APPENDIX C

REPORT OF THE COMMITTEE ON LAW AND LEGISLATION*

CHARLES J. MORRIS**

Part I

The past two years have marked an experiment in which the Report of the American Bar Association's Labor and Employment Law Section Committee on Labor Arbitration and the Law of Collective Agreements has been distributed to the Academy membership in lieu of a separately prepared Academy report. The earlier practice, which had prevailed for many years, had been for the Academy's Committee on Law and Legislation to prepare its own report with the aid of paid outside assistance. Because the resulting report, excellent though it was, seemed to duplicate the report that was prepared annually by teams of union and management lawyers in the ABA Labor and Employment Law Section, and because the outside assistance used in preparation of the Academy's report proved to be costly (the 1976 report cost $2500), arrangements were made, without cost to the Academy, to distribute and rely upon the ABA section's report.

The principal role of the Law and Legislation Committee during the past year was to continue the arrangement with the ABA and to monitor and assess the membership's reaction to the ABA product. We now have two years of experience from which to draw conclusions and make recommendations.

One disadvantage of the ABA report is that it does not become available until the end of the summer or early fall. The most recent report was not available for distribution to the

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*Members of the Committee on Law and Legislation are Nathan Cohen, Daniel Gutman, David M. Helfeld, Richard L. Kanner, William Levin, Thomas P. Lewis, Samuel J. Nicholas, Jr., Benjamin Rubenstein, William S. Rule, and Charles J. Morris, chairman.

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Academy's membership until mid-October 1978, which was not early enough for an evaluation to have been made prior to the Board of Governors' meeting on October 20–21, 1978.

On October 31, 1978, we sent the following letter to the entire membership:

"To: NAA Members
"From: Charles Morris, Chairman
Law and Legislation Committee
"Re: 1978 ABA Labor Law Section Report

"Recently, you received a copy of the 1978 ABA Labor Law Section Report on Labor Arbitration and the Law of Collective Agreements. You may recall that, at the suggestion of the Law and Legislation Committee, the Academy discontinued its practice of retaining someone to prepare its own report, inasmuch as the ABA Report was considered to be a satisfactory replacement.

"For the past two years, we have sent copies of the ABA Report. In order for the Committee to fully consider the Report and your response to it, and to thereafter advise the Board of Governors, I would appreciate hearing from you should you desire to comment.

"The Committee's findings and recommendations will be reported to the Board of Governors at the May meeting in Detroit."

Only 25 members responded. Seventeen stated that they were satisfied with the ABA report and did not recommend a separate NAA report; four expressed satisfaction with the ABA report but recommended that the NAA committee add a report of its own as an addendum, highlights, or something "from the arbitrator's perspective"; only four members expressed dissatisfaction with the ABA report and recommended reinstatement of a separate NAA report.

Basing its judgment on the silent approval implied by the overwhelming lack of direct response to our inquiry and on the overwhelmingly favorable response of those few members who did answer the inquiry, the Law and Legislation Committee recommends continuation of the arrangement with the American Bar Association's Labor and Employment Law Section. We express our gratitude to the ABA section for its generous cooperation in sharing with us the fruits of its members' labor.

Additionally, however, our committee is of the opinion that something extra is needed. We therefore recommend further experimentation in order to take advantage of the freedom that use of the ABA report now provides. The freedom to which we refer is the freedom to pick and choose a few timely topics for discussion and exposition, inasmuch as our own portion of the

report can now become selective—for it is the ABA portion that is comprehensive in coverage of developments in the subject area. With this approach in mind, Part II of this year's report represents an initial effort to select several recent decisions (eight from the courts and one from the National Labor Relations Board) and discuss them more thoroughly than the comprehensive format of the ABA report would allow. It is suggested that next year the committee continue to experiment and perhaps adopt a "case note" type of procedure whereby each member of the committee would be responsible for analysis of one case or a series of related cases. This approach could provide a depth of analysis not heretofore feasible.

Part II

Nine decisions decided during the past year have been selected because of their importance to the law of private-sector labor arbitration. Six concern the scope of judicial review of arbitrators' awards, two concern the relation of arbitration awards to the law of the National Labor Relations Act, and one concerns a union's use of a *Boys Markets*[1] injunction to maintain the status quo pending arbitration.

A. Scope of Judicial Review of Arbitration Awards

Although the courts have generally shown a reluctance to review the merits of arbitration awards, federal circuit courts of appeals in two of the decisions examined here have relied on important exceptions to justify judicial intervention where the court found that the arbitrator exceeded his authority under the contract. In all of the cases treated in this section, however, the courts pay homage to the role of restraint mandated by the Supreme Court when the award "draws its essence" from the agreement.[2] The Court there admonished: "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."

