given notice of the reasons for their discharge by means of the telegrams sent to them. Selective discharge was a term included in the collective bargaining agreement, according to the court, and the agreement also provided that the arbitrator could not modify its terms.[72]

In the third successful challenge of an award, an employee had been cleared for work by his own physician as able to perform his regular duties, which included working before certain drying ovens. A company physician had also approved his clearance. But the employee refused to perform his assigned duties and was then terminated. An arbitrator reinstated him without back pay, but the court held that this did not accord with the "essence" of the agreement, since the arbitrator had found no threat to health and the collective agreement barred his ruling on any disciplinary action based on a refusal to perform assigned work in the absence of a serious health hazard. Additionally, the management-rights clauses gave the company sole power to assign reasonable tasks.[73]

[72] *Auto Workers, Local 342* v. *TRW Inc.*, 402 F.2d 727, 69 LRRM 2524 (6th Cir., 1968).
[73] *Magnavox Co.* v. *IUE*, 287 F. Supp. 47, 68 LRRM 2846 (E.D. Tenn., 1968).

The fourth successful challenge involved an arbitrator's award which altered a one-week suspension to a disciplinary warning. The arbitrator had found that the grievant employee intentionally used abusive language to a fellow employee, a violation of the employer's "factory rules" for which the employee was suspended. The alteration by the arbitrator was held by the court to be "outside" the agreement because the penalty was a matter left to the discretion of the employer by the collective agreement.[74]

Arbitration awards were also challenged this past year on the basis of procedural rulings, but all challenges were unsuccessful.[75] In one case it was claimed that a prejudicial violation of an arbitration board's rule regarding sequestering of key witnesses had occurred. The court reasoned that the argument amounted to a contention that by failure to direct compliance with the sequestration rule, there had resulted a consideration of perjured testimony and so this was in fact an attack on credibility. As such, it was a matter for final determination by the arbitrator.[76]

In another such case the award was claimed invalid because an arbitration panel had refused to consider a claim that the company had intimidated and silenced union witnesses. But the court held that the provisions of the statute applicable to vacation of an arbitration award required that the error be such as to deprive the injured party of a fair hearing. Such deprivation was not present, according to the court. The union had presented expert witnesses other than those claimed to have been intimidated and silenced by the employer, and it had even had a four-week continuance to prepare for their examination. Moreover, after the witness claimed to have been silenced had agreed to testify, the union refused to call him.[77]

In the last of these cases, one of the challenges to the award was that the collective agreement required grievances to be presented

[74] *Local 217, IUE* v. *Holtzer-Cabot Corp.*, 277 F. Supp. 704, 67 LRRM 2244 (D. Mass., 1968).
[75] *Yellow Cab Co.* v. *Democratic Union*, 398 F.2d 735, 68 LRRM 2814 (7th Cir., 1968); *Newark Stereotypers* v. *Morning Ledger Co.*, 397 F.2d 594, 68 LRRM 2561 (3d Cir., 1968); *Cloak, Shirt and Dressmakers* v. *Senco, Inc.*, 289 F. Supp. 513, 69 LRRM 2142 (D. Mass., 1968); *Transport Workers* v. *Transportation Co.*, 283 F. Supp. 697, 68 LRRM 2094 (E.D. Pa., 1968).
[76] *Transport Workers* v. *Transportation Co.*, 283 F. Supp. 597, 68 LRRM 2094 (E.D. Pa., 1968).
[77] *Newark Stereotypers* v. *Morning Ledger Co.*, 397 F.2d 594, 68 LRRM 2561 (3rd Cir., 1968).

in writing within specified time periods and that neither requirement had been followed. The arbitrator had relied on the past practice of the parties not to follow those requirements, and the court upheld the decision.[78]

IV. RELATIONSHIP OF SECTION 301 TO OTHER LEGISLATION

A. *Norris-LaGuardia Act*

The most significant development this year was the decision by the Supreme Court in *Avco Corp.* v. *Aero Lodge No. 735, IAM.*[79] It removed the doubt found among the federal district courts over the removability to a federal court of a state court action for an injunction against the breach of a no-strike clause. Even while *Avco* was before the Supreme Court, courts were ruling that removal of an action for injunction against breach was improper.[80] Justice Douglas, in a concise opinion, found first that a suit for an injunction against the breach of a no-strike provision was a claim arising under the laws of the United States and so within the original jurisdiction of the federal courts. Further, although *Sinclair Refining Co.* v. *Atkinson*[81] had held that federal courts were barred under the Norris-LaGuardia Act from issuing such injunctions, that decision dealt only with the nature of the relief available once jurisdiction had attached. According to Justice Douglas, the absence of jurisdiction referred to in *Sinclair* referred only to equity jurisdiction. Thus the reasoning turned on the distinction between the attachment of jurisdiction and the availability of relief after jurisdiction had attached.[82]

