APPENDIX B

ARBITRATION AND FEDERAL RIGHTS UNDER COLLECTIVE AGREEMENTS IN 1969*

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During the past year courts for the most part followed the mandates of the Supreme Court in compelling arbitration or confirming awards. With one notable exception, the noteworthy cases tended to be those in which courts sought to justify refusal to extend existing doctrines to new situations. There were few perceivable attempts to discuss and apply new interpretations of those doctrines.

I. THE RIGHTS OF AN EMPLOYEE UNDER SECTION 301

Under rules articulated in a line of Supreme Court decisions beginning with *Smith* v. *Evening News Assn.*[1] in 1962 and culminating in *Vaca* v. *Sipes*[2] in 1967, when a collective bargaining agreement sets forth procedures for the redress of grievances, an employee must justify deviation from those procedures when he appears in court with his claim. Several courts grappled with difficult problems involving allegations by

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This Report is based upon a reading of all reported state and federal cases, but only those that presented facts and reasoning are used here, a number of cases being too sparse in one or the other to be helpful. By early January 1970, about 110 cases had been reported. This compares with 81 for 1968, 130 for 1967, 120 for 1966, and 150 for 1965. We make no representation that this Report is exhaustive. A portion of it, the text from note 132 to 152, was prepared by Robert G. Howlett, Chairman of the NAA-NLRB Liaison Committee.

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[1] 371 U.S. 195, 51 LRRM 2646 (1962); *Humphrey* v. *Moore*, 375 U.S. 335, 55 LRRM 2031 (1964); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 58 LRRM 2193 (1965).

[2] 386 U.S. 171, 64 LRRM 2369 (1967).

an employee both that his employer had breached the collective bargaining agreement and that his union had breached its duty of fair representation; this issue typically arises in the context of the failure of the employee to exhaust grievance and arbitration machinery. Exhaustion of contractual grievance procedures, or at least the attempt to do so, continues to be a prerequisite to an individual's cause of action under Section 301. But this prerequisite is no bar if it is proven either that the union or its representatives acted arbitrarily, in bad faith, or with hostility toward the plaintiff in refusing to process his grievance,[3] or that attempts at compliance would be futile.[4]

Where the procedures were fully complied with, it was held that a final award precluded further consideration by a court,[5] at least in the absence of fraud or bad faith.[6] This was so even though the union's position was contrary to the interests of the plaintiff throughout,[7] as long as no arbitrariness or discrimination is shown.[8] This reasoning applies also where the act complained of was in disregard of the express terms of the contract,[9] or where the complaining party had been injured by the union's failure to invoke a clause of the contract.[10]

Though requiring compliance with the grievance procedure is the norm, there is a growing body of law justifying noncompliance with it. In the only federal appellate decision in this area,[11] the court excused the plaintiff employee's failure to exhaust his remedies under the collective bargaining agreement where the union representative on a joint committee which had originally heard the grievance had failed to press for arbitration. Nevertheless the court concluded that there had been no breach of

[3] *Horkstrom* v. *Stonefort Coal Mining Co.*, 246 N.E.2d 128, 71 LRRM 2100 (Ill. App. Ct., 1969).

[4] *Waters* v. *Wisconsin Steel Works*, 301 F.Supp. 663, 71 LRRM 2886 (N.D. Ill., 1969); *Neider* v. *J. G. Van Holten & Son, Inc.*, 165 N.W.2d 113, 70 LRRM 2877 (Wis., 1969).

[5] *McAfee* v. *UAW*, —— F.Supp. ——, 71 LRRM 2515 (E.D. Mich., 1969).

[6] *Borg* v. *Wojcik*, —— F.Supp. ——, 70 LRRM 3093 (E.D. Mich., 1969).

[7] *Ferrara* v. *Pacific Intermountain Express Co.*, 301 F.Supp. 1240, 71 LRRM 2872 (N.D. Ill., 1969).

[8] *Fuller* v. *Highway Truck Drivers, Local 107*, 300 F.Supp. 643, 71 LRRM 2673 (E.D. Penn., 1969); see also *Neider* v. *J. G. Holten & Son, Inc.*, *infra* note 18.

[9] *Walters* v. *Teamsters, Local 612*, —— F.Supp. ——, 70 LRRM 3252 (N.D. Ala., 1969) (oral agreement between union and company effectively amended the collective bargaining agreement).

[10] *Price* v. *Teamsters*, 46 FRD 18, 71 LRRM 2167 (E.D. Penn., 1969).

[11] *Law* v. *Joint Checker Labor Relations Committee*, 412 F.2d 795, 71 LRRM 2911 (9th Cir., 1969).

contract in terminating the plaintiff's employment since the facts established that he had been fairly represented and that the company's complaint against him was true. Again, if an employee cannot unilaterally force the grievance to arbitration, failure to exhaust the grievance procedure does not necessarily preclude a claim of breach of the collective bargaining agreement against an employer.[12] Exhaustion is also not required if any attempt would have been futile,[13] although it has been held that futility is no excuse for noncompliance with intra-union appeal procedures.[14] Another court held a suit allowable by former employees of a shut-down plant to recover pension rights despite a contention that contract grievance procedures had not been complied with.[15] But an employee could not bring a Section 301 suit against his employer for failure to grant severance pay where the contract grievance procedure providing for binding arbitration had not been invoked by the union.[16]

One court observed that there was "serious question" whether a union could participate in processing a grievance consistently with its duty of fair representation where it had taken a position contrary to that of grievants.[17] The obligation to exhaust internal remedies was held to apply equally to internal union procedures to protest breach of the duty of fair representation,[18] and to protest acts of joint union-management committees.[19]

Courts continued to recognize that in disputes involving seniority classifications a union does not necessarily violate its duty of fair representation by taking a position contrary to the interests of one group of members,[20] and an allegation to that effect is not a sufficient excuse to justify lack of compliance with internal procedures. An employer, however, was not chargeable

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[12] *Gottschling* v. *Square D. Co., infra* note 22.

[13] *Walters* v. *Wisconsin Steel Works,* 301 F.Supp. 663, 71 LRRM 2886 (N.D.Ill., 1969); *Price* v. *Teamsters, supra* note 10.

[14] *Harrington* v. *Chrysler Corp.,* 303 F.Supp. 495, 72 LRRM 2248 (E.D. Mich., 1969).

[15] *Hauser* v. *Farwell, Ozmun, Kirk & Co.,* 299 F.Supp. 387, 72 LRRM 2001 (D. Minn., 1969).

[16] *O'Sullivan* v. *Getty Oil Co.,* 296 F.Supp. 272, 71 LRRM 2281 (D. Mass., 1969).

[17] *Supra* note 10.

[18] *Neider* v. *J. G. Van Holten & Son, Inc.,* 165 N.W. 2d 113, 70 LRRM 2877 (Wis., 1969); *Harrington* v. *Chrysler Corp., supra* note 14.

[19] *Borg* v. *Wojcik,* — F.Supp. —, 70 LRRM 3093 (E.D. Mich., 1969).

[20] *Horkstrom* v. *Stonefort Coal Mining Co.,* 246 N.E.2d 128, 71 LRRM 2100 (Ill. App. Ct., 1969); *Walters* v. *Teamsters, Local 612, supra* note 9; *Fuller* v. *Highway Truck Drivers, Local 107, supra* note 8.

with refusal to participate or with repudiation of the procedure where it was the union officials who refused to prosecute the grievance and the employer was never requested to participate.[21] Of course it is accepted now that a union does not breach its duty of fair representation merely by its decision in good faith not to process a grievance to arbitration.[22] When it does proceed, its duty is discharged when it utilizes modes of redress mutually negotiated with the employer.[23] Nor does a union breach its duty by refusing to allow grievants' own counsel to conduct their case at arbitration. Despite a union's control over the presentation of its case, and while an arbitrator may refuse to order the recording of testimony, it has been held, however, that grievants have the right to have the services of their own stenographer to preserve a record.

One of the more difficult issues radiating from *Vaca* v. *Sipes*[24] was whether an action for breach of contract may lie against an employer in the absence of compliance with the grievance procedure merely upon the allegation that a union has failed in its duty of fair representation and without an allegation of an actual conspiracy between the union and the employer.[25] A Connecticut federal district court framed the issue as being whether an employee could recover from his employer even though the employer had played no part in preventing him from exhausting his contractual remedies.[26] In contrast to this case, in *Vaca* the union's alleged breach of duty had foreclosed the employee's completion of the grievance procedure. The court conceded that *Vaca* could be interpreted to mean that a union's conduct must actually prevent exhaustion before an employee may proceed directly against the employer. But it held that an allegation that a union had refused to cooperate with the employee implied that resort to the grievance procedure would be useless, so an express allegation to that effect was unnecessary. Hence the employee was permitted to maintain his action against his

[21] *Horkstrom* v. *Stonefort Coal Mining Co., supra* note 20.

