APPENDIX B

ARBITRATION AND FEDERAL RIGHTS UNDER COLLECTIVE AGREEMENTS IN 1970 *

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During 1970 the single most significant development affecting arbitration was the Supreme Court decision in *Boys Markets, Inc.* v. *Retail Clerks Union* [1] permitting federal courts to issue injunctions against strikes in violation of collective bargaining agreements in which the employer is willing to arbitrate the dispute under the agreement and is suffering irreparable injury by reason of the strike. The *Boys Markets* decision and similar cases are discussed separately below. The greatest amount of litigation was centered on employee actions under Section 301 (a) of the Labor Management Relations Act (LMRA) [2] against an employer and/or labor organization, alleging a breach of a collective bargaining agreement on the part of the employer and a breach of the duty of fair representation on the part of the labor organization. Also, on the state level, at least in the lower courts, there is a rise in the number of decisions involving collective bargaining, arbitration, and public employees, including a few compulsory arbitration decisions, especially in police and fire departments. Discussed and cited below are the most sig-

* Report of the Committee on Law and Legislation for 1970, National Academy of Arbitrators. Although all reported federal and state cases touching upon arbitration were read and studied, the focus of this report is on Sec. 301 actions under the Labor Management Relations Act (LMRA) reported in 1970. By the second week in January 1971, approximately 150 federal court cases had been reported, including those involving the civil rights-arbitration area, not counting cases where both the lower court and an appellate opinion were handed down during the year. In addition, there were approximately 60 Railway Labor Act cases reported and about 60 state court actions reported, most of which involved the State of New York. Also there are a large number of NLRB opinions touching upon arbitration, and federal court decisions dealing with recognition of awards of the National Joint Board for the Settlement of Jurisdictional Disputes; some of those cases are referred to herein. No representation is made that this report is necessarily exhaustive.

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[1] 398 U.S. 235, 74 LRRM 2257 (1970).

[2] 29 U.S.C. 185.

nificant decisions, and cases with the clearest statement of principles impinging upon the arbitral process.

I. Strikes, Injunctions, and Arbitration

Under the Supreme Court's 1962 decision in *Sinclair Refining Co.* v. *Atkinson*,[3] federal courts were forbidden to issue injunctions against strikes in violation of a collective bargaining agreement, since such strikes constituted "labor disputes" within the meaning of the Norris-LaGuardia Act.[4] In view of the *Steelworkers* trilogy [5] and the Court's subsequent decision approving removal of state court injunctive proceedings involving violations of collective bargaining agreements to federal courts in *Avco Corp.* v. *Aero Lodge No. 735*,[6] the Supreme Court held in *Boys Markets* that *Sinclair* was "a significant departure from our otherwise consistent efforts upon the congressional policy to promote the peaceful settlement of labor disputes through arbitration." [7] Therefore, the Court held, in substance, that an employer may obtain injunctive relief against a strike by a union in breach of a no-strike clause in a collective bargaining agreement in which the grievance was subject to arbitration under the contract, the employer was ready to proceed with arbitration, and the employer suffered irreparable injury by reason of the union's breach of its no-strike obligation. Thus, the *Boys Markets* decision restates the overriding importance of arbitration in the labor-management relations of this country, while at the same time providing another entree for the action of courts in our industrial relations.[8]

Of course, *Boys Markets* did not change the fact that employers could collect damages under 301 caused by the union's

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[3] 370 U.S. 195, 50 LRRM 2420 (1962).

[4] 29 U.S.C. 104.

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

[6] 390 U.S. 557, 67 LRRM 2881 (1968).

[7] 398 U.S. at 241, 74 LRRM at 2259.

[8] See generally, Gould, "On Labor Injunctions, Unions, and the Judges: The Boys Markets Case," 1970 *Sup Ct. Rev.* 215. See also, Isaacson, "A Fresh Look at the Labor Injunction," *Labor Law Developments*, Proceedings of the 17th Annual Institute on Labor Law, The Southwestern Legal Foundation (New York: Matthew Bender, 1971).

breach of contract,[9] even after the contract expired,[10] or where the no-strike clause was implied because the contract contained a broad arbitration provision.[11] An arbitrator's award ordering a labor organization to cease and desist from continuing a work stoppage in violation of contract is also enforceable under Section 301.[12] In view of the presumption of arbitrability,[13] the courts have often stayed employer's suits for damages for breach of contract and ordered the parties to proceed to arbitration,[14] and may even dismiss an employer's suit where arbitrable issues are presented.[15]

Even after *Boys Markets* one court has denied injunctive relief where the contract does not bind the parties to arbitration on the no-strike clause in addition to the underlying issue [16] or where there is no dispute subject to arbitration under the contract, as in the *Simplex Wire* case.[17] In *U.S. Steel Corp.* v. *Mine Workers,*[18] the Third Circuit reversed a district court's grant of an injunction, holding that the court must still determine the appropriateness of injunctive relief in a given case, the strike being over hazardous conditions in the coal mines.

A New York district court granted an employer a temporary restraining order against a strike, but made stringent requirements for the arbitration of the dispute, even to the point of setting an early deadline (six days) for the submission of the

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[9] *Blue Diamond Coal Co.* v. *Mine Workers,* 436 F.2d 551, 76 LRRM 2003 (6th Cir. 1970) (judgment for almost $250,000).

[10] *Union Tank Car Co.* v. *Truck Drivers, Local 5,* 309 F.Supp. 1162, 73 LRRM 2425 (E.D. La. 1970).

[11] *Colts, Inc.* v. *Local 376, UAW,* 314 F.Supp. 578 LRRM 2252 (D. Conn. 1970). See the leading case of *Teamsters* v. *Lucas Flour Co.,* 369 U.S. 95, 49 LRRM 2717 (1962).

[12] *New Orleans Steamship Ass'n* v. *Local 1418, ILA,* 423 F.2d 38, 73 LRRM 2613 (5th Cir. 1970).

[13] *ITT World Communications, Inc.* v. *Communications Workers, Local 1174,* 422 F.2d 77, 73 LRRM 2244 (2d Cir. 1970).

[14] *Fluor Corp.* v. *Carpenters District Council,* 424 F.2d 283, 74 LRRM 2004 (5th Cir. 1970); *Howard Electric Co.* v. *IBEW, Local 570,* 423 F.2d 164, 73 LRRM 2785 (9th Cir. 1970).

[15] *Johnson Builders, Inc.* v. *Carpenters Local 1095,* 422 F.2d 137, 73 LRRM 2664 (10th Cir. 1970); but see *Rounds Co.* v. *Joint Council of Teamsters,* 8 Cal. App. 3d 830, 75 LRRM 2198 (1970), where the court held that an order to compel arbitration and not a complete dismissal was the proper remedy.

[16] *Stroehmann Bros. Co.* v. *Local 424, Bakery Workers,* 315 F.Supp. 647, 74 LRRM 2957 (M.D. Pa. 1970).

[17] *Simplex Wire & Cable Co.* v. *Local 2208, IBEW,* 314 F.Supp. 88, 75 LRRM 2475 (D. N.H. 1970).

[18] —— F.2d ——, 74 LRRM 2611 (3rd Cir. 1970), *rev'g* 74 LRRM 2607 (W.D. Pa. 1970).

arbitrator's award.[19] However, in a plant-closing situation in which the union was seeking to compel arbitration of the dispute, the court held that the union did not waive its right to arbitration where it had engaged in a strike in violation of the contract and despite the employer's offer of expedited arbitration.[20] In sum, courts seemed disposed to grant injunctions to prevent a strike,[21] or a slowdown,[22] where the dispute is subject to arbitration.

II. Rights of Individual Employees Under Section 301

The progeny of *Vaca* v. *Sipes* [23] continue to proliferate, but the formidable obstacles to a successful result on the part of individual employees remain. Illustrative of the pitfalls of such litigation is the recent decision of the Sixth Circuit Court of Appeals in *Dill* v. *Greyhound Corp.*, [24] reversing and dismissing an employee's suit for breach of contract and unfair representation over seniority placement in which a judgment for substantial damages had been awarded by the lower court. The Sixth Circuit held that the employer's construction of the contract was reasonable. Further, the court held that there was no violation on the part of the union of its duty to represent fairly its members since there was no proof of hostility, malice, or bad faith on its part in settling the grievance at a lower step than arbitration in the grievance procedure,[25] despite the lower court's finding that the union acted arbitrarily and in reckless disregard of the employee's rights. The Sixth Circuit noted that

[19] *American Tel. & Tel. Co.* v. *Communications Workers*, 75 LRRM 2178 (S.D. N.Y. 1970).

[20] *Teamsters Local 757* v. *Borden, Inc.*, 433 F.2d 41, 75 LRRM 2481 (2d Cir. 1970), *aff'g* 312 F.Supp. 549, 74 LRRM 3020 (S.D. N.Y. 1970).

[21] *W. R. Grace & Co.* v. *Local 759, Rubber Workers*, 76 LRRM 2113 (N.D. Miss. 1970); *Holland Constr. Co.* v. *Operating Engineers, Local 101*, 315 F.Supp. 791, 74 LRRM 3087 (D. Ky. 1970); but see *California Council of Carpenters* v. *Orange County Super. Ct.*, 11 Cal. App. 3d 144, 75 LRRM 2364 (1970); *cf. Tri-Cities Newspapers, Inc.* v. *Local 349, Printing Pressmen*, 427 F.2d 325, 74 LRRM 2285 (5th Cir. 1970), concerning the procedural issue as to whether the international union was an indispensable party in the employer's action.

[22] *Pittsburgh Press Co.* v. *Printing Pressmen*, 75 LRRM 2800 (W.D. Pa. 1970).

[23] 386 U.S. 171, 64 LRRM 2369 (1967).

[24] 435 F.2d 231, 76 LRRM 2070 (6th Cir. 1970), *rev'g* 76 LRRM 2060 (W.D. Tenn. 1969).

[25] In regard to the refusal of the union to proceed to arbitration, see also *Lomax* v. *Armstrong Cork Co.*, 433 F.2d 1277, 75 LRRM 2585 (5th Cir. 1970), *aff'g* 75 LRRM 2580 (S.D. Miss. 1969). In this regard the courts usually refuse to distinguish between the step of arbitration and earlier steps in the grievance procedure.

an employee does not have an absolute right to require his bargaining representative to press his complaint to the end of the grievance procedure, and that proof that the union acted negligently or exercised poor judgment is not enough to support a claim of unfair representation.[26]

The only individual employee 301 action, also based upon a seniority dispute, that was noticeably successful was a breach-of-contract judgment against an employer, but the Court of Appeals for the First Circuit at the same time dismissed the unfair representation action against the union as barred by the one-year statute of limitations applicable to tort actions in Puerto Rico.[27] The First Circuit also held that reinstatement was a perfectly acceptable form of relief for 301 suits against an employer and remanded the action to the lower court to enter such an order, or to submit the question of the amount of future lost earnings to a jury.