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[1] *Boys Markets, Inc.* v. *Retail Clarks' Union Local 770*, 398 U.S. 235, 74 LRRM 2257 (1970).

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

1. The Arbitrator's Authority in the Face of Contractual Limitations. In *Falls Stamping and Welding Co.* v. *Int'l Union, UAW Local 1194,*[3] the collective bargaining agreement contained a clause authorizing the company to discharge or otherwise discipline employees who violated the no-strike clause in the agreement. The same clause provided, however, that "any discipline or discharge as a result of the foregoing is subject to the grievance procedure," which included arbitration. When the company discharged 93 employees following a series of wildcat strikes, the union filed a grievance and followed with arbitration. The resulting award ordered the employees reinstated with seniority but without back pay.

In an action brought under Section 10 of the Arbitration Act,[4] the company obtained a vacation order from the district court, which relied on *Amanda Bent Bolt Co.* v. *UAW.*[5] The court of appeals, in a per curiam opinion, reversed and ordered the court below to reinstate the arbitral award. The court distinguished *Amanda* because the no-strike clause in that case did not contain a grievance provision; the arbitrator found that the grievants had indeed violated the clause but ordered their reinstatement. In the face of the arbitrator's findings, the Sixth Circuit held that the remedy contravened the express words of the contract.

In *Falls Stamping,* the court of appeals distinguished *Amanda* as a case in which management had reserved the "unequivocal right to discharge employees who violate the no-strike provision," whereas in the present case, "the company expressly agreed that the discharge of employees for participating in a strike would be subject to the grievance procedure [which] included arbitration." The decision reinforces the principle that if the dispute is arbitrable, the arbitrator has broad authority to fashion a remedy according to the facts of the case before him, even as to employees who violate an express no-strike provision.

Boise Cascade Corp. v. *United Steelworkers*[6] was a decision in which the collective bargaining agreement contained a "no additions or alterations" clause, but also provided for "final and binding" arbitration. In a grievance protesting the company's reduction of wages to certain employees who had elected to accept temporary

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[3]575 F.2d 1191, 98 LRRM 2530 (6th Cir. 1978).
[4]9 U.S.C. § 10 (1970).
[5]451 F.2d 1277, 79 LRRM 2023 (6th Cir. 1971).
[6]558 F.2d 127, 100 LRRM 2481 (5th Cir. 1979).

jobs in lower paying classifications rather than face a temporary layoff, the union asserted a violation of a pay provision of the agreement. After determining that the language of the pay provision was ambiguous, the arbitrator concluded that the company's past practices supported the union's interpretation. In an action to vacate, the federal district court held that the arbitrator had exceeded his authority by using extrinsic evidence in violation of the "no additions or alterations" clause in the agreement and granted summary judgment. The Fifth Circuit reversed, noting that the basis for the lower court's holding was a disagreement with the arbitrator's factual finding of ambiguity.

Declaring that it is the rule of the circuit, following *Enterprise Wheel,* that an award will be vacated only when it is "without foundation in reason or fact,"[7] the court stated that the arbitrator's findings "cannot be said to have no foundation in reason or fact." Thus, the "no additions or alterations" clause does not bar an arbitrator from relying on extrinsic evidence, at least where he concludes that the contract is ambiguous. The district court had failed to consider the arbitrator's preliminary conclusion regarding ambiguity as a "finding of fact." The court of appeals quoted with approval Professor St. Antoine's comment:

> "The difficulty is that any time a court is incensed enough with an arbitrator's reading of the contract and such supplementary data as practice, bargaining history, and the 'common law of the shop,' it is simplicity itself to conclude that the arbitrator must have 'added to or altered' the collective agreement. How else can one explain this abomination of a construction? Yet if the courts are to remain faithful to the injunction of Enterprise Wheel, they must recognize that most arbitral aberrations are merely the product of fallible minds, not of overreaching power. At bottom, there is an inherent tension (if not consistency) between the 'final and binding' arbitration clause and the 'no additions or modifications' provision. The arbitrator cannot be effective as the parties' surrogate for giving shape to their necessarily amorphous contract unless he is allowed to fill the inevitable lacunae."[8]

2. Arbitrator's Authority to Determine Procedural Arbitrability. Another case which tested the extent to which an arbitrator was bound by specific contractual language, though in the context of procedural arbitrability, was *Detroit Coil Co.* v. *Int'l Ass'n of*

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[7]*Machinists Dist. No. 145* v. *Modern Air Transport,* 495 F.2d 1241, 1244, 86 LRRM 2886 (5th Cir.), *cert. denied,* 419 U.S. 1050, 87 LRRM 3035 (1974).