[22] *Bartels* v. *Lithographers,* 306 F.Supp. 1266, 73 LRRM 2154 (S.D. N.Y., 1969); *Gottschling* v. *Square D. Co.,* 301 F.Supp. 1349, 71 LRRM 3009 (E.D., Wis., 1969).

[23] *Koch* v. *Met Food Corp.,* 70 LRRM 2408 (N.Y. Sup. Ct., 1968).

[24] 386 U.S. 171, 64 LRRM 2369 (1967).

[25] *Desrosier's* v. *American Cyanamid Co.,* 299 F.Supp. 162, 71 LRRM 2050 (D. Conn., 1969).

[26] *Id.*

employer even though through no fault of the employer the grievance procedure had not been utilized.

Another interesting issue under *Vaca* arose in another Connecticut federal district court.[27] Plaintiff had been promoted out of the bargaining unit and had protested the employer's denial of his alleged right under the contract to be restored to a bargaining unit position. He justified his lack of compliance with the grievance procedure by arguing that he was not entitled to avail himself of it because he was no longer a member of the bargaining unit. That issue was not reached, however, since defendant's motion to dismiss for failure to join the local and national union was granted. It should be noted that the requirements under *Vaca* concerning proper parties are still in a state of flux. It has elsewhere been held that under *Vaca* the employer is not an indispensable party.[28]

II. GENERAL JUDICIAL PROBLEMS UNDER SECTION 301

A. *Actions Cognizable Under Section 301*

Though most actions brought under Section 301 involve claims of breaches of collective bargaining agreements by employers, employees, and unions, the scope of the statute is broad enough to confer jurisdiction on the courts to hear a great variety of disputes. Where the claim is that no contract exists between a union and a company, courts routinely have jurisdiction to decide that question.[29] Actually, the breadth of Section 301 varies with the imagination and activism of the courts, who have the jurisdiction under Section 301 to determine their own jurisdiction,[30] although state statutes of limitations may bar Section 301 suits.[31] For instance, rights claimed under pension and welfare plans are frequently asserted under Section 301. The courts this past year continued to hold that the trustees of pension and welfare plans may bring actions under it for employer contributions.[32]

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[27] *Johnson* v. *Colts, Inc.*, — F.Supp. —, 71 LRRM 2969 (D. Conn., 1969).

[28] *Lewis* v. *Shubert*, 300 F.Supp. 174, 72 LRRM 2120 (W.D. Mo., 1969).

[29] *Steelworkers* v. *O'Neal Steel, Inc.*, — F.Supp. —, 72 LRRM 2893 (N.D., Ala., 1969).

[30] *Baker* v. *Fleet Maintenance, Inc.*, 409 F.2d 551, 70 LRRM 3385 (7th Cir., 1969).

[31] *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 61 LRRM 2545 (1966). *Accord: Brown* v. *Trans-American Freight Lines, Inc.*, — F.Supp. —, 72 LRRM 2678 (N.D. Ill., 1969).

[32] *Williams* v. *Wisconsin Barge Line, Inc.*, 416 F.2d 28, 71 LRRM 3225 (7th Cir., 1969).

Once a dispute had been resolved by arbitration, an action in court would not lie by the employees affected against their employer for the same claims.[33] Futhermore, the decisions of joint committees are as final and binding for this purpose as are those of arbitrators.[34] Though employees in their individual capacities may sue both their union and their employer for breach of the collective bargaining agreement,[35] individuals, either as employees or in their representative capacities as union officials, have been held not liable individually for breach of a collective bargaining agreement.[36] Even where one party to an agreement sued the other for tortious conspiracy, the operation of the arbitration clause was not thereby precluded; a stay was granted, Section 301 conferring jurisdiction upon the court to resolve any remaining issues following arbitration.[37] A Michigan federal district court [38] adopted an earlier New Jersey Supreme Court decision [39] that had held that an offset of workmen's compensation benefits against private pension benefits does not violate any state public policy. Since an employer is not legally compelled to provide pension benefits, he may negotiate the manner in which such benefits shall be paid under a collective bargaining agreement.

In a novel case, a New York federal district court entertained a Section 301 suit by a union of supervisors seeking an order to compel bargaining since the NLRB does not have jurisdiction over such a dispute.[40] But of course when a breach of contract also amounts to an unfair labor practice within the jurisdiction of the NLRB, a court only has concurrent jurisdiction under Section 301.[41] The general prohibitions against injunctions in labor disputes were held inapplicable in a Section 301 suit to enforce an arbitration award where enforcement would have

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[33] *Piper* v. *Neco, Inc.*, 412 F.2d 752, 71 LRRM 2655 (6th Cir., 1969).
[34] *Greenwalt* v. *New Penn Motor Express*, 296 F.Supp. 1117, 71 LRRM 2559 (M.D. Pa., 1968).
[35] *Derr* v. *Bright*, 408 F.Supp. 497, 70 LRRM 2785 (M.D. Pa., 1969). See also Section I, *supra*, and Section II F, *infra*.
[36] *Jersey Farms Milk Service, Inc.* v. *Meat Cutters*, 297 F.Supp. 1098, 70 LRRM 2391 (M.D. Tenn., 1969).
[37] *IUOE, Local 14-B* v. *Bronx Iron & Metals Corp.*, — F.Supp. —, 70 LRRM 2248 (S.D.N.Y., 1968).
[38] *Borg.* v. *Wojcik*, — F.Supp. —, 70 LRRM 3093 (1969).
[39] *Renshaw* v. *U.S. Pipe & Foundry Co.*, 153 A.2d 673, 44 LRRM 2618 (1959).
[40] *Marine Engineers Beneficial Assn.* v. *Socony Mobil Oil Co., Inc.*, —F.Supp.—, 70 LRRM 2936 (S.D. N.Y., 1969).
[41] *Powers* v. *Troy Mills, Inc.*, 303 F.Supp. 1377, 72 LRRM 2863 (D. N.H., 1969).

been tantamount to a mandatory injunction;[42] the Supreme Court had not yet resolved this crucial issue as it was to do in its 1970 decision in *Boys Markets,* overruling the *Sinclair Refining* doctrine of 1962.[43] At the request of a local union, one court restrained an employer from bargaining with an international union where it appeared that a breach of contract would have resulted.[44]

An Arizona federal district court was presented with a unique racial case which gives some insight into the difficult problems raised for arbitrators and reviewing courts by racial discrimination grievances.[45] A black grievant claimed he had not been given a fair chance to qualify for a promotion. After an arbitral hearing but before issuance of an award, the employer informed the arbitrator that an investigation by a national detective agency had uncovered false statements in the grievant's arbitral testimony about his past experience and education, on the basis of which investigation the grievant was discharged for falsifying his application. The arbitrator's conclusions reached on the rest of the record that the company had engaged in discrimination against the grievant were confirmed by this elaborate reaction. The variances were neither so material nor so recent as to warrant discharge, he found, nor were they even relevant to the question whether the grievant's supervisors, based on their knowledge of him, had treated him differently because he was black. So although the discharge came after the hearing, the arbitrator ordered the company to desist from further discipline concerning grievant's application, to reinstate him and pay him for any time lost, and to give him a 30-day trial period on the job about which he had originally grieved.[46]

The court refused to enforce the award. It held that the arbitrator had gone beyond the submitted issue of discrimination concerning a promotion; he had no jurisdiction to deal with the false-application issue when it had not yet been processed through

[42] *IBT, Local 75* v. *Verifine Dairy Products Corp.,* — F.Supp. —, 70 LRRM 3323 (E.D. Wis., 1969).

[43] *See Boys Markets, Inc.* v. *Retail Clerks, Local 770,* 398 U.S. 235, 74 LRRM 2257 (1970), overruling *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 238, 50 LRRM 2433 (1962).

[44] *Local 28, Department Store Union* v. *American Bakeries Co.,* 305 F.Supp. 624, 72 LRRM 2568 (W.D. N.C., 1969).

[45] *United Steelworkers* v. *Allison Steel Mfg. Co.,* — F.Supp. — (D. Ariz., 1969) (this case was to have been appealed but the death of the grievant rendered it moot).