It should be noted that actions for damages for breach or to compel arbitration were removable to federal courts before[83] as

[78] *Yellow Cab Co.* v. *Democratic Union,* 398 F.2d 735, 68 LRRM 2812 (7th Cir., 1968).
[79] 390 U.S. 557, 67 LRRM 2881 (1968).
[80] *Carroll Construction Co.* v. *Reneau,* 279 F. Supp. 715, 67 LRRM 2599 (W.D. Fla., 1968).
[81] 370 U.S. 195, 50 LRRM 2420 (1962).
[82] For a discussion of the decisions leading to *Avco* as well as criticism of *Sinclair* see Bakaly and Pepe, "And After Avco" 20 *Lab.L.J.* 67 (1969).
[83] *Roper Corp.* v. *Stove Workers, Local 16,* 279 F. Supp. 717, 688 LRRM 2409 (S.D. Ohio, 1968).

well as after *Avco.*[84] Although the action was held removable in *Avco,* the prospect of removability did not arise only after the Supreme Court had decided the case.[85]

Although the Supreme Court has yet to decide whether the Norris-LaGuardia Act precludes specific enforcement of an arbitration decision directing that a strike cease, the Fifth Circuit has held that such an order is enforceable. In *New Orleans Steamship Ass'n* v. *ILA, Local 1418,*[86] an expedited arbitration resulted in an award ordering the unions to cease work stoppages held to be in violation of the collective agreement. On a petition for mandatory injunction to enforce that award, the district court held the action to be barred by the Norris-LaGuardia Act. In reversing the district court, the Fifth Circuit distinguished *Sinclair Refining Co.*[87] on the ground that it did not involve enforcement of an arbitration award. According to the court, the Norris-LaGuardia Act is limited in its application to "labor disputes," and the specific performance of an arbitration agreement does not constitute a "labor dispute." The court also noted that a no-strike clause with an expedited arbitration provision would be a sham unless enforceable. There must be a remedy, according to the court, if one party chooses to ignore the arbitrator's order.

The Norris-LaGuardia Act was held inapplicable to an action in a federal court for a preliminary injunction restraining an employer from closing down a plant pending the determination of whether it would violate the collective agreement to do so.[88] The injunction was held to be simply a means to preserve the jurisdiction of the court and to maintain the status quo while it resolved the contractual issue. The employer had prepared to close down its plant when the union brought suit relying upon a provision in the agreement to the effect that non-bargaining-unit employees would not be permitted to perform the work of the bargaining-unit employees. According to the court, the Norris-LaGuardia Act was no more applicable here than it was in *Textile Workers* v. *Lincoln*

[84] *Margo Farms Creamery Corp.* v. *Distini,* 68 LRRM 2716 (S.D. N.Y., 1968).
[85] *Avco Co.* v. *UAW, Local 1010,* 287 F. Supp. 132, 68 LRRM 2816 (D. Conn., 1968).
[86] 389 F.2d 369, 67 LRRM 2430 (5th Cir., 1968).
[87] 370 U.S. 195, 50 LRRM 2420 (1962).
[88] *Teamsters, Local No. 328* v. *Armour & Co.,* 294 F. Supp. 168, 69 LRRM 2895 (W.D. Mich., 1968).

Mills [89] to an injunction requiring compliance by an employer with the collective agreement.

The Norris-LaGuardia Act has also been held inapplicable to actions in state courts for injunctions.[90]

B. *National Labor Relations Act*

The courts in 1968 had to cope with the impact of the National Labor Relations Act on contractual actions under Section 301, and the results in the cases varied.