Perhaps the most important fair-representation decision of the past year is the Supreme Court's decision in *Czosek* v. *O'Mara*,[28] applying *Vaca* rationale to employees covered by the Railway Labor Act. In *Czosek* the Court upheld the complaint of discharged railroad employees against the union for the alleged breach of its duty of fair representation. The Court held that breach of the duty of fair representation is not within the jurisdiction of the National Railroad Adjustment Board (NRAB) nor subject to the ordinary rule that administrative remedies should be exhausted before resort to the courts. The Court further denied the union's claim that it was error for the lower courts to dismiss the suit against the employer in the absence of any allegation that the employer was in any way implicated in the union's alleged discriminatory conduct, noting that the union is responsible only for the damages flowing from its own conduct, and citing the *Vaca* decision. The Court said that the union would not be materially prejudiced by the possible absence of the railroad as a codefendant. Thus, it is clear that

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[26] The Court quoted from *Bazarte* v. *United Transportation Union*, 429 F.2d 868, 75 LRRM 2017 (3d Cir. 1970), *rev'g* 305 F.Supp. 442, 73 LRRM 2379 (E.D. Pa. 1969).

[27] *Figueroa* v. *Trabajadores Packinghouse*, 425 F.2d 281, 74 LRRM 2028 (1st Cir. 1970), *aff'g in part and reman'g*, 302 F.Supp. 224, 72 LRRM 2585 (D.P.R. 1969).

[28] 397 U.S. 25, 73 LRRM 2481 (1970).

in employee 301 actions neither the employer [29] nor the union [30] are indispensable parties in actions brought against one of the parties individually. The *Czosek* case was cited by the Ninth Circuit Court of Appeals in a 301 suit by nonunion employees attacking the use of agency shop fees for political purposes as precedent for rejecting the union's contention that the matter was within the exclusive jurisdiction of the National Labor Relations Board (NLRB).[31] Despite *Czosek,* employee suits against employers and unions subject to the Railway Labor Act encounter the same difficulties as other *Vaca*-type suits.[32] But what remains unresolved and unclear is the extent to which the court's assumptions about the irrelevance of NRAB to fair representation suits apply to *Vaca* cases arising under the NLRA. In both *Czosek,* and to a lesser extent in the *Glover* [33] case which was decided in the previous term, the Court seemed to emphasize the fact that union and employer together controlled Railway Labor Act machinery. Query: May the same be said about the impartial arbitration *selected* by the two parties and not the complaining individual or group?

Where the employer has broad power under the collective bargaining agreement to perform the action complained of in the 301 breach-of-contract action, the courts are powerless to rewrite the agreement for the parties.[34] In regard to the finality to be accorded to the grievance procedure, one court refused to determine whether the settlement of the grievance breached the contract where it found no breach of the duty of fair representation on the union's part.[35] Further, the courts have required the dissenting employee to exhaust available remedies, even in-

[29] *Young* v. *United Steelworkers,* 49 F.R.D. 74, 74 LRRM 2165 (E.D. Pa. 1969).

[30] *Sandobal* v. *Armour & Co.,* 429 F.2d 249, 74 LRRM 2781 (8th Cir. 1970), but reversing the lower court on its application of the Nebraska four-year statute of limitations for oral contracts rather than the five-year limitation applicable to written contracts, 74 LRRM 2778 and 2780 (D. Neb. 1968 and 1969). See also, *LaSalle* v. *Associated Press,* 2 FEP Cases 818 (W.D. Mo. 1970) involving the Civil Rights Act of 1964.

[31] *Seay* v. *McDonnell Douglas Corp.,* 427 F.2d 996. 74 LRRM 2600 (9th Cir. 1970).

[32] See, for example, *Jackson* v. *Trans World Airlines, Inc.,* 75 LRRM 2251 (S.D. N.Y. 1970) wherein the court found no "hostile discrimination" by the employer or the union regarding a change in the contract, within the meaning of *Steele* v. *L. & N. RR,* 323 U.S. 192, 15 LRRM 708 (1944).

[33] *Glover* v. *St. Louis-San Francisco Ry,* 393 U.S. 324, 70 LRRM 2097 (1969).

[34] *Shields* v. *General Electric Co.,* 73 LRRM 2144 (N.D. Ky. 1970).

[35] *Bowen* v. *Lockheed Georgia Co.,* 309 F.Supp. 1210, 74 LRRM 2367 (N.D. Ga. 1970). See also *Hunter* v. *Locher,* 74 LRRM 2761 (E.D. Mich. 1970).

tra-union remedies,[36] unless facts are shown that such appeal would be futile.

A court has also directed arbitration, "with appropriate participation by plaintiff," in an individual employee action under 301 and stay court proceedings pending such arbitration.[37] However, the Fourth Circuit pointed out in its affirmance of the dismissal of an employee 301 action that it was error for the lower court to ground its dismissal on the theory that plaintiffs were required to submit their claim to arbitration and the arbitrator's holdings were binding on the court, where the plaintiffs based their case upon an illegal conspiracy between the union and the employer to deprive them of their rights.[38] The court pointed out that in such cases the complaining employees would be entrusted to parties charged with combining to defraud them. Therefore, the court dismissed the suit on its merits for failure to state a claim of improper representation.

In another case involving bumping rights, a Colorado district court refused a defendant union's offer to arbitrate and to permit plaintiffs to be represented by counsel at such arbitration, because the union had previously taken a position adverse to that of the plaintiffs and thereby, in effect, had already wrongfully refused to take their grievance to arbitration.[39] The court also objected to the fact that the plaintiff employees, as the true adverse parties, had no choice in the selection of the arbitrator chosen and paid by the employer and the union under the contract, finding that this placed the arbitrator in a difficult position, "open to the charge that he is interested in the outcome." Further, an appellate court in Indiana was faced with a breach-of-contract action by a discharged employee against the employer and overruled the trial court's denial of a new trial based upon findings of no breach of contract and failure to exhaust contractual remedies.[40] The appellate court held, apparently on the basis of the fact that the plaintiff was discharged after a meeting of employer and union representatives, that the evi-

[36] *Anderson* v. *Ford Motor Co.*, 75 LRRM 2687 (E.D. Mich. 1970).

[37] *Nuest* v. *Westinghouse Air Brake Co.*, 313 F.Supp. 1228, 74 LRRM 2564 (S.D. Ill. 1970).

[38] *Lusk* v. *Eastern Products Corp.*, 427 F.2d 705, 74 LRRM 2594 (4th Cir. 1970), *aff'g on different grounds* 74 LRRM 2592 (D. Md. 1969).

[39] *Watson* v. *Cudahy Co.*, 315 F.Supp. 1286, 75 LRRM 2632 (D. Colo. 1970).

[40] *Landaw* v. *Tucker Freight Lines, Inc.*, 263 N.E.2d 756, 76 LRRM 2029 (Ind. App. 1970).

dence "clearly demonstrates that the actions and words of the Union officials . . . would have made any appeal [by plaintiff] fruitless and, at most, a hollow gesture . . . ," and that "any attempt by [plaintiff] to prosecute a written appeal through his Union would have been for naught." Thus the court held that plaintiff's "only logical recourse" was to the courts since the alternative of arbitration would be an exercise in futility under the circumstances. In contrast, however, a Michigan appellate court held that an employee was entitled to proceed with his wrongful discharge and unfair representation suit where the allegations were that the union failed to follow *mandatory* steps of the grievance procedure and intra-union remedies would be so time-consuming as to be futile.[41] In one other case where an employee was contesting his discharge for violation of the no-strike clause of the collective bargaining agreement and the local union membership voted not to proceed further with the employee's grievance, the court dismissed the action holding that the plaintiff had no standing to substitute himself for the local union as the enforcement agency of the agreement, which explicitly gave the union final authority to decline to process a grievance.[42] However, the Ninth Circuit, reversing the district court, held that employees who had been reinstated to their jobs as a result of an arbitration award were entitled to arbitration over the interpretation of the back-pay provision of the collective bargaining agreement where the employees disagreed with the disposition proposed by the employer and the union.[43] The court disposed of the allegation that the plaintiffs had no standing to order the employer to proceed to arbitration by holding that this was a question of procedure to be decided by the arbitrator, citing *Wiley* v. *Livingston*.[44]

As might be expected, most employee suits involve alleged

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[41] *Harrison* v. *Arrow Metal Products Corp.*, 20 Mich. App. 590, 174 N.E. 2d 875, 73 LRRM 2712 (1969). (This case also involved extensive discussion of plaintiff's allegations of libel, slander, and blacklisting flowing from his discharge for theft.)

[42] *Encina* v. *Tony Lama Co.*, 316 F.Supp. 239, 75 LRRM 2012 (W.D. Tex. 1970).

[43] *Bealmer* v. *Texaco, Inc.*, 427 F.2d 885, 74 LRRM 2635 (9th Cir. 1970), *cert. den.* 400 U.S. 926, 75 LRRM 2612 (1970).

[44] 376 U.S. 543, 55 LRRM 2769 (1964). But see *Hackett* v. *McGuire Bros., Inc.*, 2 FEP Cases 1076 (E.D. Pa. 1970), holding that a retired employee had no standing to contest the hiring practices of the employer under Title VII of the Civil Rights Act of 1964.

wrongful discharges,[45] and most result in adverse results for the plaintiffs. Resolutions of seniority placement are also a fruitful source of employee 301 litigation,[46] especially pursuant to agreements involving merger of facilities and dovetailing of seniority in the transportation industry.[47] Also, during the past year employee suits have frequently been aimed at disputes concerning overtime compensation [48] or other wage losses.[49] Courts have also become involved with employee suits involving libel or slander connected with grievances or the proceedings thereon.[50] In summary, employee suits under Section 301 and the *Vaca* case appear to be increasing, but their chances of success appear slight except in the unusual circumstances where both the breach of contract is clear and hostility, bad faith, or malice on the part of the union is shown.