[46] The arbitrator's opinion is in 53 LA 101 (E. Jones, 1969).

the pre-arbitral steps of the grievance procedure. Somewhat ironically, the court invoked against the arbitrator the Supreme Court's mandate aimed at preventing *courts* from interfering with the operation of the grievance procedures so they would be given "full play" without judicial intervention. An employer intent upon racial or other discrimination would be enabled by this court's reasoning to impose an intolerable burden of harassment on the employee who has grieved and proven a particular act of discrimination and on the union which must spend its funds to protect him against it as part of its duty of fair representation. Such cases are peculiarly vulnerable to this kind of abuse if each successive act must be grieved and proven in separate proceedings despite an arbitrator's conclusion that a pattern, not just an isolated act, has been proven. The case suggests that in discrimination cases at least, arbitrators may need to exert power to compel contract violators to cease and desist from conduct peripheral to the act complained of and "submitted" to them lest otherwise the effectiveness of an award be unconscionably frustrated. That kind of power is reasonably impliable from the good-faith requisite of the contractual grievance procedure and is quite like the power historically evolved and wielded by equity chancellors to protect their jurisdiction.

B. *Existence of a Contract*

The Supreme Court declared in one of the trilogy cases,[47] that it is the duty of a court to decide whether there is an agreement to arbitrate a particular dispute, and this is recognized to be so even if a determination of this question will necessarily amount to a determination on the merits.[48] Granting a temporary injunction for preservation of the status quo ante, pending an arbitral determination, is permissible and does not constitute a judicial determination on the merits. The injunction will have effect only until a contrary determination by the arbitrators.[49] The presence of grievance procedures in the basic labor contract was not relevant to the court's jurisdiction

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[47] *Steelworkers* v. *American Mfg.*, 363 U.S. 564, 46 LRRM 2414 (1960).

[48] *RCA* v. *Association of Scientists*, 414 F.2d 893, 71 LRRM 3196 (3rd Cir., 1969). The line is not readily drawn. See Jones, "The Name of the Game Is Decision—Some Reflections on 'Arbitrability' and 'Authority' in Labor Arbitration," 46 *Tex. L. Rev.* 865 (1968).

[49] *Commerce Reporting Inc.* v. *Melman*, 71 LRRM 2815 (N.Y. Sup. Ct., 1969).

to issue an injunction to prevent the breach of a separate strike settlement agreement.[50]

Under Section 301, a court may determine its own jurisdiction, *i.e.*, whether the parties entered into a collective bargaining agreement at all.[51] More narrowly, where it was found that there was no agreement to arbitrate the dispute in question, a motion to compel arbitration was denied,[52] even though the union was claiming rights which apparently had accrued under a contract which did make them arbitrable; and in another, an arbitrator's award was set aside on the ground that no contract was in effect at the time the dispute arose.[53] In another case an agreement to arbitrate was found to exist by estoppel.[54] It continues to be held that a party's objection to the jurisdiction of the arbitrator may be preserved against waiver while still participating on the merits.[55] One court held that under its authority to develop federal labor law it could order joint arbitration even in the absence of an agreement among the parties to that effect.[56] A broad arbitration clause, however, was held not to bar all common-law rights of action of employees against employers for wages; nor were employees required to submit a dispute to arbitration which they had not agreed to submit, especially since neither the interpretation of the agreement nor the enforcement of a right created by its provisions was involved in the wage claim.[57]

C. *Obligations of Successors*

The courts continued to be called upon to decide if a particular transaction renders the surviving company a "successor" under the principles developed under *John Wiley & Sons* v. *Livingston*.[58] Though *Wiley* involved a merger of two corporations, the structure of the transaction is not definitively signifi-

[50] *Local 214, Teamsters* v. *Dearborn*, 71 LRRM 2793 (Mich. Cir. Ct., 1969).
[51] *Baker* v. *Fleet Maintenance, Inc.*, 409 F.2d 551, 70 LRRM 3385 (7th Cir., 1969).
[52] *D. S. Trucking Co.* v. *Truck Drivers, Local 807*, 71 LRRM 2278 (N.Y. Sup. Ct., 1969).
[53] *LaSalle & Koch Co.* v. *Doyle*, 413 F.2d 345, 71 LRRM 3101 (6th Cir., 1969).
[54] *U.S. Trucking Corp.* v. *Frank*, 405 F.2d 497, 70 LRRM 2240 (N.Y. Sup. Ct., 1968).
[55] *Trudon & Platt Motor Sales v. Local 707*, IBT —— F.Supp. ——, 71 LRRM 2814 (S.D. N.Y., 1969).
[56] *CBS* v. *American Recording & Broadcasting Assn.*, 414 F.2d 1326, 72 LRRM 2140 (2d Cir., 1969). See *infra* note 63 and accompanying text.
[57] *Hirt* v. *New York Automatic Canteen Corp.*, 295 NYS2d 142, 70 LRRM 2485 (N.Y. Cir. Ct., 1968).
[58] 376 U.S. 543, 55 LRRM 2769 (1964).

cant, and a purchaser of assets may be found to be a successor.[59] But since it is only the agreement to arbitrate which binds a successor, specific performance of other sections of the contract may not be granted. The successor may, however, be compelled to arbitrate issues arising under other sections of the contract.[60] Where a company has been reorganized under the supervision of the bankruptcy court, the union may not make claims on the successor in excess of the amounts held to be due in the order of confirmation. To the extent the predecessor's obligation has been expunged, no claim based on the expunged obligation will lie against the successor.[61]

The court, in *Worcester Express Co.*,[62] never reached the issue of whether a management controller under an ICC certificate of temporary management is a successor.

D. *Parties to the Agreement*

Multiparty arbitration produced perhaps the most significant decision of the year. The Second Circuit held, in *CBS* v. *Broadcasting Assn.*,[63] that Section 301 is available to an employer seeking to enjoin one arbitration proceeding in order to consolidate it with another even though, as the petitioning party, it did not claim a violation of contract as required by the face language of Section 301. Last year's report[64] discussed the district court's decision[65] in this litigation to order trilateral arbitration of a jurisdictional work dispute. The court of appeals affirmed that order, and that affirmation will not be appealed to the Supreme Court because the interunion schism which provoked the trilateral dispute has since been healed. The decision, however, will undoubtedly be quite influential.

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[59] *Retail Clerks, Local 1552* v. *Lynn Drug Co.*, 299 F.Supp. 1036, 72 LRRM 2009 (S.D. Ohio, 1969).

[60] *Id.*

[61] *Eastern Freight Ways, Inc.* v. *Local 707, Highway and Local Motor Freight*, 300 F.Supp. 1289, 71 LRRM 2631 (S.D. N.Y., 1969).

[62] See *infra* note 154 and accompanying text.

[63] 414 F.2d 1326, 72 LRRM 2140 (2d Cir., 1969).

[64] "Arbitration and Federal Rights Under Collective Agreements in 1968," in *Arbitration and Social Change*, Proceedings of the Twenty-Second Annual Meeting, National Academy of Arbitrators, ed. G. G. Somers (Washington: BNA Books, 1970), 187, 194.

[65] 293 F.Supp. 1400, 69 LRRM 2914 (S.D. N.Y., 1968). This was the first reported decision so holding. But a federal court in San Diego in 1966 issued a like order although it remained unreported. See 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, 886-887 (1968).

CBS had assigned certain work to members of an IBEW local with which it had a collective agreement with a broad arbitration provision. CBS had a like agreement with the American Recording and Broadcasting Association which claimed that the work should instead have been assigned to its people; it demanded arbitration. CBS then demanded that IBEW arbitrate the issue by joining as a party. It commenced a Section 301 suit to enjoin the ARBA bilateral proceeding and to compel consolidation into a trilateral arbitration among it and the two interested unions to resolve this work-assignment dispute. The district court, holding that it had the jurisdiction under Section 301 to do so and that CBS had presented a valid claim for relief, ordered the three to participate in a trilateral arbitration proceeding. A panel of three judges (Waterman, Moore, and Friendly) of the Second Circuit unanimously affirmed that order. It found "ample authority" for its assertion of jurisdiction under Section 301 even where no formal contract exists between the union and employer involved, citing the Supreme Court's 1964 decision in *John Wiley & Sons* v. *Livingston* [66] compelling a successor employer to arbitrate with a union with which it had never contracted.[67] It also found the district court had the power to consolidate two arbitration proceedings, rejecting ARBA's argument based on traditional common-law contract notions about the lack of standing of a "stranger" who is not in "privity" to intervene or be joined in an action based on a contract to which it is not a party. The circuit court relied on the Supreme Court's 1966 assertion in Mr. Justice Black's opinion for the majority in *Transportation-Communication Employees Union* v. *Union Pacific Railroad Co.*[68] of the need for a "new common law" governing labor contracts, inclusive specifically of multi-union jurisdictional work-assignment disputes. "As the type of dispute here so closely parallels the type involved in *Transportation-Communication Employees Union* v. *Union Pacific Railroad Co.*," Judge Waterman wrote, "we hold that the district court had the necessary power to order joint arbi-

[66] 376 U.S. 543, 55 LRRM 2769 (1964).