One action was brought to compel an employer to arbitrate the question of whether the agreement required negotiation of wages for employees working in classes not specified in the labor agreement. The Ninth Circuit held that the issue was arbitrable, rejecting the employer's contention that the issue was purely representational and so within the exclusive jurisdiction of the Board. Relying on *Carey v. Westinghouse Electric Corp.*,[91] the court held that the existence of a remedy before the Board did not preclude arbitration.[92] The court declined to rule on an issue of estoppel raised by the unions in reliance on the position taken by the employer in a prior representation proceeding. The court did not decide the issue, however, stating that whatever decision might result would not affect the decision that arbitration was proper.

In *Luchenbach Overseas Corp.* v. *Curran*,[93] a Second Circuit case, the employer had a collective agreement with the Seafarers International Union and then acquired the steamships of another company. The latter corporation had a collective agreement with the National Maritime Union. The acquiring employer discharged the NMU seamen and hired SIU members in their stead. The NMU seamen filed charges against the employer, which were dismissed, and NMU then sought an expedited arbitration. The employer went to court and obtained a stay. On appeal, it was held

[89] 353 U.S. 448, 40 LRRM 2113, 2120 (1957).
[90] *Masonite Corp.* v. *Woodworkers, Local 5-443*, 215 So.2d 691, 69 LRRM 2831 (Miss. Sup. Ct., 1968).
[91] 375 U.S. 261, 55 LRRM 2042 (1964).
[92] *Clanenbach Inc.* v. *Culinary Workers*, 388 F.2d 766, 67 LRRM 2498 (9th Cir., 1968).
[93] 398 F.2d 403, 68 LRRM 3040 (2d Cir., 1968).

that dismissal of the charges did not itself preclude resort to contractual rights and remedies. But the court then concluded that the expedited-arbitration provision was applicable only to lockout and strike situations, which were not involved in the instant case, although it is puzzling why it did not leave that issue to be resolved by an arbitrator. Instead, it affirmed the stay of the expedited arbitration but declared that the stay would be dissolved if resort were had to the regular grievance procedures. Parenthetically, it should be noted that this was a multilateral dispute which might well have required the kind of consolidation effectuated in the *CBS* case discussed earlier in this report.

In another New York case, it was held by a district court that dismissal of unfair labor practice charges does not foreclose arbitration of the underlying dispute.[94]

In a Louisiana federal case, a Board award of work which had been claimed by two unions engaged in a jurisdictional dispute was held to bar recovery of damages in an action under Section 301 by the union to which the award had not been made. The union relied on the failure of the employer to abide by the award of a grievance committee which had awarded it the work. The NLRB award was rendered subsequent to the grievance committee award.[95]

The issue of the effect of the National Labor Relations Act on Section 301 actions was presented somewhat differently to a state court in which an action was brought to enforce an arbitration award under Section 301. The California Supreme Court held that it did not have jurisdiction to hear the defense that the union had refused to bargain with the employers or had attempted to cause them to pay for services that were not performed. The court reasoned that these allegations were arguably unfair labor practices under the federal act,[96] so that a state court could not resolve them. In the same state, however, an intermediate appellate court had before it an action by an employer for damages for the breach

[94] *IUE* v. *General Electric Corp.*, 278 F. Supp. 991, 68 LRRM 2161 (S.D. N.Y., 1968). See also *Masonite Corp.* v. *Woodworkers, Local 5-443*, 215 So.2d 691, 69 LRRM 2831 (Miss. Sup. Ct., 1968).
[95] *Dockloaders, ILA Local 854* v. *Richeson & Sons*, 280 F. Supp. 402, 67 LRRM 2560 (D. La., 1968).
[96] *Pipe Trades Council, No. 16* v. *England*, 69 LRRM 2379 (Cal. Sup. Ct., 1968).

of a collective agreement attributable to picketing. The court held that it was not preempted by the federal act since, aside from possible unfair labor practices, the action was based on the agreement rather than on any unfair labor practices.[97]

In an interesting Third Circuit case which demonstrates how complicated these tribunal interaction cases can get, three employees had originally filed unfair labor practice charges against the employer, which had been dismissed. They then filed a state court action, which in turn was dismissed on the ground of preemption. Undaunted, they turned to the federal district court to sue the union and the employer for an alleged conspiracy violative of the collective agreement. That suit was dismissed under Section 301 on a challenge to jurisdiction, it being held that the Labor Board had jurisdiction and that the collective bargaining agreement had expired. Plaintiffs then again sued the employer for breach of the collective agreement, but the district court dismissed on the ground of *res judicata.* On appeal to the circuit court, however, the case was remanded to the district court for a full hearing on the question of whether the contract had indeed expired, since the plaintiffs had not had their day in court on *that* issue.[98]