Whether there had been exhaustion of remedies under the

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[45] See, for example, *Abrams* v. *Carrier Corp.*, 434 F.2d 1234, 75 LRRM 2736 (2d Cir. 1970), *reman'g* 75 LRRM 2724 (N.D. N.Y. 1968); *Young* v. *Southwestern Bell Tel. Co.*, 424 F.2d 256, 74 LRRM 2256 (8th Cir. 1970), *aff'g* 309 F.Supp. 475, 74 LRRM 2154 (E.D. Ark. 1969); *Barefoot* v. *Teamsters, Local 886*, 424 F.2d 1001, 73 LRRM 2885 (10th Cir. 1970); *Alessandrini* v. *Fed. of Musicians*, 75 LRRM 2338 (S.D. N.Y. 1970); *Patrick* v. *I. D. Packing Co.*, 308 F.Supp. 821, 74 LRRM 2060 (D. Iowa 1969) (possibility of exemplary damages also discussed); *Bartels* v. *Lithographers No. I-P*, 306 F.Supp. 1266, 73 LRRM 2154 (S.D. N.Y. 1969); *Boutte* v. *Beaumont City Lines, Inc.*, 450 S.W.2d 383, 73 LRRM 2791 (Tex. Civ. App. 1970); *Jakubus* v. *Associated Truck Lines, Inc.*, 76 LRRM 2013 (Mich. Cir. Ct. 1970); *DeLosa* v. *Transport Workers Union*, 73 LRRM 2620 (N.Y. Sup. Ct. 1970).

[46] See *Walters* v. *Teamsters, Local 612*, 425 F.2d 115, 74 LRRM 2379 (5th Cir. 1970); and *Bruen* v. *Local 492, IUE*, 425 F.2d 190, 74 LRRM 2169 (3d Cir. 1970), *aff'g* 75 LRRM 2212 (D. N.J. 1969); see also cases involving both fair representation and the Civil Rights Act of 1964, *Tippett* v. *Liggett & Myers Tobacco Co.*, 316 F.Supp. 292, 2 FEP Cases 904 (M.D. N.C. 1970); *Austin* v. *Reynolds Metals Co.*, 2 FEP Cases 451 (E.D. Va. 1970); *Sciaraffa* v. *Oxford Paper Co.*, 310 F.Supp. 891, 2 FEP Cases 398 (D. Me. 1970).

[47] See *Fuller* v. *Truck Drivers, Local 107*, 428 F.2d 503, 74 LRRM 2497 (3rd Cir. 1970); *Safely* v. *T.I.M.E. Freight, Inc.*, 307 F.Supp. 319, 74 LRRM 2075 (W.D. Va. 1969), *aff'd* 424 F.2d 1367, 75 LRRM 2047 (4th Cir. 1970); *Taylor* v. *Dealers Transport Co.*, 73 LRRM 2106 (W.D. Ky. 1968), *aff'd* 73 LRRM 2110 (6th Cir. 1969) *cert. denied* 396 U.S. 1008, 73 LRRM 2120 (1970); *Farkas* v. *Printing Pressmen's Union No. 2*, 312 F.Supp. 161, 74 LRRM 2362 (S.D. N.Y. 1970); *Humphrey* v. *Dealers Transport Co.*, 304 F.Supp. 104, 73 LRRM 2103 (W.D. Ky. 1967); *Crowley* v. *Locomotive Engineers, Div. 28*, 472 P.2d 106, 75 LRRM 2036 (Ariz. App. 1970). See also the leading case of *Humphrey* v. *Moore*, 375 U.S. 335, 55 LRRM 2031 (1964).

[48] See *Centeno* v. *Puerto Rico Aggregates Co.*, 312 F.Supp. 907, 74 LRRM 2276 (D. P.R. 1970); and *Adams* v. *Knox Glass, Inc.*, 73 LRRM 2390 (N.D. Ga. 1969).

[49] See *Amaya* v. *Hilton Hotel Corp.*, 74 LRRM 2486 (Cal. App. 1970); and *Livingston* v. *Kaplan*, 73 LRRM 2272 (N.Y. Sup. Ct. 1969).

[50] *Harris* v. *Hall's Motor Transit Co.*, 73 LRRM 2274 (D.C. Gen. Sess. 1969); and *Bird* v. *Meadow Gold Products Corp.*, 302 N.Y.S. 2d 701, 73 LRRM 2100 (1969).

grievance procedure is a question of fact to be determined by the court at a trial, where the plaintiff employee alleges his efforts to comply with the grievance machinery were blocked by the wrongful acts of the company and the union.[51] Failure to make such allegations and to pursue contract remedies can lead to summary dismissal of a 301 action by an employee.[52]

III. General Judicial Problems Under 301

A. *Actions Cognizable Under 301*

During the past year there were a number of unusual court actions brought under Section 301 which deserve comment. Section 301 actions usually involve suits by unions and employers on a collective bargaining agreement, but in one case involving a union representing entertainers, the union filed suit for past-due wages for individual employees based upon breach of both a collective bargaining agreement and the employees' individual contracts with the employer.[53] The collective bargaining agreement provided for minimum compensation with the specific provision that the employees could make their own individual contracts for greater compensation. The court held that the suit on both the individual and collective agreements was cognizable under Section 301, especially since the individual rights sought to be enforced by the union have their basis in the collective bargaining agreement. The case also involved the rather novel question of whether the union could bind an individual defendant who signed the contract as well as the corporate defendant, and held that under the form contract used in this case it was a question of fact to be answered at trial as to whether the individual defendant signed as an agent or whether he bound himself personally on the contract.

Following the leading case of *Parks* v. *IBEW*,[54] a number of 301 suits between local unions and their internationals arose during the past year, based on the holding that the union constitution is a contract between labor organizations within the

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[51] *Sandobal* v. *Armour & Co.*, *supra* note 30.

[52] See *Anderson* v. *Ford Motor Co.*, *supra* note 36; *Lindsey* v. *General Dynamics Corp.*, 450 S.W. 2d 895, 73 LRRM 2671 (Tex. Civ. App. 1970); but see *Landaw* v. *Tucker Freight Lines, Inc.*, *supra* note 40.

[53] *Musical Artists* v. *Atlanta Municipal Theater, Inc.*, 310 F. Supp. 944, 74 LRRM 2459 (N.D. Ga. 1970).

[54] 314 F.2d 886, 52 LRRM 2577 (4th Cir.), *cert. denied*, 372 U.S. 976, 52 LRRM 2943 (1963).

meaning of 301 (a). In one case a millwrights local of the Carpenters Union sued its international for injunctive relief and damages for failure to recognize its statewide claim to jurisdiction under its charter over all millwrights, who prior to the issuance of the charter to the plaintiff had been represented by regular carpenter locals.[55] The suit was dismissed on the ground that there was no exhaustion of intra-union remedies or excuse for its failure to do so, since the matter had not been appealed by the complaining local to the general executive board of the union or to its convention, as provided in the union constitution.

In another unusual case, in which the union constitution was not mentioned as such, a local of the Steelworkers Union sued its international, the employer, and a second Steelworkers local union.[56] The company whose employees were represented by the plaintiff local was sold to the employer whose employees were represented by the defendant local. The suit alleged a breach of the collective bargaining agreement between the plaintiff and the predecessor company and an award of an arbitrator interpreting that agreement after the sale of the company. A second cause of the action was predicated on a breach of the duty of fair representation. The court denied the motions of the defendants to dismiss the complaint, except for the fair representation cause of action against the employer.

Two local unions which were formerly affiliated with the defendant international union brought state court actions to recover local assets after disaffiliation.[57] The federal court permitted removal because the international constitution would be involved in determining the rights of the parties. In a Ninth Circuit case, a local union brought suit under Section 301 against a member in order to collect a fine for crossing a picket line.[58] Even though the fine was based upon a violation of the union

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[55] *Local 1219 Carpenters* v. *United Bro. of Carpenters,* 314 F.Supp. 148, 74 LRRM 2527 (D. Me. 1970).

[56] *Local 4076, Steelworkers* v. *United Steelworkers,* 75 LRRM 2457 (W.D. Pa. 1970).

[57] *Locals 10 and 20, Paper Workers* v. *Int'l Bro. of Pulp, Sulphite, and Paper Mill Workers,* 75 LRRM 2399 (W.D. Wash. 1970).

[58] *Hotel and Restaurant Employees, Local 400* v. *Svacek,* 431 F.2d 705, 75 LRRM 2427 (9th Cir. 1970); but see *Ballas* v. *McKiernan,* 312 N.Y.S. 2d 204, 74 LRRM 2647 (1970). See generally, Gould, "Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis Chalmers," 6 *Duke L. J.* 1067 (1970).

constitution, the court dismissed the suit on the ground that it was an intra-union dispute unrelated to a collective bargaining agreement and that 301 does not give a basis for a suit by a union against its members. Thus, where members of a union brought an action under Section 301 to compel their officers to comply with the alleged requirements of the union constitution in regard to the conduct of elections, the suit was dismissed on the ground that the grant of jurisdiction under 301 does not extend to internal union affairs.[59]

In a rather complicated case, 225 former employees of Carrier Corp. brought a 301 action for breach of contract and unfair representation against Carrier and the two unions, Steelworkers and Sheet Metal Workers, that replaced in succession the original independent union representing the employees of Carrier.[60] In response to the allegation that there was no contract at the time of the discharges of the plaintiffs, the court held that where the Steelworkers merely replaced the former independent, which had not reopened its contract at the time of the election petition, that contract provided the basis for the suit against Carrier and the Steelworkers. However, the court expressed some doubt, but permitted amendment of the complaint, as to whether suit under 301 against the Steelworkers could be based on the charter and bylaws granted by the international to the local on the theory that plaintiffs were third-party beneficiaries. As for the Sheet Metal Workers, which replaced the Steelworkers as bargaining representative of the employees, the court held that the plaintiffs had no standing under Section 301 to maintain a suit for a breach of a special no-raiding agreement applying to the Carrier situation and entered into by the Sheet Metal Workers and other international unions, since such agreement was for the benefit of the particular union winning the certification election, and not for the benefit of the plaintiffs.

Section 301 suits involving pension fund disputes become intertwined with the provisions of Section 302 of the LMRA.[61]

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[59] *Antal* v. *Budzanoski*, 75 LRRM 2828 (W.D. Pa. 1970). But compare trusteeship cases under Section 302 of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. 462, where the courts take an activist role; and see *Local 167 Luggage Workers* v. *International Leather Goods Workers*, 316 F.Supp. 500, 75 LRRM 2056 (D. Del. 1970); *Smith* v. *Distillery Workers*, 75 LRRM 2049 (E.D. Ky. 1970).

[60] *Abrams* v. *Carrier Corp.*, *supra* note 45.

[61] See *Doyle* v. *Shortman*, 311 F.Supp. 187, 73 LRRM 2657 (1970).