[67] See Jones, "An Arbitral Answer to a Judicial Dilemma: The Carey Decision and Trilateral Arbitration of Jurisdictional Disputes," 11 *UCLA L. Rev.* 327 (1964). The issues are debated in Bernstein, "Nudging and Shoving All Parties to a Jurisdictional Dispute into Arbitration: The Dubious Procedure of National Steel," 78 *Harv. L. Rev.* 784 (1965); and Jones, "A Sequel in the Evolution of the Trilateral Arbitration . . .," *supra* note 65.

[68] 385 U.S. 157, 63 LRRM 2481 (1966).

tration." Noting that IBEW had conceded that, if ordered to join, it would accept the arbitrator selected by CBS and ARBA —thereby obviating "whatever difficulty might have plagued the court if there had been a disagreement among the parties on this point"—it affirmed the lower court's order "requiring arbitration of the claims of the three parties in this one consolidated proceeding before the one agreed-upon arbitrator."

In another ingenious application of a trilateral arbitral remedy, a New York state court was asked by the same counsel who had represented CBS to surmount the agreed-upon-arbitrator difficulty mentioned by Judge Waterman as absent in the *CBS* case. This time, all the television networks were involved. AFTRA demanded that they arbitrate a cost-of-living dispute under a provision that contemplated appointment of a single ad hoc arbitrator. AFTRA filed the same claim against certain advertising agencies, but here the collective agreements provided for tripartite boards. As the grievances were processed, the networks selected impartial arbitrator *A*, the agencies named *B*, and AFTRA wanted *C*. On motion of employer counsel, the state court granted consolidation of the proceedings into one hearing with impartial arbitrator *N* sitting with a panel comprised of *A* and *C* (the networks and AFTRA) and one comprised of *B* and *C* (the agencies and AFTRA).[69]

In a more routine jurisdictional dispute,[70] a district court perceived an incipient jurisdictional dispute and ordered the other union joined as a defendant in the Section 301 suit brought by the first union. The defendant employer had refused to accept a grievance for processing on the ground that the dispute was outside the plaintiff union's jurisdiction. When the plaintiff sought to enforce its rights under the agreement, the company moved to compel the joinder of the other union. In spite of the first union's argument that such a motion was premature, and that a demand for trilateral arbitration ought to be made before an arbitrator, the court drew authority from the "distinctive nature" of the collective bargaining agreement, and also under Rule 19 of the Federal Rules of Civil Procedure, to grant the employer's request. Although the question of

[69] *Am. Broadcasting Co.* v. *Brandt*, 72 LRRM 2210 (N.Y. Sup. Ct., 1969). See discussion in *Coulston*, N.Y.L.J. 2, c. 1 (7-22-69).

[70] *Window Glass Cutters League* v. *American St. Gobain Corp.*, 47 FRD 255, 71 LRRM 3173 (W.D. Pa., 1969).

whether a trilateral procedure is appropriate in the circumstances might well be allowed to go to an arbitrator on order of the court to determine it, since this delicate issue might more appropriately be determined by the parties' own selected and better informed decision-maker, this court felt that the alternative was to force the employer to follow a course which "might well bind it irrevocably to an escalator from which there is no point of departure until a distinction is reached which places it face to face in a dispute with another union." [71]

When the issue arises whether a company is a party to the agreement, it is an issue of "substantive" arbitrability which is to be decided by a court,[72] according to a California court. The dispute concerned whether the company had "acquired or established" an additional store to which the agreement with the union had to be extended. The company denied that it had any connection with the allegedly affiliated store. The court reasoned that an award against the company would affect the rights of that store, and concluded that an arbitrator has no power to determine the rights and obligations of one who is not a party to the arbitration agreement or arbitration proceedings. Whether the agreement may be applied to such a third party was an issue of fact to be decided by a court, not by an arbitrator. The court also determined that an arbitrator would have no power under state law to join a "stranger." [73]

In another case,[74] a local union which was not a party to an arbitration of a jurisdictional dispute was held not to be an indispensable party in a motion to enforce that award, though the award was in direct conflict with a subsequent resolution of the same jurisdictional dispute by the general executive board of the international union. The local that had not been a party to the arbitration proceeding had been a party to the international proceeding. The court purported to resolve the issue solely on the basis that this local had been neither a party to the collective bargaining agreement nor a party to the arbitration proceeding. But in deciding whether to enforce the

[71] *Id.* at 258, 71 LRRM at 3175.

[72] *Unimart* v. *Superior Court*, 73 LRRM 2122 (Cal. App. Ct., 1969).

[73] See discussion of the "stranger" syndrome in Jones, "Power and Prudence in the Arbitration of Labor Disputes: A Venture in Some Hypotheses," 11 *UCLA L. Rev.* 675, 725 *et seq.* (1964).

[74] *Jennings* v. *M&M Transportation Co.*, 249 A.2d 631, 70 LRRM 2591 (N.J. Sup. Ct., 1969).

arbitrator's award, the court balanced the federal policy of enforcing arbitration awards against the policy of encouraging the establishment of internal union machinery for the voluntary adjustment of intra-union disputes. The court found that the later jurisdictional award of the board of the international union was controlling since such a holding would terminate the litigation and since it had adjudicated all the issues with jurisdiction over all parties.

An interesting result of the doctrine that the grievant himself is not a party to an arbitration arose in a case in which the court held that the defenses of res judicata and collateral estoppel did not bar the grievant in a later suit against the employer for activities that had led to his indictment and discharge.[75] Though the indictment had been dismissed, the discharge had been sustained in arbitration. In an odd and unsettling decision, however, the court held that the grievant could nonetheless bring this action because he was not a "party" and so was not bound by any of the findings in the arbitration. Employers reading this result will blanch at the prospect of that kind of unwarranted double bite in a discharge case! Another case, however, tipped in the other direction; where the employee's cause of action was based on alleged defamatory remarks at the arbitration hearing itself, the court held that the grievant was bound to have litigated that issue at the hearing or at least upon the motion to confirm, and was collaterally estopped from raising it in another proceeding.[76]

E. *Plant Removals*

In a further refinement of the Second Circuit's overruling of its decision in *Zdanok* v. *Glidden Co.*,[77] the Sixth Circuit had held—notably without any supportive reasoning—that an employee does not have a property right in his job [78] sufficient to

[75] *Fernandez* v. *London Records, Inc.*, 71 LRRM 2480 (N.Y. Sup. Ct., 1969). See also *Zanker* v. *New York Coat & Suit Assn.*, 72 LRRM 2412 (N.Y. Sup. Ct., 1969) in which the court held that the grievant had no independent right to petition for a permanent stay of arbitration in that he was not a party to the collective bargaining agreement.

[76] *Bird* v. *Meadow Gold Products Corp.*, 302 NYS2d 701, 73 LRRM 2100 (N.Y. Sup. Ct. 1969). This was an alternative holding in that the court's primary reason for granting summary judgment to the defendant was based on New York defamation laws and its conclusion that the remarks were not actionable.

[77] 288 F.2d 99, 47 LRRM 2865 (1961), overruled by *Local 1251, UAW* v. *Robertshaw Controls Co.*, 405 F.2d 29, 68 LRRM 2671 (2d Cir., 1968).

[78] *Charland* v. *Norge Division*, 407 F.2d 1062, 70 LRRM 2705 (1969).

sustain his claim against an employer who has eliminated his job by removing the plant to another state. In that case, an employee with 30 years of service sought to recover under Section 301 against his employer on the theory that the employer had violated his property right in his job. He also argued that his union was privy to the violation for its failure to protect that right. Indeed, in another case, a court found the propriety of such a removal not even arbitrable on the theory that the agreement to arbitrate had expired at the same time as the termination of employment.[79] Though the union claimed that the time the contract expired was itself an arbitrable issue, the court held that the language of the contract was too explicit and unambiguous to find that the dispute was within the contractually agreed scope of the arbitration clause.

III. SUITS TO COMPEL ARBITRATION OR TO REVIEW AWARDS

A. *Suits to Compel Arbitration*

The courts continued this year to indulge the "presumption of arbitrability" and sent to arbitration most disputes involving the interpretation of a contract with an arbitration clause.[80] Thus, where a demand for arbitration was countered by a company's contention that it had "gone out of business"—which it had an "absolute right" to do, as it saw it—the court made a finding that it had not actually gone out of business; and it accordingly sent the dispute on to arbitration.[81] One court's decision that an arbitration clause was broad enough to cover a particular dispute was reached despite its rejection of the principle that the presence of a no-strike clause raised the inference of the comprehensive arbitration agreement.[82] Though the issue of substantive arbitrability is a matter for the courts to de-

[79] *Teamsters, Local 249* v. *Kroger Co.*, 411 F.2d 1191, 71 LRRM 2479 (3d Cir., 1969).