[8]St. Antoine, *Judicial Review of Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny,* 75 Mich. L. Rev. 1137, 1153 (1977).

Machinists Lodge No. 82.[9] The contract contained a provision that unless the local union notified the company "within eight (8) working days from the date" when the union made the decision to arbitrate, "the grievance or grievances shall be considered settled." The union made its decision to arbitrate at a meeting on April 6, 1976, and notified the company by letter dated April 15, which the company did not receive until April 30. The company responded that it considered the grievance settled, but the union persisted in seeking arbitration, to which the company would not agree. The parties did agree, however, to submit the arbitrability issue to arbitration.

The arbitrator ruled that the case should be heard on its merits, despite the union's failure to meet the literal notification requirements in the contract, because of several factors: (1) The letter containing the notification was dated within the eight-day period. (2) No evidence was submitted to indicate that the union considered the grievance settled. (3) The parties had not in the past used the excuse of time limits to deny a grievance. (4) Union testimony indicated it had not insisted on a company response within a 48-hour contractual requirement. (5) The union had waived the time requirements at Step 3 in order to give the owner of the company, who was out of the city, an opportunity to make his input in the company's response. The arbitrator also took note of the good relations between the union and the company, indicating that a denial of arbitrability would result in a deterioration of that relationship.

In an action by the company to vacate the award, the federal district court refused to vacate, finding that the arbitrator had acted on factual determinations that he had made based on past practice of the parties. However, the Court of Appeals for the Sixth Circuit reversed, holding that the arbitrator was "without authority to disregard or modify plain or unambiguous provisions," that there was no evidence in the record that the parties had waived this particular timeliness requirement at any time in the past, and that the conclusion that a denial of the grievance would result in a deterioration of the relationship between the parties amounted to the arbitrator's "dispensing his own brand of industrial justice." The circuit's opinion made no mention whatever of *John Wiley & Sons* v. *Livingston,*[10] in which the Supreme Court had declared that "procedural questions which

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[9]592 F.2d 575, 100 LRRM 3138 (6th Cir. 1979).
[10]376 U.S. 543, 55 LRRM 2769 (1964).

grow out of the dispute and bear on [the] final disposition should be left to the arbitrator," thus distinguishing procedural arbitrability from substantive arbitrability, the latter being the province of the courts.[11] It is true that under *John Wiley* the courts were not totally ousted from review of questions concerning procedural arbitrability, but the arbitrator's ruling on such questions would have to be tested against the stringent limits of *Enterprise Wheel* standards, the same as would be done for other contractual or substantive determinations made by an arbitrator. In disagreeing with the arbitrator's finding of past practice in *Detroit Coil,* however, the Sixth Circuit seems to have stretched the narrow limits of judicial review applicable to determination of procedural arbitrability. Arbitrators are thus put on notice—particularly in the Sixth Circuit—that determinations of time-period compliance may be subject to closer judicial scrutiny unless, of course, the *Detroit Coil* decision is reversed or confined to its facts.

3. Arbitrator's Authority to Ignore or Reject Previous Awards Interpreting the Same Contractual Language. In *Westinghouse Elevators of Puerto Rico, Inc.* v. *S.I.U. de Puerto Rico,*[12] the First Circuit affirmed a district court's ruling that it lacked jurisdiction to review an arbitration award interpreting a collective bargaining agreement provision. The challenged award had represented a complete departure from a previous award interpreting the same provision in a prior agreement between the same parties. The subject clause provided for payment of an expense allowance to employees working outside the metropolitan area of San Juan, Puerto Rico. In 1969, an arbitrator had interpreted the provision to exclude payment unless the employees actually incurred expenses. The arbitrator in the current case, however, construed the same provision to mean that employees must receive the allowance whether or not they actually incurred expenses.

The company brought the action to vacate, arguing the binding effect of the prior award. Subsequent to the first award, the parties had renegotiated the contract without modifying the operative language of the subject provision, thus tacitly adopting the first award and incorporating it into the present agree-

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[11] *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960).

[12] 583 F.2d 1184, 99 LRRM 2651 (1st Cir. 1978).

ment. The company therefore contended that the second arbitrator modified the terms of the contract, thereby manifesting his "infidelity" to the agreement.