Whether a dispute under a pension plan is arbitrable or not depends upon the provisions of the collective bargaining agreement and the pension agreement.[62] A 301 action by a committee of pensioned miners has been maintained against the union and the pension fund trustees in order to force the defendants to recover delinquent royalty payments against mine operators.[63] In another case by retired employees, the District of Columbia circuit court of appeals held that the eligibility requirement of a pension fund was invalid as being arbitrary and without rational basis, and ordered the retirees to be granted pensions if they met the other lawful requirements of the pension plan.[64]

B. *Existence of a Contract*

A necessary prerequisite to a suit to determine rights under a contract is the existence of the contract itself. Thus, the Eighth Circuit recently held that declaratory judgment procedure could be used under Section 301 to determine that a valid and enforceable contract, which had neither been modified nor terminated by mutual consent, existed between the parties.[65] The parties modified a previous agreement by signing a "letter of understanding," which the district court found to be a valid collective bargaining agreement, contrary to the contention of the union that it was only a temporary or preliminary agreement. The district court held that the agreement was unconditional, and parol evidence was not permitted to alter or contradict its terms. Although the parties later discussed altering the agreement, they never mutually agreed to reopen it and then be bound by subsequent negotiations. Similarly, the Sixth Circuit enforced a settlement memorandum and a supplemental agreement pursuant thereto with respect to certain pay rates, even though the time limits for reaching the agreement had elapsed.[66]

Under 301 a party may obtain reformation of a contract that does not accurately reflect the agreement reached during nego-

[62] *Sigismondi* v. *Queens Transit Corp.*, 73 LRRM 2479 (N.Y. Sup. Ct. 1969).

[63] *Thomas* v. *Honeybrook Mines, Inc.*, 428 F.2d 981, 74 LRRM 2337 (3rd Cir. 1970). (This particular decision involved the payment of attorney fees for the plaintiffs by the pension fund.)

[64] *Roark* v. *Boyle*, 439 F.2d 497, 74 LRRM 3025 (D.C. Cir. 1970).

[65] *Heavy Contractors Ass'n* v. *Laborers, Local 1140*, 430 F.2d 1350, 75 LRRM 2117 (8th Cir. 1970), *aff'g* 312 F.Supp. 1345, 75 LRRM 2113 (D. Neb. 1969).

[66] *Kentucky Skilled Craft Guild* v. *General Electric Co.*, 431 F.2d 62, 75 LRRM 2122 (6th Cir. 1970), *aff'g* 75 LRRM 2117 (N.D. Ky. 1969).

tiations, since a party cannot be required to submit to arbitration any dispute he has not agreed to submit. Thus, the Ninth Circuit, in a 301 suit by an employer, reformed the contract to accurately reflect the agreement of the parties by making certain changes in disputed wage schedules.[67] The court rejected the union's motion that the dispute should be sent to arbitration, noting that where the employer seeks a change in the terms of a written agreement, "it can be said with positive assurance that such an issue is not arbitrable under the agreement." The court also denied that it was usurping the function of an arbitrator in examining the bargaining history to resolve the issue on the merits, since it was reviewing the negotiations not to aid it in *interpreting* the wage scales as written in the contract, but to determine if the scales, as written, reflected the actual agreement of the parties. The court rejected the union's contention that the dispute related to a mere ambiguity, but held, rather, that it involved the failure of the written contract to record the actual agreement reached. Under *Smith* v. *Evening News Ass'n*,[68] the Supreme Court held that relief under 301 was available, even though the employer could have redrafted the contract and presented it to the union, and if the union refused to sign the tendered contract a charge of refusal to bargain could have been filed with the NLRB under Section 8 (b) (3) of the NLRA.

The existence of the contract is closely tied with the problem of the repudiation, cancellation, or termination of a collective bargaining agreement.[69] Thus, it is very clear that a union's violation of a no-strike clause does not automatically entitle the employer to repudiate the contract and its arbitration clause.[70] Further, the withdrawal of employees from the union does not serve to nullify the contract.[71]

The Sixth Circuit recently had occasion to discuss the effect of union ratification on the existence of a contract upon which a suit under Sections 301 and 303 of the LMRA could be

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[67] *West Coast Tel. Co.* v. *Local 77*, IBEW, 431 F.2d 1219, 75 LRRM 2469 (9th Cir. 1970), *aff'g* 75 LRRM 2464 (W.D. Wash., 1968).

[68] 371 U.S. 195, 51 LRRM 2646 (1962).

[69] See the discussion in *Teamsters, Local 745*, v. *Braswell Motor Freight Lines, Inc.*, 428 F.2d 1371, 74 LRRM 2717 (5th Cir. 1970).

[70] *Cast Optics Corp.* v. *Textile Workers*, 75 LRRM 2169 (S.D. N.Y. 1970).

[71] *Livingston* v. *Electro Film Offset Printing Co.*, 73 LRRM 2267 (N.Y. Sup Ct. 1970).

based.[72] The case arose when the union which represented all the production and maintenance employees demanded, in order to achieve employee ratification of the tentative agreement between the parties, that the employer bargain separately with the skilled employees. Under a relatively new provision of the union constitution, production employees and skilled employees were permitted to vote separately on ratification. The production workers, who comprised about 90 percent of the bargaining unit, voted to ratify, but the skilled workers rejected the tentative agreement. The Sixth Circuit approved the lower court dismissal of the employer's 301 action for damages, rejecting the employer's claim that on the basis of past bargaining history a contract came into existence when a majority of the total bargaining unit voted for ratification of the tentative agreement. The court held that the method of ratification, unless otherwise stipulated by the parties, is an internal concern of the union, and until it ratifies the formal instrument the contract does not become operative. However, as to the novel claim for damages under Section 303 [73] by reason of the alleged inducement by the union of the employees to strike to force the employer to bargain with a labor organization (*i.e.*, "skilled employees") other than the one which was the certified representative of the employees, the court held that a factual issue was presented as to whether the "skilled employees" constituted a "labor organization" under Section 2 (5) of the NLRA.[74]

The question of the existence of an arbitration provision in a contract arose in several state cases involving the Musicians Union, whose arbitration clause was contained in its bylaws and incorporated by reference in its standard form contracts. A California appellate court confirmed an arbitration award under such a contract, despite the employer's contentions that he was not aware of the arbitration provision or the proceedings thereon, he had not read the contract prior to signing it, and the procedure before the union trial board was not an impartial one since the board was composed of union members rather than a neutral arbitrator.[75] The court rejected all of the employer's claims under the California Arbitration Act. A New York court,

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[72] *Lear Siegler, Inc.* v. *UAW*, 419 F.2d 534, 73 LRRM 2097 (6th Cir. 1969).

[73] 29 U.S.C. 187.

[74] 29 U.S.C. 152 (5).

[75] *Federico* v. *Frick*, 3 Cal. App. 3d 872, 73 LRRM 2810 (1970).

on the other hand, granted a stay of arbitration under such a contract, finding no clear and unequivocal agreement to arbitrate and noting, *inter alia,* that the employer was not aware of the bylaw and had not been given a copy thereof.[76] An earlier decision of the same court, however, did compel arbitration under what would appear to be the same contract.[77]

Public employment offers special problems as to the existence of a collective agreement since statutory authority underlines the ability of the public employer to enter into an enforceable contract or contractual provisions.[78] Thus, the Washington Supreme Court denied specific performance of an alleged agreement in regard to a wage increase which was not in writing as provided in the authorizing legislation, the court noting that anyone contracting with a municipal corporation is bound to take notice of the limitations in its power to contract.[79] In the case of *West Allis Policemen's Ass'n* v. *City of West Allis,* the court found no agreement on a wage increase where the city council did not ratify the agreement as required by state law, the court noting: [80]

> "Public employee labor negotiations and wage determinations must be conducted within the framework of existing political structures and related legislative restraints upon the municipality relative to budget and spending matters."

C. *Application of Contract Outside Its Term*

Few cases were decided during the past year in regard to application of contracts to matters preceding their execution or following their expiration, and most of the problems in this area pertain to successorships or plant closures treated below. In a Puerto Rico case the court set aside an arbitrator's award of back wages for work done during rest periods in violation of a three-year contract, where he ordered back pay for a 12-year period pursuant to a Puerto Rico statute permitting employees to claim back wages not received from their employer for a maximum period of 10 retroactive years.[81] The court held

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[76] *Iona College* v. *William Morris Agency,* 73 LRRM 2592 (N.Y. Sup. Ct. 1970).
[77] *Fenton* v. *Lipsius,* 73 LRRM 2271 (N.Y. Sup. Ct. 1969).
[78] *Zderick* v. *Silver Bow County,* 460 P.2d 749, 73 LRRM 2076 (Mont. 1969).
[79] *State of Washington* v. *Callam County Comm'rs,* 77 Wash. 2d 549, 73 LRRM 2493 (1970).
[80] 73 LRRM 2339, at 2342 (Wis. Cir. Ct. 1970).
[81] *Dorado Beach Hotel Corp.* v. *Local 610, Hotel Employees,* 317 F.Supp. 217, 75 LRRM 2383 (D. P.R. 1970).

that under the explicit terms of the contract the arbitrator had no jurisdiction to go back further than the five-day period prior to the submission of the grievance, and that the statute applied only to legal actions and not to the processing of grievances under a collective bargaining agreement.

In another case the Ninth Circuit confirmed an arbitration award of a joint area committee established under a 1964 Teamster contract covering grievances unresolved when the prior 1961 collective bargaining agreement expired, at which time the focus of the grievance machinery shifted from a regional to a national basis under the 1964 contract.[82] The court held that the 1964 area committee that considered the grievances was substantially the same institution as the prior committee and was the proper forum to consider unresolved disputes arising from the 1961 agreement, and that the question of jurisdiction to decide the grievances was for the committees involved to decide.

Reaffirming the principle that rights created and arising under a collective bargaining agreement are not expunged by the expiration of that agreement, a court has compelled a union to arbitrate an employer's claim for strike damages where the permanent arbitrator had held the matter of damages open pursuant to the request of the parties.[83] Further, it has been held that an employer may not avoid arbitration of a dispute arising during the term of a new contract on the ground that the matter is governed by a strike settlement understanding reached prior to the execution of the contract in which it was allegedly agreed that the dispute was not subject to arbitration.[84]

D. *Plant Closure and Removal, Accretion, and Successorship*

A complete cessation of business by an employer with a single operation presents the clearest situation as to contract rights, since, unlike a merger of facilities or companies, the identity of the contracting parties is not usually a matter in dispute. For example, in the past year a Pennsylvania district court was called

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[82] *Freight Drivers Local 208* v. *Braswell Motor Freight Lines, Inc.*, 422 F.2d 109, 73 LRRM 2543 (9th Cir. 1970).

[83] *Honeywell, Inc.* v. *Instrument Workers Local 116, IUE*, 307 F.Supp. 1126, 73 LRRM 2210 (E.D. Pa. 1970). (The court also held that the permanent arbitrator was not an indispensable party in the action.)