[80] *O'Leary* v. *Westinghouse Electric Corp.*, 408 F.2d 24, 70 LRRM 2955 (3d Cir., 1969); *Independent Oil Workers, Local 117* v. *American Oil Co.*, 296 F.Supp. 650, 70 LRRM 2860 (D. Kan., 1969); *Patriot-News Co.* v. *Harrisburg Printing Pressmen*, — F.Supp. —, 70 LRRM 3098 (M.D. Pa., 1968); *Sterling Provision Corp.* v. *Butchers, Local 174*, 71 LRRM 2046 (1969); *ITT World Communications, Inc.* v. *CWA*, — F.Supp. —, 71 LRRM 2474 (S.D. N.Y., 1969).

[81] *Leon Handbag Co.* v. *Local 213, Leather Workers*, 72 LRRM 2583 (Calif. Ct. App., 1969).

[82] *Akron Typographical Union 182* v. *Beacon Journal Pub. Co.*, — F.Supp. —, 72 LRRM 2362 (N.D. Ohio, 1968), aff'd. 417 F.2d 36, 72 LRRM 2368 (6th Cir., 1969).

cide under federal labor law,[83] if the parties contract to allow the arbitrator to determine his own jurisdiction, that agreement will be enforced.[84] And arbitrability has been found to exist by estoppel.[85]

In a few cases, courts have refused to order arbitration because of their conclusion that if an arbitrator were to decide the dispute, he would be exceeding his powers,[86] even in the absence of a specific clause excluding the subject from arbitration.[87] Although these decisions favored resisters of arbitration, in one case the court still ordered arbitration when an arbitral decision for the union would have been in direct contravention of state law, and this on the ground that the dispute was covered by the agreement to arbitrate.[88]

The lengthy and complex exclusionary clauses which courts are more and more having to deal with provoked one judge to remark that: "When an arbitration clause begins to resemble a trust indenture, one wonders what gain there is for either party in agreeing to arbitrate at all, other than the questionable joys of litigation." [89] In that case, the union's construction of the clause was that it had no effect whatsoever. The court disagreed, acknowledging its obligation to deal with and interpret it. It ultimately found some of the disputes in question arbitrable and some effectively excluded by the exclusionary clause; but it did not squarely face the issue whether the presumption of arbitrability could be contractually nullified, as the contract attempted to do, because it held that it need not indulge such a presumption in order to decide the case. It did say, however, that there was a "substantial question whether national labor policy may be so blithely diluted." [90]

In their dealings with exclusionary clauses, courts generally

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[83] *Steelworkers* v. *American Mfg.*, 363 U.S. 564, 46 LRRM 2414 1960).
[84] *Ormet Corp.* v. *Steelworkers*, — F.Supp. —, 72 LRRM 2268 (W.D. Pa., 1969).
[85] *U.S. Trucking Corp.* v. *Frank*, 405 F.2d 497, 70 LRRM 2240 (N.Y. Sup. Ct., 1968).
[86] *F&M Schaefer Brewing Co.* v. *Brewery Workers, Local 49*, — F.Supp. —, 72 LRRM 2272 (S.D. N.Y., 1969).
[87] *Beckley Mfg. Corp.* v. *Local 2011, IBEW*, 297 F.Supp. 117, 70 LRRM 2689 (S.D. W. Va., 1969).
[88] *Air Engineering* v. *ARO Inc.*, 306 F.Supp. 7, 72 LRRM 2571 (E.D. Tenn., 1969).
[89] *IUE* v. *General Electric Co.*, 407 F.2d 253, 258, 70 LRRM 2082, 2085 (2d Cir., 1968).
[90] *Id.* at 259, 70 LRRM at 2086.

still require a great deal of specificity in order to overcome the presumption of arbitrability.[91] Especially is this so when an arbitration clause is broad and the dispute arguably involves a matter of contractual interpretation.[92] This requirement for carefully drafted language of exclusion in order to avoid the presumption of arbitrability applies in the public sector as well as in the private sector in which it was developed.[93] One court assumed without deciding that it had jurisdiction to weigh a defense of waiver.[94] Another court impliedly held that the issue was within its jurisdiction when it decided that participation in a law suit, standing alone, did not constitute a waiver,[95] also noting that the presence or absence of prejudice was determinative of the issue because of the federal policy favoring arbitration.

In the only case in which the issue of the relevance of bargaining history was discussed,[96] the court first acknowledged the conflict among the circuits and then held that such bargaining history was not admissible to show whether an issue was intended to be excluded from arbitration. In another case,[97] it was simply admitted without discussion.

B. *Suits to Review Awards*

The overwhelming majority of suits to review arbitration awards resulted in confirmation.[98] As long as an award does

[91] *IAM* v. *General Electric Co.*, 406 F.2d 1046, 70 LRRM 2477 (2d Cir., 1969); *Republican Co.* v. *Springfield Newspaper Employees Assn., Inc.*, 294 F.Supp. 399, 70 LRRM 2046 (D. Mass., 1968).

[92] *Rubber Workers, Local 198* v. *Interco, Inc.*, 415 F.2d 1208, 72 LRRM 2377 (8th Cir., 1969), but see *Halstead & Mitchell Co.* v. *Steelworkers, Local 7032*, 421 F.2d 1191, 72 LRRM 2915 (3d Cir., 1969); *Cleveland Federation of Musicians, Local 4*, v. *Musical Arts Assn.*, — F.Supp. —, 71 LRRM 2855 (N.D. Ohio, 1969).

[93] *Central School District* v. *Litz*, 304 NYS2d 372, 72 LRRM 2937 (N.Y. Sup. Ct., 1969).

[94] *Rubber Workers, Local 198* v. *Interco, Inc.*, 415 F.2d 1208, 72 LRRM 2377 (8th Cir., 1969).

[95] *ITT World Communications, Inc.* v. *CWA*, — F.Supp. —, 71 LRRM 2474 (S.D. N.Y., 1969).

[96] *CWA* v. *Southwestern Bell Telephone Co.*, 415 F.2d 35, 71 LRRM 3025 (5th Cir., 1969).

[97] *Butchers, Local 641* v. *Capitol Packing Co.*, 413 F.2d 668, 71 LRRM 2950 (10th Cir., 1969).

[98] *Sheet Metal Contractors Assn., Inc.* v. *Sheet Metal Workers, Local 28*, 301 F.Supp. 553, 71 LRRM 2836 (S.D. N.Y., 1969); *Butchers, Local 641* v. *Capitol Packing Co.*, 413 F.2d 668, 71 LRRM 2950 (10th Cir., 1960); *Pacific Maritime Assn.* v. *Longshoremen*, 304 F.Supp. 1315, 71 LRRM 3117 (N.D. Calif., 1969); *Gulf States Telephone Co.* v. *IBEW, Local 1692*, 416 F.2d 198, 72 LRRM 2026 (5th Cir., 1969); *National Maritime Union* v. *Federal Barge Lines, Inc.*, 304 F.Supp. 256, 72 LRRM 2942 (E.D. Mo., 1969); *In re Culinary Alliance, Local 703 (Fifth Wheel Cafe)*, 410 F.2d 952, 72 LRRM 2989 (Calif. Super. Ct., 1969); *In re Esposito (NYSA-ILA Seniority Board)* 72 LRRM 2361 (N.Y. Sup. Ct., 1969).

not fly in the face of "any rational interpretation of the collective bargaining agreement" [99] but "draws its essence" from it,[100] an award would be upheld even if it could not be found that an arbitrator considered specific clauses of the collective bargaining agreement.[101] One court would not permit relitigation of an issue presented to an arbitrator.[102] According to another court, an arbitrator does not exceed his powers when he bases his award on "equity and good conscience." [103] One state court held that it had the jurisdiction to confirm an out-of-state arbitral award.[104]

An arbitrator, it is often said, draws his authority from the submission agreement [105] if there be one, and in that case the terms of the underlying collective agreement are often (and unpersuasively) thought to be important only if the submission agreement requires interpretation.[106] In a case that is potentially quite important, the Seventh Circuit confirmed an award in which an arbitrator reinstated an employee who had been discharged for a violation of a penal law on the company's premises. Although a term of the contract categorized this as "just cause," the submission agreement nonetheless authorized the arbitrator to determine from the circumstances whether there had been "just cause." [107] The conviction was for a misdemeanor gambling charge, and the court endorsed the arbitrator's challenge of the reasonableness of the sanction of discharge for violation of "any penal law" where state penal laws ranged from felony murder to misdemeanor nuisance.

The difference between the level of post-award judicial scru-

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[99] *Ludwig Honold Mfg. Co.* v. *Fletcher,* 405 F.2d 1123, 70 LRRM 2368 (3d Cir., 1969).

[100] *District 50, Mine Workers* v. *Tenn Clad Industries, Inc.,* 297 F.Supp. 52, 70 LRRM 3082 (E.D. Tenn., 1969).