The effectiveness of a potential remedy before the Labor Board was discounted in a district court case cited earlier in this report. Charges had been filed and an injunction sought by the Board. Nevertheless, the court held that a preliminary injunction sought under Section 301 should be issued. The Michigan District Court felt that the Board procedures were incapable of the expeditious handling that was needed to ensure continuation of the plant pending disposition of the unfair labor practice charges. As the court saw it, even if the charges were sustained after hearing on the complaint, the remedy might still not be sufficient.[99]

---

[97] *Consolidated Theaters, Inc.* v. *Stage Employees, Local 16,* 67 LRRM 2839 (Dist. Ct. App., 1968); also see *UAW, Local 577* v. *Hamilton Beach Mfg. Co.,* 162 N.W.2d 16, 69 LRRM 2563 (Wis. Sup. Ct., 1968).

[98] *Smith* v. *Pittsburgh Gauge & Steel Co.,* 388 F.2d 983, 67 LRRM 2446 (3d Cir., 1968).

[99] *Teamsters Local 328* v. *Armour & Co.,* 294 F. Supp. 168, 69 LRRM 2895 (W.D. Mich., 1968). See discussion to this effect in "refusal-to-disclose" Board cases in Jones, "The Labor Board, The Courts, and Arbitration—A Feasibility Study of Tribunal Interaction in Grievable Refusals to Disclose," 116 *Pa. L.Rev.* 1185, 1188 *et seq.* (1968).

C. *Bankruptcy Act*

A federal district court in Arkansas was confronted this past year with the question of whether the receiver-trustee of a bankrupt corporation has the power to repudiate a collective agreement in force between the bankrupt and a labor union at the time of the filing of the petition in bankruptcy. In *Carpenter's, No. 2746* v. *Turney Wood Products, Inc.*,[100] the receiver-trustee of the bankrupt corporation placed the plant in temporary operation. When the receiver reopened the plant, he repudiated the collective agreement between the union and the bankrupt on the legal ground that is was an "executory contract." This he did without notice to or prior consultation with the union. Employees were laid off without regard to seniority, and wages were reduced. The union filed unfair labor practice charges and commenced a suit in equity to determine whether the trustee in bankruptcy had the power he asserted. The receiver also refused to entertain specific grievances filed by the union on the grounds that he had properly exercised a right as trustee to reject the contract and that, there being no collective agreement between him and the union, no grievance procedure existed to be followed.

The court noted the absence of language in both the Bankruptcy Act and the appropriate federal labor statute which would exclude collective agreements from the operation of Section 70B of the Bankruptcy Act,[101] which enables a trustee in bankruptcy to reject executory contracts. Concluding that Section 70B was applicable to a collective agreement, the court relied upon the language of Section 77N of the Bankruptcy Act, which provides for the reorganization of certain common carriers and specifically prohibits the bankruptcy courts from interfering with collective agreements involving carriers whose employees are subject to the provisions of the Railway Labor Act.[102] The court went on to state that the conclusion that Section 70B is applicable to collective agreements does not imply that the trustee could continue to operate the business of the bankrupt without regard to the National Labor Relations Act. According to the court, if a union representing employees demands that a new contract be negotiated, the trustee must negotiate, and a

[100] 289 F. Supp. 143, 69 LRRM 2977 (W.D. Ark., 1968).
[101] 11 USC §110B.
[102] 29 USC §§151-163, 181-185.

refusal to do so constitutes an unfair labor practice. As the court pointed out, this decision was apparently the first instance in which a court was squarely called on to pass upon the status of a collective agreement in a straight bankruptcy proceeding.

V. CONCLUSION

Our survey discloses that the major trend of judicial decision continues to be to send disputes to arbitration and to refrain from displacing the judgment of the arbitrator with that of the court before and after his award has been issued. There still persist those courts, however, who cannot quite reconcile themselves to the forbearance required by the decisions of the Supreme Court, and, accordingly, somewhat of an increase in judicial ouster of arbitral judgment was observable this past year. But these judicial deviations cannot obscure the economic and legal realities that the parties to collective bargaining do not resort to courts but to arbitration for final and binding decisions in practically all of the disputes that arise during the terms of the 125,000 or so collective agreements being administered in the United States today.