[84] *Associated Press* v. *Local 222, Newspaper Guild*, 73 LRRM 2908 (S.D. N.Y. 1970).

upon to rule on a 301 suit by a union claiming vacation pay under a collective bargaining agreement, where the employer had sold its physical assets and dissolved the corporation.[85] The court granted the union's motion for summary judgment and awarded the vacation pay on a pro rata basis as deferred compensation without any reference to the grievance procedure of the contract. The problem, however, often becomes more difficult to resolve when the employer closing its plant has more than one place of business.[86]

Even where there is a successor employer, the union may decide to proceed against the selling employer with which it has a contract. Thus, the Seventh Circuit has compelled an employer that sold its business to arbitrate a union's claims for separation allowances and vacation pay, denying the employer's request for a judicial construction of the contract.[87] Citing the *Wiley* case, the defendant employer also claimed that the purchaser of the business, who had hired the former unit members as new employees, was bound by operation of law to observe the provisions of the contract. The court held that the possible legal rights of the union against the purchaser, as a successor, carry no implication of a release of the seller from obligations arising under the bargaining agreement prior to the transfer of ownership. The court specifically refused to consider what rights the union has against the purchaser for the seller's obligations, or what continuing liabilities the seller might have for damages incurred by the employees at the hands of the purchaser.

Under the *Wiley* doctrine, an arbitration clause of a collective bargaining agreement remains in effect when a successor employer replaces its predecessor by way of merger, purchase, lease, or otherwise, the principal test being whether there is a "substantial continuity of identity in the business enterprise."[88] If the employing industry remains essentially the same despite the change of ownership, then the new company is a successor employer and is obligated to arbitrate under the terms of its predecessor's contract. A number of federal court decisions finding successorship and ordering arbitration or confirming awards

[85] *United Automobile Workers* v. *Aluminum Alloys Corp.*, 310 F.Supp. 213, 73 LRRM 2796 (E.D. Mich. 1970).

[86] See *Teamsters Local 757* v. *Borden, Inc., supra* note 20.

[87] *Packinghouse Workers* v. *Cold Storage Corp.*, 430 F.2d 70, 74 LRRM 3055 (7th Cir. 1970), *aff'g* 74 LRRM 3051 (N.D. Ill. 1969).

[88] 376 U.S. at 551, 55 LRRM 2773.

were handed down during the past year.[89] However, courts are frequently confronted with a demand by a labor organization to declare an entire collective bargaining agreement binding upon a successor employer, but they refrain from doing so on the ground that this would be passing on the merits of the union's claims and would usurp the function of the arbitrator.[90]

Nevertheless, the courts must still determine whether there is a successor employer who has a duty to arbitrate under its transferor's contract. Thus, a court dismissed a union's action for specific performance of its contract with the seller against the purchaser, where the latter continued its operations at its former place of business with its own employees, who were represented for purposes of collective bargaining by another labor organization, and where it did not hire any of the seller's employees.[91] While not specifically requested by the union, the court assumed that it also demanded enforcement of the arbitration clause of its contract, and held that the duty to arbitrate did not survive this transaction. The court also noted that forcing the purchaser to bargain with the plaintiff union when its employees were already represented by another labor organization would expose the purchaser to a charge of unfair labor practices under the NLRA.

In another breach of contract action, the Oregon district court ruled that the defendant partnership was a new business entity which was not bound by the contract entered into with the inactive corporation.[92] The partnership took over the corporation's commercial rock-crushing plant and its employees, but the heavy construction business of the corporation was discontinued entirely. The same person was the principal owner-manager of both the partnership and the corporation. The partnership refused the union's demand to abide by the construc-

[89] *Retail Clerks Local 1552* v. *Lynn Drug Co.*, 421 F.2d 1361, 73 LRRM 2814 (6th Cir. 1970), *aff'g as modified* 299 F.Supp. 1036, 72 LRRM 2009 (S.D. Ohio 1969); *Garment Workers* v. *Senco, Inc.*, 310 F.Supp. 539, 74 LRRM 2501 (D. Mass. 1970); *DeLaurentis* v. *Towne Nursing Center, Inc.*, 74 LRRM 2396 (S.D. N.Y. 1970).

[90] For a discussion of the courts being limited to compelling arbitration in successorship cases and not granting what amounts to specific performance of the contract, see the District Court opinion in *Retail Clerks* v. *Lynn Drug Co.*, *supra* note 89.

[91] *Printing Pressmen No. 447* v. *Pride Papers—Aaronson Bros. Paper Corp.*, 75 LRRM 2185 (S.D. N.Y. 1970).

[92] *Operating Engineers, Local 701* v. *Pioneer Constr. Co.*, 313 F.Supp. 753, 73 LRRM 2839 (D. Ore. 1970).

tion contract covering the employees of the corporation, but did offer to accept the contract that the plaintiff union had with other commercial gravel producers in the area which provided for lower wages. In denying the union's claims of successorship, the court noted that the end product of the old business and range of skills of the work force was far more complex, that the work force of the new operation was much smaller, and that the nature of the new gravel operation did not require the higher rate of pay enjoyed by construction workers.

The Third Circuit recently held that a union had no right to compel arbitration concerning the applicability of its contract to the employees of the employer's wholly owned subsidiary.[93] The subsidiary had been acquired before execution of the agreement and nothing was stated therein as to the application of the contract to the subsidiary. Also, the employees of the subsidiary had twice voted against representation by the union in elections conducted by the NLRB. Therefore, it was held that the dispute fell outside the collective bargaining agreement and there was no duty on the part of the employer to arbitrate.

A California appellate court also was faced with the application of a contract covering retail stores to a new location and the question of joinder of the new corporate entity in the proceedings.[94] The employer sought an order to restrain arbitration proceedings ordered by a lower court at the request of the union. The court set aside the order to arbitrate, holding that it was a question of "substantive arbitrability" to be determined by the court, not an arbitrator, as to whether or not the "additional locations" clause of the union contract could be applied to the new store, in which the employer claimed it had no interest, financial or otherwise. The court also held that it was an error to determine whether the new corporate entity was owned, operated, or controlled by the employer without joinder of the new corporation. Under the California arbitration statute it was held that neither the arbitrator nor a party to the arbitration has the power to compel a stranger to become a party to the arbitration proceedings.

[93] *Local 464, Bakery Workers* v. *Hershey Chocolate Corp.*, 433 F.2d 926, 75 LRRM 2845 (3d Cir. 1970), *aff'g* 310 F.Supp. 1182, 73 LRRM 2538, amended 75 LRRM 2239 (M.D. Pa. 1970).

[94] *Food Giant Markets, Inc.* v. *California Superior Court*, 73 LRRM 2122 (Cal. App. 1969).

E. *Multiparty Arbitration*

Other than the few factual situations treated in the text above which involved questions as to tripartite arbitration, there were few court decisions in the past year dealing directly with the problem of multiparty arbitration. A classic work-assignment dispute in a procedural posture was presented to the Third Circuit, and the court affirmed the dismissal of the plaintiff union's 301 action to compel arbitration because of its refusal to join the second union, whose members were then performing the work, as an additional party defendant under the Federal Rules of Civil Procedure.[95] The court noted that without the joinder the employer would be exposed to the risk that the second union would in turn institute a separate grievance leading potentially to conflicting awards. In view of the dismissal on procedural grounds, the court noted that it did not need to consider the propriety of an order for tripartite arbitration under the important *CBS* decision of the Second Circuit in 1969.[96]

A rather complex case was presented to the Seventh Circuit in which a trade association of milk dealers received from the district court a summary judgment compelling the union to arbitrate a dispute over the union's alleged violation of a clause in the contract regarding the granting of more advantageous terms and conditions to other dealers in the area (most-favored-nation clause).[97] The court rejected the union's argument for dismissal on the ground that since the contract was signed by the individual milk dealers after its negotiation by the association, the association was not a proper party to demand arbitration and then enforce the standard area contract. The court held that to require each of the individual dealers to make perfunctory demands before joining as plaintiffs would be an excessively technical and meaningless gesture, and that the presence of various individual dealers in the suit cured any defect as to whether there was a proper plaintiff, there being at most a harmless misjoinder of parties. The suit, however, was remanded to the district court because of its summary rejection of the union's defense against arbitration on the ground that the clause

[95] *Window Glass Cutters League* v. *American St. Gobain Corp.*, 428 F.2d 353, 74 LRRM 2749 (3d Cir. 1970).

[96] *CBS, Inc.* v. *American Recording & Broadcasting Ass'n*, 414 F.2d 1326, 72 LRRM 2140 (2d Cir. 1969).

[97] *Associated Milk Dealers, Inc.* v. *Local 753, Teamsters*, 422 F.2d 546, 73 LRRM 2435 (7th Cir. 1970).

in question violated the antitrust laws, holding that the district court, rather than an arbitrator, must interpret the antitrust laws and possible violations thereof. The court further held that the district court failed to fully consider the union's claim that the matter was not arbitrable under the contract and a memorandum of understanding between the parties, and indicated that it should have considered parol evidence of the bargaining history to determine whether the parties intended to submit the particular dispute to arbitration, noting that its ruling on arbitrability will not affect an arbitrator's interpretation of the most-favored-nation clause.

F. *Exhaustion and Court Decisions on Merits*

As noted in many of the cases cited above, before a court will entertain a 301 suit for violation of a collective bargaining agreement, available grievance machinery must be exhausted even though it does not lead to arbitration in the usual sense, and once a final decision on the merits is reached the courts will not permit relitigation of the decision. A district court recently discussed three exceptions to the usual refusal of courts to consider the merits of final awards under the grievance procedure: namely, cases involving breach of duty of fair representation by the union in handling the employee's grievance; unavailability or inadequacy of the grievance procedure; and refusal of the decision-maker under the contract to consider the merits of the grievance.[98] The court then concluded that the latter exception applied to the case at hand in which a state joint grievance committee under a Teamster contract decided that it did not have authority to make a decision on the matter in dispute and dismissed the grievance without rendering a decision on the merits. Since the decision of the committee was "final and binding" under the contract, the court decided it must inquire into the merits of the grievance. The court found no violation of the contract by the company and the union and dismissed the employee suit.

The fact that a union continues to bargain with an employer over employment conditions does not mean that it waives its rights under the argeement or is estopped from asserting such rights. Thus, a court found that bargaining was contemplated

[98] *Safely* v. *T.I.M.E. Freight, Inc., supra* note 47.

by the agreement, and that it would denigrate the arbitration process to penalize the union because it tried to settle the dispute by bargaining while at the same time seeking to have the arbitration award enforced.[99] However, where an employee accepts an informal settlement of his discharge grievance and fails to pursue his remedies under the contract further, he cannot later bring suit for wrongful discharge in the absence of factual allegations that he was coerced by the employer and the union into abandoning his grievance and accepting a settlement.[100]

IV. Compelling Arbitration or Reviewing Awards

Almost all 301 litigation involves the issue of either compelling arbitration or review of an award, as is apparent from the cases discussed or cited above. The following subheadings will introduce some of the other cases reported in the past year that are of particular interest. The courts have continued, with minor exceptions, to exercise their responsibility in seeing that contractual means of disposition of disputes are followed and carried out without unnecessary interference or usurpation from the courts or other outside sources.