[101] *Graham* v. *Acme Markets, Inc.,* 299 F.Supp. 1304, 71 LRRM 2155 (E.D. Pa., 1969).

[102] *Teamsters* v. *Verifine Dairy Products, Inc.,* —— F.Supp. ——, 70 LRRM 3323 (E.D. Wis., 1969).

[103] *Pelletier* v. *Auclair Transportation Co., Inc.,* 250 A.2d 834, 70 LRRM 3261 (N.H. Sup. Ct., 1969).

[104] *In re AFTRA,* 72 LRRM 2865 (N.Y. Sup. Ct., 1969).

[105] *Palacios* v. *Texaco Puerto Rico, Inc.,* 305 F.Supp. 1076, 72 LRRM 2729 (D. Puerto Rico, 1969); *H. K. Porter Co., Inc.* v. *United Saw Workers,* 406 F.2d 643, 70 LRRM 2385 (3d Cir., 1969).

[106] *Railway Clerks* v. *Universal Carloading and Distributing Co., Inc.,* 72 LRRM 2798 (Calif. App. Ct., 1969).

[107] *IAM, District 7* v. *Campbell Soup Co.,* 406 F.2d 1223, 70 LRRM 2569 (7th Cir., 1969).

tiny permissible as compared to pre-award was discussed by the Ninth Circuit in *Holly Sugar Corp.* v. *Distillery Workers.*[108] The court endorsed the view that a court's ordering of arbitration did not imply that it would approve of whatever an arbitrator might decide in resolving the dispute. It rejected a broad post-award review and also disapproved the Second Circuit's *Torrington* decision[109] to the extent that it authorized greater judicial intervention.

The court in *Federal Labor Union* v. *Midvale-Heppenstall Co.*[110] ducked the necessity of dealing with the interesting issue of whether arbitrators are bound by the trilogy's presumption of arbitrability. In that case, the arbitrator had held that he had no jurisdiction to decide the dispute. But the court concluded that the arbitrator had not understood what "jurisdiction" meant and proceeded to construe the arbitrator's opinion as being tantamount to an award on the merits for the responding party.

Three cases dealing with late awards all resulted in confirmation. In one, the Second Circuit overruled the application of a state statute which voided any award rendered more than 60 days after submission.[111] In *Lodge 725, IAM* v. *Mooney Aircraft, Inc.*,[112] the Fifth Circuit refused to invalidate an award rendered after expiration of the time limits prescribed in a collective bargaining agreement since there was no protest prior to the rendering of the decision. And even though there was a timely protest in *Teamsters, Local 560* v. *Anchor Motor Freight, Inc.*,[113] the Third Circuit still confirmed the award on the ground that there was no showing of harm or prejudice by the delay.

Of the few awards that were refused confirmation, only three were based upon a court's determination that the dispute was not arbitrable according to the clear language of the contract.[114]

[108] 412 F.2d 899, 71 LRRM 2841 (9th Cir., 1969).

[109] *Torrington Co.* v. *Metal Products Workers Union,* 362 F.2d 677, 62 LRRM 2495 (1966). See discussion of this case in Jones, "The Name of the Game Is Decision . . .," *supra* note 48.

[110] 298 F.Supp. 574, 71 LRRM 2876 (E.D. Pa., 1969).

[111] *IAM* v. *Geometric Tool Co.,* 406 F.2d 284, 70 LRRM 2228 (2d Cir., 1968).

[112] 410 F.2d 681, 71 LRRM 2121 (5th Cir., 1969).

[113] 415 F.2d 220, 71 LRRM 3205 (3d Cir., 1969).

[114] *Magnavox Co.* v. *Electrical Workers,* 410 F.2d 388, 71 LRRM 2049 (6th Cir., 1969); *New Orleans Steamship Assn.* v. *Longshoremen,* 306 F.Supp. 134, 72 LRRM 2740 (E.D. La., 1969); *San Diego District Council Arbiters* v. *Wood, Fire and Metal Lathers, Local 260,* 274 A.C.A. 726, 71 LRRM 3189 (Calif. App. Ct., 1969).

One was disapproved but not vacated, though the court was aghast at the result, declaring that an honest intellect could not have reached such a result.[115] Where one of the parties was a public entity, an award was set aside because it ordered an act assertedly beyond the scope of the authority of the public party,[116] although the court affirmed the city's right to contract for binding arbitration. Another award was refused enforcement because a subsequent, though conflicting, intra-union proceeding more completely resolved the dispute.[117] Two awards were set aside for lack of due process.[118] In one, the arbitrators had failed to consider whether the grievant was guilty or innocent, but only considered the propriety of the penalty assuming that the offense had been committed. In the other, an interested employee had not received notice of the dispute between her union and her employer. Though notice to the parties alone is usually sufficient, the court held that when the employer had declared its neutrality, notice to it could not be deemed to be fair notice to interested parties.

In *Parker* v. *Mercury Freight Lines, Inc.*,[119] the court faced the issue of which of four awards should be enforced when all of them purported to deal with the same seniority disputes. The court found that only the first award to deal with all the current issues should be enforced. Its reasoning was grounded upon the doctrine of arbitral finality and not res judicata or collateral estoppel.

IV. RELATIONSHIP OF SECTION 301 TO OTHER LEGISLATION

A. *Norris-La Guardia Act*

Two cases in the Ninth Circuit dealt with the relationship between Section 301 and the Norris-LaGuardia Act, one of which—

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[115] *San Francisco-Oakland Newspaper Guild* v. *Tribune Publishing Co.*, 407 F.2d 1327, 70 LRRM 3184 (9th Cir., 1969) (per curiam).

[116] *In re City of Washington, Pa.*, 259 A.2d 437, 72 LRRM 2847 (Pa. Sup. Ct., 1969). See also *In re Teacher's Association Central High School District No. 3 (Board of Education)*, 305 NYS2d 724, 72 LRRM 2858 (N.Y. Sup. Ct., 1969).

[117] *Jennings* v. *M&M Transportation Co.*, 249 A.2d 631, 70 LRRM 2591 (N.J. Sup. Ct., 1969).

[118] *Food Workers, Local 56* v. *Great Atlantic & Pacific Tea Co.*, 415 F.2d 185, 71 LRRM 2966 (3d Cir., 1969); *Peterson* v. *Building Service Employees*, 405 F.2d 175, 70 LRRM 2048 (N.Y. Sup. Ct., 1968).

[119] 307 F.Supp. 789, 73 LRRM 2189 (D.C. Ala., 1969).

Boys Markets, Inc. v. *Retail Clerks, Local 770*[120]—became the vehicle for overruling the Supreme Court's 1962 *Sinclair* decision.[121] Although there was an arbitral provision, no arbitration had been held, and the Ninth Circuit felt bound by *Sinclair* not to enjoin the union's strike in violation of a no-strike commitment. In the second case the court was asked to enforce an arbitrator's award which ordered termination of a work stoppage. The defendant union contended that the court lacked jurisdiction to confirm the arbitration award since confirmation would be tantamount to enjoining a work stoppage in violation of Section 4 of the Norris-La Guardia Act of 1932.[122] The court noted the long line of cases upholding the jurisdiction of federal courts to grant specific enforcement of agreements to arbitrate. It distinguished the Supreme Court's *Sinclair* decision on the basis that there had been no arbitration there resulting in an award similar to the one in the instant case. The possible conflict between *Sinclair* and the instant case was recognized by three Justices on the *Avco*[123] court who expressly stated that *Sinclair's* application in such a situation was not yet settled. In the instant case, the court held that an accommodation between Section 301 and the Norris-La Guardia Act was necessary, and in order to foster labor-management relations, the arbitrator's award was enforced. In another case, a district court held that Section 301 conferred jurisdiction to issue an injunction enforcing an arbitration award.[124]

B. *NLRA*

Even though alleged contractual violations may amount to unfair labor practices within the jurisdiction of the NLRB, the courts still have concurrent jurisdiction under Section 301.[125] Even if unfair-labor-practice charges have been filed with the Labor Board, one court held [126] that under *Smith* v. *Evening News,*[127] the court retained jurisdiction over the proceeding to

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[120] *Boys Markets, Inc.* v. *Retail Clerks, Local 770,* 416 F.2d 368, 72 LRRM 2527 (1969), *rev'd* 398 U.S. 235, 74 LRRM 2257 (1970); *Pacific Maritime Assn.* v. *Longshoremen,* 304 F.Supp. 1315, 71 LRRM 3117 (N.D. Calif., 1969). The *Boys Markets* decision is a landmark one and will be treated in next year's report.

[121] *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195, 50 LRRM 2420 (1962).

[122] 47 Stat. 70, 29 U.S.C. § 104 (1965).