It is a quite conservative estimate that there are upwards of 10,000 labor arbitration awards issued each year by some 500 or so active arbitrators. Some would place the total around 25,000 or more, but there are no reliable figures as yet to fix it that high. In any event, the noteworthy fact is that, at least as reflected in the reported cases, the courts only confront an insignificant number of disputes—ranging annually in the past five years from about 150 to 81—in which either prior or subsequent to an arbitral award one of the parties to a collective agreement challenges the arbitrability of the dispute or the authority of an arbitrator to do what he has done. Enough is known about labor arbitrators at this point to state that the output of the courts, insignificant in quantity, is nonetheless influential in affecting the judgment of arbitrators as they confront the various problems dealt with by the courts. And this is also true of the attitudes and advocacy of most of the counsel who represent managements and unions before arbitrators. Thus what the courts do remains important to the orderly development of efficient grievance procedures, inclusive of arbitration, in collective bargaining. The role of the courts, though quantitatively small, is qualitatively significant.

BIBLIOGRAPHY

Brundage, "Adaptation of Judicial Procedures to the Arbitral Process," 5 *San Diego L.Rev.* 1 (1968).

Gregory, C. O., "The Enforcement of Collective Labour Agreements in the United States," 21 *Current Legal Problems* 159 (1968).

Jones, E. A., Jr., "The Labor Board, The Courts, and Arbitration—A Feasibility Study of Tribunal Interaction in Grievable Refusals to Disclose," 116 *Pa. L.Rev.* 1185 (1968).

Jones, E. A., Jr., "The Accretion of Federal Power in Labor Arbitration—The Example of Arbitral Discovery," 116 *Pa. L.Rev.* 830 (1968).

Jones, E. A., Jr., "A Sequel in the Evolution of the Trilateral Arbitration of Jurisdictional Disputes—The Supreme Court's Gift to Embattled Employers," 15 *U.C.L.A. L.Rev.* 877 (1968).

Jones, E. A., Jr., "The Name of the Game is Decision—Some Reflections on 'Arbitrability' and 'Authority' in Labor Arbitration," 46 *Tex. L. Rev.* 865 (1968).

Jones, E. A., Jr., "Blindman's Buff and the *Now* Problems of Apocrypha, Inc. and Local 711—Discovery Procedures in Collective Bargaining Disputes," 116 *Pa. L.Rev.* 571 (1968).

McDermott, "Arbitrability: The Courts Versus the Arbitrator," 23 *Arb. J.* 18 (1968).

Note, "A New Look at Arbitration—Enforcement of a No-Strike Clause by Injunctive Relief," 19 *Syra. L.Rev.* 957 (1968).

Note, "The Duties of Successor Employees under *John Wiley & Sons* v. *Livingston* and Its Progeny," 43 *NYU L.Rev.* 498 (1968).

Note, "Approaching an Accommodation between Section 4 of Norris-LaGuardia and Section 301 of LMRA," 40 *Colo. L. Rev.* 639 (1968).

Note, "Union's Right to Assert Grievances Subsequent to Its Decertification and Change of Corporate Employers," 16 *Kan. L.Rev.* 552 (1968).

Note, "Authority of the Judiciary to Review Arbitration," 52 *Minn. L.Rev.* 1118 (1968).

Note, "State Court Limited to Federal Law Remedies for Breach of Collective Bargaining Agreement," 36 *Geo.Wash. L.Rev.* 678 (1968).

Note, "NLRB and Deference to Arbitration," 77 *Yale L.J.* 1191 (1968).

Note, "Specific Enforcement of an Arbitrator's Award Which Has the Effect of Enjoining a Strike," 29 *Pitt. L.Rev.* 517 (1968).

Note, "Judicial Enforcement of the Individual Employee's Rights in Collective Bargaining Agreements," 19 *Syra. L. Rev.* 669 (1968).

Note, "Successor Employer's Obligation under Predecessor's Collective Bargaining Agreement after a Business Reorganization," 36 *Ford. L.Rev.* 569 (1968).

Note, *"International Longshoremen's Ass'n., Local 1291* v. *Philadelphia Marine Trade Ass'n.,"* 22 *SW. L.J.* 388 (1968).

Note, *"Avco Corp.* v. *Aero, Lodge 735,"* 36 *Geo. Wash. L. Rev.* 678 (1968).