A. *Suits to Compel Arbitration and Arbitrability*

Unless a dispute is clearly precluded from arbitration, it must be resolved by the agreed-upon method of resolution, but it is for a court to decide whether or not an employer is required to arbitrate and the issues it must arbitrate. Once a court finds that there are contractual provisions that govern a dispute or that it cannot be said with positive assurance that the contract excludes the dispute from arbitration, that is, finds that the dispute is arbitrable, then it will compel the parties to submit the interpretation of the contractual provisions to an arbitrator. So strong is the presumption of arbitrability that a court will compel arbitration, even though it is "crystal-clear" that the arbitrator could decide the merits only one way.[101] Even frivolous or weak claims may be arbitrable, and doubts by the court should

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[99] *Teamsters, Local 745* v. *Braswell Motor Freight Lines, Inc., supra* note 69.

[100] *Gutierrez* v. *Gaffers & Sattler Corp.*, 74 LRRM 2022 (Cal. App. 1970).

[101] *Local 286, IUE* v. *General Electric Co.*, 429 F.2d 412, 74 LRRM 2645 (1st Cir. 1970); *Operating Engineers, Local 103* v. *Crown Constr. Co.*, 75 LRRM 2184 (N.D. Ind. 1970). (Judgment on pleadings in union suit granted.)

be resolved in favor of contract coverage.[102] Where there is a broad arbitration provision, the courts will not speculate in advance as to what the arbitrator will award or whether any such award can be enforced.[103]

Suits for breach of contract may result instead in the court's compelling arbitration, and the commencement of such action does not constitute a waiver of the arbitration provisions of the contract.[104] In one such recent case based upon breach of a settlement agreement, the Fifth Circuit affirmed the lower court's order that the settlement agreement became an integral part of the then-existing collective bargaining agreement and that the dispute be submitted to the arbitration proceedings under the contract.[105] The court also approved of the order for discovery by the parties under the Federal Rules of Civil Procedure in aid of the arbitration proceedings and the retention of jurisdiction by the court pending the determination by the arbitrator.

It has been clearly established under the Supreme Court's *Wiley* decision that where the substantive issues of a dispute are a proper subject for arbitration, procedural matters arising out of that dispute, such as whether preliminary steps of the grievance procedure may be disregarded, are for the arbitrator, not the court, to determine because procedural matters are often intertwined with the merits of the dispute.[106] Thus, even in a situation where the contract explicitly requires strict adherence to the grievance procedure and specifically requires that "no step shall be used until all previous steps have been ex-

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[102] *F & M Schaefer Brewing Co.* v. *Local 49, Brewery Workers,* 420 F.2d 854, 73 LRRM 2298 (2d Cir. 1970).

[103] *United Ins. Co.* v. *Insurance Workers,* 315 F.Supp. 1133, 75 LRRM 2053 (E.D. Pa. 1970).

[104] *Local 66, Pointers Pension Fund* v. *Horn Waterproofing Corp.,* 74 LRRM 2397 (S.D. N.Y. 1970); see also *Teledyne Wisconsin Motor* v. *Local 283, UAW,* 75 LRRM 2472 (E.D. Wis. 1970).

[105] *Asbestos Workers Local 66* v. *Leona Lee Corp.,* 434 F.2d 192, 76 LRRM 2026 (5th Cir. 1970), *aff'g* 76 LRRM 2024 (W.D. Tex. 1969).

[106] *Meat Cutters, Local 405* v. *Tennessee Dressed Beef Co.,* 428 F.2d 797, 74 LRRM 2722 (6th Cir. 1970), *rev'g* 74 LRRM 2720 (M.D. Tenn. 1969). See also *Bealmer* v. *Texaco, Inc., supra* note 43 (standing of individual employees, binding effect of agreement, and timeliness as procedural in nature); *Air Engineering Metal Trades* v. *ARO, Inc.,* 307 F.Supp. 934, 74 LRRM 2167 (E.D. Tenn. 1969) (lapse of 15-day period for submitting to arbitration).

hausted," a South Dakota district court ordered arbitration,[107] noting in strong language:

> "Technical or strict construction will be disregarded . . . even as it is agreed on, will not be permitted as a method to nullify the policy back of the Labor Management Relations Act and moreover may not be used as a defense against arbitration."

Further, the court will not require a party to submit to the expense and inconvenience of separate arbitration hearings for procedural and substantive issues.[108]

Cases refusing to compel arbitration are, relatively speaking, few in number and often involve special circumstances which dictate the result. Thus, in an employer's damage action under Section 303 of the LMRA, the Fifth Circuit refused the union's motion to stay the action pending arbitration under the broad arbitration clause in the contract between the parties.[109] The court restated the established principle that courts must hear and determine the validity of tort damage claims "absent a clear, explicit statement in the collective bargaining contract directing an arbitrator to hear and determine" such claims. Also, where the contract clearly does not require the matter to be submitted to arbitration, such as "jurisdictional disputes" subject to the National Joint Board for the Settlement of Jurisdictional Disputes, or the grievance has been adjusted satisfactorily and the matter is now moot, the courts will not compel arbitration.[110] However, where the employer requested and was denied a stay of arbitration pending an appeal as to arbitrability, the Tenth Circuit held that the case was not moot because "implementation of the arbitration award depends on the validity of the court order requiring arbitration." [111] In the somewhat unusual case of a suit to compel arbitration under the provisions of a terminated contract regarding the terms of a new collec-

[107] *Local Lodge 862, IAM* v. *Schweigers, Inc.*, 314 F.Supp. 585, 74 LRRM 2682 (D. S.D. 1970).

[108] *Steelworkers* v. *Jones & Armstrong Steel Co.*, 74 LRRM 2374 (N.D. Ala. 1970) (timeliness issue).

[109] *Vulcan Materials Co.* v. *Steelworkers, Local 2176*, 430 F.2d 446, 74 LRRM 2818 (5th Cir. 1970).

[110] *Tobacco Workers Local 317* v. *P. Lorillard Corp.*, 314 F.Supp. 513, 75 LRRM 2437 (M.D. N.C. 1970); see also *Communications Workers* v. *Southern Bell Tel. & Tel. Co.*, 419 F.2d 1210, 73 LRRM 2206 (5th Cir. 1970); *Vincent J. Smith, Inc.* v. *Brennan*, 33 App. Div.2d 1099, 74 LRRM 2254 (N.Y. Sup. Ct. 1970); *Central Steel Erecting Co.* v. *Carpenters, Local 125*, 33 App. Div.2d 876, 73 LRRM 2622 (N.Y. Sup. Ct. 1970).

[111] *Automobile Workers, UAW* v. *Folding Carrier Corp.*, 422 F.2d 47, 73 LRRM 2632 (10th Cir. 1970).

tive bargaining agreement which would supersede the terminated contract, the court stayed proceedings and held that the matter was not ripe for determination at that time where the parties had resumed negotiation and, therefore, were not at an impasse.[112]

B. *Reviewing, Enforcing, or Vacating Awards*

In view of the national policy to encourage arbitration as a device to settle industrial disputes and the fact that the parties have bargained for a determination of their disputes by an arbitrator or other means of final determination, rather than by a court, the courts must not substitute their judgment for that of the arbitrator by reviewing the merits of an award.[113] As long as the award "draws its essence" from the collective bargaining agreement and is not in manifest disregard of the agreement, of the submission to the arbitrator, or of the law of the shop, the award must be enforced, and any ambiguity is to be resolved in favor of the award.[114] An arbitrator may decide that certain issues are beyond his authority to decide under the contract, and the courts will respect such awards.[115]

To be enforceable an award must be "final and binding" or a "definitive settlement" under the collective bargaining agreement.[116] Thus, an otherwise final award was enforced against an employer, even though the union could have elected under the terms of the agreement to strike but did not do so, rather than seeking court enforcement of the award.[117] Where there has been more than one award in connection with a particular dispute, the court will have to determine which award is final,

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[112] *South Pittsburgh Water Co.* v. *Utility Workers, Local 174,* 315 F.Supp. 305, 75 LRRM 2477 (W.D. Pa. 1970).

[113] *New Orleans Steamship Ass'n* v. *Local 1418, ILA, supra* note 12; *Teamsters Local 249* v. *Motor Freight Express, Inc.,* 48 F.R.D. 294, 73 LRRM 2799 (W.D. Pa. 1966); but see *Communications Equipment Workers* v. *Western Electric Co.,* 75 LRRM 2776 (D. Md. 1970) where the court correctly cited the law but engaged in "a careful review of all the evidence presented before the Board of Arbitrators" and found no error in their decision.

[114] *District 50, UMW* v. *Bowman Transp., Inc.,* 421 F.2d 934, 73 LRRM 2317 (5th Cir. 1970); *Steelworkers* v. *Reynolds Aluminum Supply Co.,* 75 LRRM 2180 (N.D. Ala. 1970); *IUE, Local 103* v. *Radio Corp. of America,* 74 LRRM 2883 (S.D. N.Y. 1970).

[115] *Federal Labor Union No. 18887* v. *Midvale-Heppenstall Co.,* 421 F.2d 1289, 73 LRRM 2384 (3d Cir. 1970).

[116] See *General Drivers Local 89* v. *Riss & Co.,* 372 U.S. 517, 52 LRRM 2623 (1963). See also the case discussed at note 118.

[117] *Freight Drivers Local 208* v. *Braswell Motor Freight Lines, Inc., supra* note 80.

and a procedural dismissal does not preclude a second award unless the agreement specifically bars reinstituting the complaint.[118] In one case a district court enforced, in an employee's suit, the second of four arbitration awards as the final and binding award, noting that in order to do so the court had to examine the merits of the various decisions and holding that once an award is made, the rights of the parties thereto are vested and cannot be destroyed by a later attempted modification.[119] Attempts by a party to vacate an award or enjoin its enforcement without evidence of fraud or other substantial ground meet with little success in the courts.[120]

Occasionally the courts are faced with a challenge to an award on the ground that it violates another statute or some public policy, and the courts must dispose of such contentions on the merits.[121] Other defenses to the enforcement of an award are that the employer is not bound by the agreement in question,[122] that the arbitrator exceeded his contractual authority or the scope of the issue submitted to him,[123] or that the award as rendered is indefinite or vague.[124] In the latter case, where the findings that support an award are not intelligible or complete, the court may remand the case for more definite findings.[125] The fact that a union has engaged in an illegal strike against a hospital in violation of state law is not necessarily a defense to an arbitration award.[126] As in other areas of public em-

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[118] *Local 616, IUE* v. *Byrd Plastics, Inc.*, 428 F.2d 23, 74 LRRM 2550 (3rd Cir. 1970).