The district court refused to vacate, and the First Circuit affirmed. Based on common-law principles of construction, the court of appeals noted that it might have disagreed with the arbitrator's view of the effect of a prior award, but it would refrain from second-guessing the arbitrator. It declared that it was not the court's task to interpret the contract: "It is the arbitrator's job . . . [A]rbitrators are not bound to follow judicial rules of construction and interpretation. An arbitrator who interprets a contract differently from a court has not necessarily exceeded his authority by modifying the contract."

In *Riverboat Casino* v. *Local Joint Exec. Board of Las Vegas,*[13] the Ninth Circuit also held that an arbitrator was not bound by a prior award interpreting the same language presently before the arbitrator. The arbitrator had ordered reinstatement of an employee who had been discharged for excessive absenteeism and tardiness, holding that the discharge was not for "good cause." In its action to vacate the award, the company argued that the arbitrator exceeded his authority by failing to defer to a prior award that had interpreted the "good cause" provision of the same agreement (though involving a different employer and employee) in relation to excessive absenteeism and tardiness. The district court refused to vacate, and the court of appeals affirmed, basing its decision simply on a rejection of the doctrine of *stare decisis* in reviewing arbitration awards. The court said:

> "Absent a provision in the contract to the contrary, the arbitrator could reasonably conclude that strict adherence to the doctrine of stare decisis would impair the flexibility of the arbitral process contemplated by the parties. But even if the arbitrator were incorrect in this assessment of the parties' intent and erred in not following the prior arbitral award, we would not for that reason vacate the award."

4. Arbitrator's Authority in the Face of Competing Federal Policy Expressed in Other Statutes. World Airways Inc. v. *Int'l Brotherhood of Teamsters*[14] was a case which affirmed a district court's order that had partially vacated an arbitration award involving the discipline of an airline pilot. The Ninth Circuit held that the arbitrator had exceeded his authority in fashioning a remedy. Follow-

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[13]578 F.2d 250, 99 LRRM 2374 (9th Cir. 1978).
[14]578 F.2d 800, 99 LRRM 2325 (9th Cir. 1978).

ing a series of incidents which had led the employer to conclude that grievant's judgment had deteriorated to a point where he posed a threat to life if he were to remain a pilot-in-command, the company suspended grievant for two months and permanently demoted him from pilot-in-command to co-pilot. The arbitrator found just cause for demotion but not for suspension, and further ordered the company to retrain grievant and give him an opportunity to requalify for his former position. Arguing that retraining could improve only technical skills, not judgment, and that requalification tests could not measure judgmental deterioration, the company petitioned the district court for an order to vacate the remedy. After receiving evidence and making its own findings of fact, including a finding that retraining would not remedy the deficiencies in judgment that led to grievant's demotion, the court granted the petition.

The Ninth Circuit assented to the district judge's engaging in fact finding and upheld the vacation of the award, holding that this was the rare case in which the court does have the power to vacate an arbitration award because the arbitrator had gone beyond the scope of his authority.[15] The court explained that the arbitrator had exceeded his authority by usurping the airline's duty under federal statutes and regulations, which was "to determine the competency of its pilots in the interest of public safety. . . ."[16]

Recognizing the competing federal interests at stake, the court stated: "Although the policy of resolving labor differences is strong, there is also a strong federal policy in ensuring the safety of air travel." It therefore held that the district judge had correctly balanced the competing federal interests in determining that under these unusual circumstances, the arbitrator had exceeded his authority.

Since the "competing" interest involved safety, the Court of Appeals addressed the Supreme Court's decision in *Gateway Coal Co.* v. *UMW*[17] where the Court had upheld an injunction against a strike of coal miners over a dispute involving employee safety,

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[15]Although the collective bargaining agreement provided for an Adjustment Board pursuant to the Railway Labor Act, 45 U.S.C. § 184 (1970), the union and the employer had agreed to waive the use of the Adjustment Board and submit the grievance to an arbitrator instead. 578 F.2d 800, 801, n. 3. The court of appeals did not differentiate the case on the basis of its Railway Labor Act origins.

[16]14 C.F.R. § 121.413 (4) (ii).

[17]414 U.S. 368, 85 LRRM 2049 (1974).

holding that safety disputes were a proper subject of arbitration under the parties' collective bargaining agreement. The court in the instant case narrowly read *Gateway Coal* as a dispute involving *employee* safety and distinguished it in a footnote, indicating its concern "with the safety of the air traveling public, who are not parties to the collective bargaining agreement and are unable to participate in the selection of the arbitrator."