[123] *Avco Corp.* v. *Aero Lodge No. 735,* 390 U.S. 557, 67 LRRM 2881 (1968) (Stewart, Harlan, and Brennan, J. J., separate opinion).

[124] *Supra* note 102.

[125] *Powers* v. *Troy Mills, Inc.,* 303 F.Supp. 1377, 72 LRRM 2863 (D. N.H., 1969).

[126] *Teamsters* v. *City of Dearborn,* 70 LRRM 3153 (Mich. Cir. Ct., 1969).

[127] 371 U.S. 195, 51 LRRM 2646 (1962).

enforce an arbitrator's award. A court may also take jurisdiction of a bargaining order request where the Labor Board does not have jurisdiction because the union involved is comprised of supervisors.[128]

In one of the more novel cases, a New York court refused enforcement of an arbitrator's award because it was in direct conflict with a subsequent NLRB ruling.[129] The theory was that the Board's ruling preempted even a prior arbitrator's award, so that compliance with the arbitrator's award would cause a violation of the law and the public policy of the state. *Carey* v. *Westinghouse Electric Corp.*[130] was distinguished on the basis that there the moment of conflict between the arbitration award and the NLRB decision had not yet arrived, whereas here, there was a present and direct conflict. As expressly anticipated by the Supreme Court in *Carey*,[131] it is the award that must yield.

During the past year the NLRB continued to recognize the *Spielberg*[132] doctrine by deferring to arbitration in those cases where there has been an award, both parties have agreed to be bound, the arbitrator has followed due process, and the award is not repugnant to the NLRB policies or the NLRA. NLRB continued to accept cases where an award has not been issued, however, refusing (over Member Gerald Brown's objection) to require employers and unions to use the contractual arbitration process in lieu of the statutory unfair-labor-practice procedure or to suspend action until the arbitration procedure had been followed.

There are three recent decisions in which the NLRB deferred to arbitration: *McLean Trucking Co.*,[133] involving Sections 8(a) (3) and 10(b); *W. R. Grace & Co.*,[134] involving

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[128] *Marine Engineers Beneficial Assn.* v. *Socony Mobil Oil., Inc.*, ---- F.Supp. ——, 70 LRRM 2936 (S.D. N.Y., 1969).

[129] *In re Meyers, Local 259, UAW (Kinney Motors Inc.)*, 301 NYS2d 171, 72 LRRM 2064 (N.Y. Sup. Ct. App. Div., 1969).

[130] 375 U.S. 261, 55 LRRM 2042 (1964).

[131] *Id.* at 272, 55 LRRM at 2042.

[132] 112 NLRB 1080, 36 LRRM 1152 (1955). The portion of this Report represented by footnotes 132 through 152 was prepared for the NAA-NLRB Liaison Committee by Chairman Robert Howlett.

[133] 175 NLRB No. 66, 71 LRRM 1051 (1969).

[134] 179 NLRB No. 81, 72 LRRM 1455 (1969).

Section 10 (b); and *IBEW, Local 1522 (Western Electric Co.)*,[135] involving Sections 8 (b) (2) and 10 (b).

In *McLean Trucking Co.*, the arbitrator found that an employer was warranted in discharging employees who refused to cross the picket line during the strike. The Board held that its deference to the arbitrator's award would effectuate statutory policies since the proceedings were not tainted with fraud, collusion, or unfairness; the issues concerning the employees' statutory and contractual rights were fully explored at the proceedings; and the award was not clearly repugnant to the purposes and policies of the LMRA.

In *W. R. Grace & Co.*, the Board deferred to an arbitrator's award which found a discharge of a wildcat striker to be warranted, since, again, the award was not tainted by fraud, collusion, or unfairness, or repugnant to the purposes of the Act; the arbitrator had properly applied the NLRB's standards in deciding the employer's alleged condonation of the work stoppage; and neither the statement of a union official expressing concern to strikers with regard to potential union liability for an unauthorized strike nor the lack of a transcript of the arbitration proceedings was sufficient to preclude the Board from deferring to the award.

In *Western Electric Co.*, an arbitrator upheld the discharge of an employee who failed to pay union dues. Decision turned on whether the employee was, or was not, a union member at the time of dues nonpayment. Finding that the award resolved the issue that would be determinative of the unfair-labor-practice proceedings, the Board deferred to arbitration. It refused to disregard the award against an argument that certain evidence presented and contentions advanced in the unfair-labor-practice proceedings were not presented to the arbitrator.

The NLRB continues to adhere to its position that a union may bypass arbitration where the protested employer activity may be an unfair labor practice as well as breach of contract.

In 8 (a) (5) refusal-to-bargain cases, the Board did not require the parties to use the grievance arbitration procedure where an employer refused to furnish the union with infor-

[135] 180 NLRB No. 18, 73 LRRM 1091 (1969).

mation on the employees' profit-sharing plan,[136] or unilaterally changed employees' insurance benefits,[137] or created new job classifications after the employer and union had agreed to arbitrate the accuracy of old classifications from which the new jobs were developed.[138]

In another 8 (a) (5) case, the Board stated that the existence of an arbitration procedure is insufficient to warrant deferral to arbitration (the rule consistently followed), then hedged by stating that this is particularly true where arbitration had not been invoked and the time to do so had passed.[139]

Warehouse Markets, Inc.[140] was an accretion case. Employer and union had submitted to arbitration. The award finding accretion was issued the day before a regional director determined that there had been no accretion. Three Board members (over the dissent of Members Brown and Zagoria) refused to defer to the arbitrator's award, affirmed the regional director, and remanded the case for an election.

In a National Joint Board for Settlement of Jurisdictional Disputes case,[141] involving 8 (b) (4) (D) and 10 (k), the Board once again followed its rule of not recognizing decisions when an employer is not a party in a jurisdictional dispute resolution.

Consistent with past policy, the Board disclosed greater hostility to arbitration in 8 (a) (1) and 8 (a) (3) cases than in 8 (a) (5) cases. It refused to defer to arbitration where an employee was discharged for engaging in protected concerted activities. This was not an issue within the special competence of an arbitrator, a finding which undoubtedly will surprise many arbitrators.[142] A refusal by an employer to honor an employee's request for union representation prior to a disciplinary layoff was held not to be an issue for arbitration since it involves the

[136] *Scandia Restaurants, Inc.*, 171 NLRB No. 51, 69 LRRM 1144 (1968).
[137] *Wisconsin Southern Gas Co.*, 173 NLRB No. 79, 69 LRRM 1374 (1968); *Combined Paper Mills, Inc.*, 174 NLRB No. 71, 70 LRRM 1209 (1969).
[138] *Zenith Radio Corp.*, 177 NLRB No. 30, 71 LRRM 1555 (1969).
[139] *Cello Foil Products, Inc.*, 178 NLRB No. 103, 72 LRRM 1196 (1969). For a comprehensive study of the uses of arbitration for discovery purposes in 8 (a)(5) and 8 (b) (3) situations subject also to NLRB jurisdiction, see Jones, "Discovery Procedures in Collective Bargaining," (Reprint No. 186, Inst. of Ind. Rel., UCLA) from 116 *U. of Pa. L. Rev.* 571, 830, 1185 (1968).
[140] 174 NLRB No. 70, 70 NLRB 1192 (1969).
[141] *Plumbers, Local 219 (Price Bros.)*, 174 NLRB No. 93, 70 LRRM 1258 (1969).
[142] *Eastern Illinois Gas & Securities Co.*, 175 NLRB No. 108, 71 LRRM 1035 (1969).

effect of unionization on the employees and has possible implications for other employers represented by the union.[143] The Board also refused to defer to an award upholding an employer's discharge of an employee for instigating and participating in an unauthorized strike, as the NLRB found the award was based on an erroneous factual conclusion.[144]

When an alleged 8 (a) (1) violation may involve infringement of employees' right to strike, the Board held it will not defer to the contract grievance procedure. In this instance, the grievance procedure did not provide for arbitration. The Board noted that refusal to defer was particularly pertinent where arbitration was not the terminal point in the grievance procedure.[145] The Board held it will refuse to defer to the grievance procedure, even though arbitration is the terminal point, when the union declines to take a grievance to arbitration.[146]

In another case, an arbitrator dismissed a grievance protesting a discharge based on a contract provision requiring affirmance of an employer's decision to discharge if supported by substantial evidence. Substantial evidence, said the Board—apparently meaning something less than a preponderance—does not meet the *Spielberg* requirements.[147]