[119] *Parker* v. *Mercury Freight Lines, Inc.*, 73 LRRM 2189 (N.D. Ala. 1969) (Attorney fees were denied to the plaintiffs, however, even though they prevailed; *cf. District 50, UMW* v. *Bowman Transp., Inc., supra* note 114); *cf. Hunter* v. *Locher, supra* note 35.

[120] *Iron City Indus. Cleaning Corp.* v. *Local 141, Laundry & Dry Cleaners Union*, 316 F.Supp. 1373, 75 LRRM 2797 (W.D.Pa. 1970); *Teamsters Local 807* v. *West Farms Express, Inc.*, 73 LRRM 2414 (N.Y. Sup. Ct. 1970).

[121] *Employees' Ind. Union* v. *Wyman Gordon Co.*, 314 F.Supp. 458, 75 LRRM 2425 (N.D. Ill. 1970); *Doyle* v. *Shortman, supra* note 61; *Consolidated Edison Co.* v. *Rigley*, 73 LRRM 2220 (N.Y. Sup. Ct. 1970).

[122] *Local 11, IBEW* v. *Jandon Elec. Co.*, 429 F.2d 584, 74 LRRM 2892 (9th Cir. 1970) *aff'g* 74 LRRM 2888 (C.D. Cal. 1968).

[123] *Pulp & Paper Mill Workers, Locals 359 & 361* v. *Allied Paper, Inc.*, 76 LRRM 2031 (S.D. Ala. 1970); *Pontiac Osteopathic Hospital* v. *Service Employees, Local 79*, 24 Mich. App. 585, 180 N.W.2d 510, 75 LRRM 2702 (1970).

[124] *Bowman* v. *Ruchti Bros.*, 74 LRRM 2064 (Cal. App. 1970).

[125] *New England Tel. & Tel. Co.* v. *Telephone Workers*, 74 LRRM 2685 (D. Mass. 1970); *Railroad Trainmen* v. *Ill. Cent. R.R.*, 75 LRRM 2556 (E.D. Ill. 1969), *aff'd sub nom. United Transp. Union* v. *Ill. Cent. R.R.*, 433 F.2d 566, 75 LRRM 2557 (7th Cir. 1970) (remand to National Railroad Adjustment Board because of its failure to consider alleged hearsay evidence).

[126] *In re David (Adelphi Hospital)*, 35 App. Div. 2d 737, 75 LRRM 2605 (N.Y. 1970).

ployment arbitration, the confirmation of an award depends upon the enabling legislation involved.[127]

V. Relationship of 301 to Other Legislation

A. *National Labor Relations Act*

As noted above in a number of cited cases, potential conflicts with the NLRA and other statutes are frequently raised as defenses to arbitration. However, as pointed out in *Federal-Mogul Corp.* v. *Local 985, UAW*,[128] since arbitrators are familiar with the principles of labor law, there is no basis for assuming that they would fashion a remedy that would require the losing party to violate the law. The case involved a union's suit to compel arbitration concerning the employer's failure to recognize the union at a newly acquired plant. The employer's contention that such recognition, where it had already recognized another union, would cause it to commit an unfair labor practice was held to be premature, until the award has issued.

Arbitration does not control the Board in its determination of bargaining unit issues. Thus, a unit clarification by the NLRB deprived the union of any right to recognition as the representative of the employees, and the union cannot thereafter compel arbitration of the same question.[129] However, the Ninth Circuit dismissed a 301 action by a union seeking a declaratory judgment in regard to the inclusion of certain employees in the bargaining unit after the NLRB had declared that they were excluded by reason of their supervisory status, holding that arbitration was, by agreement, the exclusive method of resolution.[130] In jurisdictional dispute cases the NLRB has always deferred to the National Joint Board for the Settlement of Jurisdictional Disputes where both unions and the employer have agreed to be bound by its decision, but some courts are not in

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[127] *Rockland Firefighters Ass'n* v. *City of Rockland,* 261 A.2d 418, 73 LRRM 2463 (Me. 1970); *cf. Mellon* v. *Fitzgerald Public Schools,* 22 Mich. App. 218, 177 N.W.2d 187, 74 LRRM 2516 (1970) (testing the right of individual presentation of grievances under the Michigan act permitting collective bargaining among public employees).

[128] 74 LRRM 2961 (E.D. Mich. 1970). See also *Heavy Contractors Ass'n* v. *Laborers. Local 1140, supra* note 65.

[129] *Smith Steel Workers* v. *A. O. Smith Corp.,* 420 F.2d 1, 73 LRRM 2028 (7th Cir. 1969).

[130] *Local 89, IBEW* v. *General Tel. Co. of the Northwest,* 431 F.2d 957, 75 LRRM 2112 (9th Cir. 1970), *rev'g* 75 LRRM 2109 (E.D. Wash. 1968).

agreement as to the necessity for the employer to be a party to such agreement.[131]

In a recent case involving the suspension of a union steward for violation of a no-solicitation rule, the employer brought a 301 action to compel arbitration, and the union filed an unfair labor practice charge with the NLRB.[132] The court held that there are areas of overlapping jurisdiction between the NLRB and the arbitrator, and where there is an arbitration clause there is concurrent contract and Board jurisdiction, with neither preempting the other. Therefore, the court compelled the union to arbitrate the employer's grievance despite the fact that the NLRB had issued a complaint and held a hearing in regard to the same matter. The court specifically refused to consider to what extent the Board should defer to an arbitrator's decision, or whether the Board should postpone its own proceeding until arbitration was concluded. It is clear that the two procedures can complement one another in some instances, as in those situations where the employer is refusing to furnish information in order to permit the union to evaluate the merits of grievances before proceeding to arbitration,[133] or in those involving a union's breach of its duty of fair representation.[134]

As for the NLRB itself deferring to arbitration in other areas of its activity, the courts continue to uphold its refusal to defer, [135] except under the rather restricted circumstances set forth in its *Spielberg Mfg. Co.* decision.[136] However, within the Board itself there has been a split in opinion as to its policy of deferral, with Member Brown consistently dissenting in favor of a more liberal policy of deferral and withholding of NLRB action and review until the existing contractual remedies have

[131] *Plasterers Local 79* v. *NLRB*, 440 F.2d 174, 74 LRRM 2575 (D.C. Cir. 1970); *Vincent* v. *Local 532, Carpenters*, 75 LRRM 2819 (W.D. N.Y. 1970). Compare, for example, *Laborers, Local 42 (R. B. Cleveland Co.)*, 184 NLRB No. 77, 74 LRRM 1562 (1970); *Millwrights Local 1862 (Jelco, Inc.)*, 184 NLRB No. 58, 74 LRRM 1485 (1970).

[132] *United Aircraft Corp.* v. *Canel Lodge 700, Machinists*, 436 F.2d 1, 76 LRRM 2111, *aff'g* 314 F.Supp. 371, 74 LRRM 2518 (D. Conn. 1970); see also *Cast Optics Corp.* v. *Textile Workers, supra* note 70, citing *Carey* v. *Westinghouse Elec. Corp.*, 375 U.S. 261, 55 LRRM 2042 (1964).

[133] *NLRB* v. *Twin City Lines, Inc.*, 425 F.2d 164, 74 LRRM 2024 (8th Cir. 1970).

[134] *Local 485, IUE (Automatic Plating Corp.)*, 183 NLRB No. 131, 74 LRRM 1396 (1970); *Port Drum Co.*, 180 NLRB No. 90, 73 LRRM 1068 (1970).

[135] *Steve's Sash & Door, Inc.* v. *NLRB*, 430 F.2d 1364, 74 LRRM 2765 (5th Cir. 1970).

[136] 112 NLRB 1080, 36 LRRM 1152 (1955).

been exhausted.[137] However, the recent decision of *Terminal Transport Co.*,[138] by a majority of a three-member panel, composed of the newly appointed Chairman of the Board Miller and Member Brown, presages a possible shift in policy on the Board's deferral policy. The majority opinion held that the NLRB would honor the arbitration award of a joint arbitration panel, where the employee refused to submit to a test in regard to his qualifications, the lack of which was the asserted reason for the employer's discharge action. Member Jenkins issued a strong dissent and would proceed to consider the grievant's case on the merits, finding that, contrary to *Spielberg*, there was not a "voluntary settlement" by the employee involved, that the committee did not directly consider and decide the issue of discrimination under Section 7 of the NLRA, and that the procedure of the joint committee was not "fair and regular" since it had no outside neutral member to provide impartial consideration of the alleged discrimination. A second new appointee, Ralph E. Kennedy, was sworn in December 14, 1970, succeeding Frank McCulloch, so it is still too early to know whether there may be a shift in Board policy in regard to deferral to arbitration, but the national policy as reaffirmed in such 1970 Supreme Court decisions as *Boys Markets* and *Czosek* would indicate that such change is likely.

B. *Arbitration and Civil Rights Legislation*

This past year there were a number of important decisions involving the relationship between arbitration and civil rights legislation, most particularly Title VII.[139] The most important of these involved the question of whether the grievant, pursuing contractual remedies available to him as the result of a collec-

[137] See, for example, *Englehardt, Inc.*, 186 NLRB No. 81, 75 LRRM 1401 (1970) (Chairman Miller not on panel); *Sunbeam Corp.*, 184 NLRB No. 117, 74 LRRM 1712 (1970) (three-way split in disposition of case involving question as to whether employee was engaged in protected activity); *International Paper Co.*, 184 NLRB No. 38, 74 LRRM 1438 (1970); *Iron Workers, Local 229 (Bethlehem Steel Corp.)*, 183 NLRB No. 35, 74 LRRM 1317 (1970).

[138] 185 NLRB No. 96, 75 LRRM 1130 (1970).

[139] See in addition to the cases discussed below, *Waters* v. *Wisconsin Steel Works, Int'l Harvester Co.*, 427 F.2d 476, 2 FEP Cases 574 (7th Cir. 1970) *rev'g* 301 F.Supp. 663, 1 FEP Cases 858 (N.D. Ill. 1969), *cert. denied* 2 FEP Cases 1059 (1970); *Fakete* v. *U.S. Steel Corp.*, 424 F.2d 331, 2 FEP Cases 540 (3d Cir. 1970), *rev'g* 300 F.Supp. 22, 2 FEP Cases 104 (W.D. Pa. 1969); *Oubichon* v. *North American Rockwell Corp.*, 3 FEP Cases 12 (C.D. Cal. 1970); *Evans Local 2127, IBEW*, 313 F.Supp. 1354, 2 FEP Cases 483 (N.D. Ga. 1970); *Newman* v. *Avco Corp.*, 313 F.Supp. 1069, 2 FEP Cases 517 (M.D. Tenn. 1970); *Bremer* v. *St. Louis Southwestern R.R.*, 310 F.Supp. 1333, 2 FEP Cases 509 (E.D. Mo. 1969).

tive bargaining agreement, could be said to have made an effective election of remedies which would preclude further litigation in the courts under Title VII. Last year the Seventh Circuit had refused to apply this doctrine to the Title VII area.[140] As the result of decisions this year by the Fifth and Sixth Circuits, the courts are now split on this issue.

In *Hutchings* v. *U.S. Industries, Inc.*,[141] the Fifth Circuit held that a black worker's prior use of contractual grievance-arbitration machinery to protest alleged promotion discrimination did not result in an election of remedies. The court held that an arbitration award, whether adverse or favorable to the employee involved, was not per se conclusive of a determination of his rights under Title VII. Moreover, the court stated that in a case like *Hutchings,* where there was an intermediate grievance determination through which the matter was deemed settled, there was no conclusive effect flowing from such a resolution of the issue. In ascertaining the legislative intent of Congress when it passed Title VII, the court, referring specifically to the national labor policy in favor of arbitration of labor disputes and the Court's holding in *Boys Markets,* stated the following: [142]

> "Congress . . . has made the federal judiciary, not the EEOC or the private arbitrator, the *final* arbiter of an individual's Title VII grievance. . . . The EEOC serves to encourage and effect voluntary compliance with Title VII. So also may the private arbitrator serve consistent with the scope of his authority. Neither, however, has the power to make the ultimate determination of Title VII rights."

The Fifth Circuit in *Hutchings* then noted its agreement with the Seventh Circuit's statement to the effect that its holding was not to be used to obtain a duplicate relief in both public and private forums ". . . which would result in an unjust enrichment or windfall to him [the plaintiff or grievant]." Moreover, the court specifically noted that arbitration awards and determinations might be properly considered as evidence, even though they are not to be regarded as conclusive upon the judiciary.

The Sixth Circuit has reached a contrary result in *Dewey* v.

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[140] *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 2 FEP Cases 121 (7th Cir. 1969).

[141] 428 F.2d 303, 2 FEP Cases 725 (5th Cir. 1970), *rev'g and reman'g* 309 F.Supp. 691, 2 FEP Cases 599 (E.D. Tex. 1969).

[142] *Id.* at 313-314, 2 FEP Cases at 732-733.

Reynolds Metals Co.[143] In *Dewey,* a case involving alleged religious discrimination, the court held that where grievances are based upon alleged civil rights violations and the parties to a collective bargaining agreement consent to a mutually acceptable arbitrator, the arbitrator's decision concerning such grievances is "final." The court cited both the *Steelworkers* trilogy as well as *Boys Markets* for the proposition that the arbitration process was to be encouraged as a matter of national labor law. If, said the Sixth Circuit, the arbitrator's award was not regarded as final,[144]

> "This result could sound the death knell to arbitration of labor disputes, which has been so usefully employed in their settlement. Employers would not be inclined to agree to arbitration clauses in collective bargaining agreements if they provide only a one-way street, i.e., that the awards are binding on them but not on their employees.
>
> "The tremendous increase in civil rights litigation leads one to the belief that the Act will be used more frequently in labor disputes. Such use ought not to destroy the efficacy of arbitration."

The Sixth Circuit did not make reference to the fact that the arbitrator in *Dewey* did not deal with the legal and constitutional issues involved. Moreover, there are a substantial number of arbitrators who believe that such matters are beyond their scope of jurisdiction or competence. And, finally, the Sixth Circuit opinion in *Dewey* ignores the fact that the plaintiff or grievant is alleging discrimination on the part of one or both parties who are involved in the selection of the impartial arbitrator—and the very serious need for reform of discrimination arbitration cases.[145] Suffice it to say, this split in the circuits makes it clear that the Supreme Court may be called upon before long to resolve the matter and determine whether the public character of Title VII overrides the thrust of decisions like the *Steelworkers* trilogy and *Boys Markets* which were used by the Sixth Circuit to argue for adherence to a "business as usual" policy in the very important civil rights arena.

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[143] 429 F.2d 324, 2 FEP Cases 687 (6th Cir. 1970), *rev'g* 300 F.Supp. 709, 71 LRRM 2406, 1 FEP Cases 759 (W.D. Mich. 1969), *rehearing den.* 429 F.2d 324, 2 FEP Cases 869 (1970), *aff'd by equally divided Court,* 402 U.S. 689, 3 FEP Cases 508 (1971). Accord *Oubichon* v. *North American Rockwell Corp., supra* note 139, *discussing Dewey, Newman,* and *Hutchings; Pompey* v. *General Motors Corp.,* 24 Mich. App. 60, 179 N.W.2d 697, 2 FEP Cases 1027 (1970).

[144] *Id.* at 332, 2 FEP Cases at 691.

[145] See Gould, "Labor Arbitration of Grievances Involving Racial Discrimination." 118 *U. Pa. L. Rev.* 40 (1969) and McKelvey, "Sex and the Single Arbitrator," 24 *Ind. & Lab. Rel. Rev.* 355 (1971).

C. *Other Statutes*

There are a few additional noteworthy cases dealing with the relationship of Section 301 to other legislation. In one case the Second Circuit affirmed the lower court's permanent injunction against a union from conducting grievance proceedings regarding unpaid benefits against the alleged successor of a motor carrier in reorganization under Chapter XI of the Bankruptcy Act.[146] The referee in bankruptcy had confirmed a plan or arrangement whereby the carrier would pay 10 percent of its claims, and the union is seeking the remaining 90 percent from the alleged successor. The court affirmed the finding that there was no successorship, and even if there had been, attempting to arbitrate the claim would be in violation of the bankruptcy order.

In another case, the court refused to set aside an arbitration award reinstating a discharged truck driver on the ground that it would violate safety regulations and Interstate Commerce Commission requirements.[147] The court noted that the employer's defense had been fully litigated in the arbitration proceedings and had been found to be a subterfuge to get rid of the employee, and that the employer had an obligation to make a bona fide effort to secure a waiver of ICC requirements in view of the employee's past history of a physical defect.

The district court in New York was required to rule on whether an arbitrator's opinion construing a contract clause forbidding the employer from selling ice cream from its Philadelphia area plant in the New York City area violated antitrust laws.[148] The court held that the construed provision is not a territorial restriction of the type prohibited by the antitrust laws, but is an attempt to preserve minimum standards for wages, hours, and working conditions and is within the labor exemption under said laws.

In the *U.S. Steel* case,[149] the Third Circuit remanded the case to the district court to determine whether the work stop-

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[146] *Eastern Freight Ways Inc.* v. *Local 707 Teamsters,* 422 F.2d 351, 73 LRRM 2270 (2d Cir. 1970), *aff'g* 300 F.Supp. 1289, 71 LRRM 2641 (S.D. N.Y. 1969).

[147] *Int'l Auto Sales & Serv., Inc.,* v. *Teamsters, Local 270,* 311 F.Supp. 313, 73 LRRM 2829 (E.D. La. 1970).

[148] *National Dairy Products Corp.* v. *Teamsters, Local 680,* 308 F.Supp. 982, 73 LRRM 2444 (S.D. N.Y. 1970).

[149] *Supra* note 18.

pages, which were the subject of the employers' action for injunctive relief, were labor disputes at all, or whether they were a mass protest against the Federal Government for its failure to enforce provisions of the new Federal Coal Mine Health and Safety Act of 1969. The appeals court also questioned that if an "abnormally dangerous condition" were found to exist, this would be a proper subject of arbitration under the contract, and if so, how.

VI. Conclusion

It is fair to conclude that the *Boys Markets* decision will have an immediate impact on arbitration, although perhaps limited in relation to the overall number of arbitration cases. As of this time, *Boys Markets* simply provides for the granting of an injunction in a *Boys Markets* strike in violation of a no-strike clause which must be conditioned upon both the availability and the willingness of the employer to avail itself of the arbitral process immediately. In view of the fact that injunctive orders are extraordinary relief, it can be anticipated that the courts will require immediate and expedited arbitration which will place demands upon both the time and expertise of arbitrators. It can also be expected that the courts will be much more willing to scrutinize the arbitral process in a *Boys Markets* situation where the arbitration is being conducted in conjunction with a pending court proceeding. Therefore, a great deal of accommodation between courts and arbitrators will be required so that each process does not intrude upon the other.

Employee suits can be expected to cause problems for employers and unions, in view of the increased militancy of minority positions or groups as well as the greater emphasis on individual freedoms and procedural due process. Accordingly, arbitrators will have to be increasingly aware of the problems and positions of dissenting minority employees in grievance arbitration disputes and take pains to see that their rights are protected as far as possible. While increasing awareness among arbitrators of the problems of individual suits will not necessarily reduce the number of such suits substantially, it may help to alleviate any conflict or tension that those suits might cause between the courts and the arbitral process.

Finally, the field of public employment arbitration would

appear to be a new arena which may require some inventive thinking for many arbitrators. The increasing use of compulsory arbitration in interest disputes in public employment, especially in the protected services, will require much more attention to the surrounding problems of other bargaining units of employees of the public employer involved and to the public itself because of the impact that the award will have on such third parties. It is possible that the viability of compulsory arbitration statutes will be in large measure determined by how successful the arbitration awards are in resolving public employment disputes, not only as to the employees immediately involved, but also in regard to the other employees of the public employer.[150]

The developments of 1970 clearly indicate an increased use of arbitration in all sectors of our economy and a broader responsibility for arbitrators than ever before. The arbitrators must be equal to the task of new problems in such controversial areas as public employee and racial discrimination disputes.

[150] See *Mount St. Mary's Hospital* v. *Catherwood*, 26 N.Y.2d 493, 74 LRRM 2897 (1970) *aff'g* 305 N.Y.S.2d 143, 73 LRRM 2127 (1969). See also, Michigan act to provide for compulsory arbitration of labor disputes in municipal police and fire departments, which the legislature made effective for a trial period until June 30, 1972, M.C.L.A. 423.231ff, M.S.A. 17.455 (31) ff. The initial experience with the act is that it has caused dissatisfaction among other employees of the public employer involved, who do not have the same right and thus are left to negotiate with an employer who has an empty purse, or one who refuses to negotiate until the compulsory arbitration is completed.

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