There were several courts of appeals cases during the past year, in each of which the court affirmed the NLRB. One involved an NLRB finding that an employer violated Section 8 (a) (3) of LMRA by discharging a union steward for leading a strike in violation of the collective bargaining contract and for failing to secure his own insurance coverage.[148] The court affirmed the NLRB's refusal to defer to an arbitrator's award requiring the employee to obtain his own insurance. This was repugnant to the policies of NLRA (actually, the arbitrator had found that the employee had been discriminatorily discharged). In another case,[149] the court affirmed an NLRB decision that it had jurisdiction to determine the amount of back pay due

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[143] *Dayton Typographical Service, Inc.*, 176 NLRB No. 48, 72 LRRM 1073 (1969).
[144] *Wagoner Transp. Co.*, 177 NLRB No. 22, 73 LRRM 1179 (1969).
[145] *A. Finke & Sons*, 180 NLRB No. 126, 73 LRRM 1154 (1970).
[146] *Dressen Industries*, 178 NLRB No. 51, 72 LRRM 1065 (1969).
[147] *Steves Sash & Door, Inc.*, 178 NLRB No. 27, 72 LRRM 1041 (1969).
[148] *NLRB* v. *Hribar Trucking, Inc.*, 406 F.2d 854, 70 LRRM 2434 (7th Cir., 1969).
[149] *NLRB* v. *K & H Specialties Co.*, 407 F.2d 820, 70 LRRM 2880 (6th Cir., 1969).

employees who had suffered a loss as the result of the employer's unlawful refusal to sign a collective bargaining contract. It has dismissed the employer's contention that, under the terms of the contract, the amount of back pay should have been determined by arbitration.

In *Unit Drop Forge Div., Eaton, Yale & Towne, Inc.*,[150] the Seventh Circuit found that the Board had not abused its discretion by refusing to defer to arbitration. In another decision,[151] the court denied a petition for review when it found that the NLRB had not abused its discretion in adjudicating an alleged unfair labor practice before grievance procedures were exhausted. It found that the Board was justified in acting, since neither party had taken steps to proceed to arbitration.

In an interesting case the Sixth Circuit apparently agreed with the Board's skepticism about the effectiveness of joint committees that have an equal number of union and employer members.[152] In *Klann Moving & Trucking Co.* v. *NLRB,* the court affirmed the Board's finding that a joint committee had considered only the contractual basis for a discharge and had not probed the employer's motive. The court enforced the NLRB order, observing, "Overstaying his vacation may well have been a legitimate reason to discharge Halada, as the grievance committee found, but the existence of a proper reason for a discharge is no defense if the discharge was actually made for an improper purpose."

C. *Bankruptcy Act*

Federal bankruptcy laws were held to be controlling in a situation of possible conflict with an arbitrator's award.[153] The defendant union sought to arbitrate whether the plaintiff company was a successor of the company whose stock it had purchased from individual stockholders. Instead, the court permanently enjoined any grievance procedures on the issue. The purchased company was in debt to the union. The purchase arrangement had been affirmed by the referee in bankruptcy

[150] 412 F.2d 108, 71 LRRM 2519 (7th Cir., 1969).

[151] *Morrison-Knudsen Co.* v. *NLRB,* 418 F.2d 203, 72 LRRM 2460 (9th Cir., 1969).

[152] *Klann Moving & Trucking Co.* v. *NLRB,* 411 F.2d 261, 71 LRRM 2196 (6th Cir., 1969).

[153] *Eastern Freight Ways, Inc.* v. *Local 707, Highway and Local Motorfreight,* 300 F.Supp. 1289, 71 LRRM 2631 (S.D. N.Y., 1969).

with the knowledge and participation of the union. It had provided that the purported successor would be liable to pay 10 percent of the debts of the company whose stock it was purchasing. The court said that the union's claims to arbitrate the claims involved in the bankruptcy proceedings were in violation of the order of confirmation. Also, since the bankruptcy law discharged the debtor to the extent of 90 percent of the original obligation, even if the purchasing union were deemed to be a successor, it could not be held for more than the 10 percent which it had offered to pay.

In *Worcester Express, Inc.*,[154] the court affirmed the referee in bankruptcy's holding that he lacked jurisdiction to stay a labor grievance hearing under a collective bargaining agreement signed by the debtor which the union attempted to enforce against the debtor's purported successor. The latter had purchased all of the debtor's issued and outstanding stock from its only two shareholders. The court held that even though the grievance might have an "effect" on the arrangement plan which was still pending, that alone was not enough to confer jurisdiction. The bankruptcy court has "exclusive jurisdiction of the debtor and his property," [155] it said, and this proceeding did not involve the debtor or its property in that the debtor has no property interest in shares of its own stock owned by its stockholders.

The jurisdiction of the bankruptcy court was also protected in *Steelworkers* v. *Hamilton Steel Products, Inc.*,[156] in which the court held that Section 301 did not provide jurisdiction over an action by the union against a bankrupt employer, a bankruptcy trustee, and a life insurance company for the proceeds of a policy purchased by the employer. The court had previously denied the union's attempt to intervene in a declaratory judgment and interpleader action brought by the insurance company against the employer. The bankruptcy trustee pointed out that Section 301 jurisdiction might conflict with the jurisdiction conferred on him under the Bankruptcy Act. It was held to be within the court's discretion to refuse to entertain this suit "at this late date" since the issues could be properly disposed of in

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[154] *In re New York & Worcester Express, Inc.* — F.Supp. —, 70 LRRM 2233 (S.D. N.Y., 1968).

[155] Bankruptcy Act § 31, 11 USC § 711 (1946).

[156] — F.2d —, 70 LRRM 2019 (7th Cir., 1968).

the interpleader and bankruptcy proceedings. The new suit was not permitted to "oust" the interpleader and bankruptcy courts of their jurisdiction.

D. *Other*

Only two cases this year dealt with the federal Arbitration Act and only one with its relationship to Section 301.[157] In *Machinists* v. *General Electric Co.*,[158] the union had commenced its action to compel arbitration under Section 4 of the Act and thereafter invoked its summary procedures. The company argued that this was grounds for reversing the court below which had ordered arbitration. The company conceded that in order to reverse on these grounds, *Signal-Stat Corp* v. *Local 475, UE*[159] would have to be overruled. It further argued, however, that such an overruling was required by the Supreme Court's decision in *Textile Workers* v. *Lincoln Mills.*[160] The court did not agree, however, and held that the Arbitration Act was invocable in an action based on Section 301 even after *Lincoln Mills.*

The Fourth Circuit dealt with a clash between Section 301 and admiralty law in *Arguelles* v. *U. S. Bulk Carrier's Inc.*[161] A claim for wages against his employer had been dismissed by the court below because he had not exhausted the grievance machinery. This was tantamount to ruling that the court lacked jurisdiction under admiralty and maritime law. On appeal, the court reversed under 46 U.S.C. Section 596, which provided that any sum found to be due as a penalty for delay in the payment of a seaman's wages shall be recoverable "as wages in any claim made before the court" which had cognizance of the maritime action. Supreme Court cases requiring exhaustion of grievance procedures were distinguished on the basis that here the plaintiff seaman was seeking the adjudication of his rights created by a federal statute which applies solely to seamen and the payment of their wages. He could elect to pursue the grievance procedure, but this could not be made mandatory on him since federal statutes and public policy with respect to seamen's wages

[157] See *Electrical Workers* v. *Westinghouse Electric Corp.*, 48 FRD 298, 72 LRRM 2779 (S.D. N.Y., 1969) (discovery under Arbitration Act).
[158] 406 F.2d 1046, 70 LRRM 2477 (2d Cir., 1969).
[159] 235 F.2d 298, 38 LRRM 2378 (2d Cir., 1956).
[160] 353 U.S. 448, 40 LRRM 2113 (1957).
[161] 408 F.2d 1065, 70 LRRM 3208 (4th Cir., 1969).

could not be nullified or circumvented by private agreement. Chief Judge Haynsworth dissented principally because he felt arbitration would not thwart any public policy for the protection of seamen, and that the need for protection was not so great as when the statute was passed because of the modern presence of collective bargaining agreement.

V. CONCLUSION

The landmark decision this year was the Second Circuit's ordering of trilateral arbitration of a jurisdictional dispute in the *CBS* case. In general, however, the courts continued to abide by the Supreme Court's doctrines favoring utilization of arbitration in resolving labor disputes occurring during the terms of collective bargaining agreements. Rarely did they refuse to order arbitration, and even less frequently did they vacate an award. What is most striking is how wrong-headed the courts appear to be who do so, although perhaps a change in this pattern may have been heralded by *IUE* v. *General Electric Co.*,[162] in which the Second Circuit dealt with lengthy and complex exclusionary and management-rights clauses, concluding that some of the disputes arising under them were not arbitrable. To the extent that negotiators allow arbitration provisions to resemble the prolixity of corporate indentures, once again will courts increasingly sense the need to become active in resolving the merits of labor disputes in order to decide issues of arbitrability.

[162] *Supra* note 89.

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