B. Relation of the Arbitration Process to the National Labor Relations Board

1. The Spielberg *Doctrine.* In a recent decision, the National Labor Relations Board strongly reaffirmed its *Spielberg* doctrine.[18] In *Kansas City Star Co.*,[19] the NLRB dismissed the union's unfair labor practice charge, holding that "the facts and issues involved in the alleged unfair labor practices have been fully and completely decided by an arbitrator pursuant to grievances filed under the parties' bargaining agreement." The company rescinded the collective bargaining agreement as a self-help response to what it asserted was a breach by the union of the contract's no-strike provision; however, it agreed to arbitrate any grievances that had arisen while the agreement was in effect.

After seven days of hearings in which the parties fully participated and after which they filed posthearing briefs, the arbitrator upheld all but two of the discharges. The union brought unfair labor practice charges under Section 8(a)(3) of the act for the discharges and under Section 8(a)(5) for the rescission of the contract.

The Board unanimously deferred to the arbitration award insofar as it upheld the original discharge and the discharge of 94 of the striking co-workers. Three members (Murphy, Penello, and Truesdale) also deferred as to the discharge of the ninety-fifth striker, union vice president Ellis, and also upheld the legality of the company's rescission of the contract. The majority held that the arbitration award met the *Spielberg* standards.[20] The majority stated:

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[18] *Spielberg Mfg. Co.*, 112 NLRB No. 1080, 36 LRRM 1152 (1955).

[19] 235 NLRB No. 119, 98 LRRM 1320 (1978).

[20] "The Board will defer to an arbitration award where the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act." 98 LRRM at 1321.

"We find that the arbitration award herein meets those standards. A full factual record was made before the arbitrator; he considered and rejected the contention that the discharged employees had been engaged in protected activities; and he found that the Union, through its vice president and agent, was responsible for the work stoppage. All issues contained in the complaint were presented, considered, and determined in the arbitration proceeding."[21]

Member Penello reproached the dissenters for "again pay [ing] lip service to Spielberg," charging that, "They have not *deferred* but, instead, after de novo review of the facts, have *adopted* that part of the award with which they agree."[22] Noting that his view of the *Spielberg* doctrine was now the majority view, he proclaimed that "this longstanding, sometimes tripping, lately falling, but not yet downed Board precedent has been revived to stand anew."[23]

The dissenters, after examining the record, found that vice president Ellis had not participated in the strike and that a breach of the no-strike clause could not be attributed to the union through him; thus both his discharge and the rescission of the contract violated the act. They willingly reviewed the facts regarding Ellis's conduct notwithstanding that the arbitrator cited testimony of three witnesses that they had heard Ellis threaten a work stoppage. Although Ellis denied making the threat, the arbitrator expressly found that Ellis was not a "credible witness."

Member Truesdale, in agreement with the majority, specially concurred and responded to the dissent. After listing the *Spielberg* "criteria," he expressed this view of the operative rule:

"The parties have chosen this [arbitration] forum, the Board binds them to the arbitrator's decision unless they can show that one of the criteria has not been met. The Board has not, however, refused to defer to an arbitrator's decision simply because, in the Board's judgment, the record evidence is susceptible of other inferences."[24]

His major criticism of the dissenters centered upon their *de novo* review of the evidence: "This willingness to review the evidence exhaustively and then substitute their judgment for that of the arbitrator can only serve to undermine the arbitral process."[25]

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[21] *Ibid.*
[22] *Id.* at 1322, n. 3. Emphasis in original.
[23] *Ibid.*
[24] 98 LRRM at 1322–23.
[25] *Id.* at 1323.

The dissenters had argued, however, that their refusal to defer was consistent with *Spielberg* because the issue of rescission had not been specifically decided by the arbitrator, to which Member Truesdale responded:

> "[W]hile the arbitrator did not pass on the legality of rescission he was required to rule on every factual and legal question necessary to the resolution of this issue, since the legality of rescission . . . turns on whether [the company] could legally discharge the strikers, and whether the strike was legal. Both of these issues were considered fully by the arbitrator in the context of the pending unfair labor practices. . . . Thus, my decision rests on the unique relationship between the issues decided and the one omitted—since all of the factual and legal findings necessary to the resolution of the 8(a) (5) allegation concerning rescission were also necessary to a determination of the legality of the discharges."[26]

Shortly after the *Kansas City Star* decision, Member Truesdale reviewed the history of the *Spielberg* doctrine[27] and noted that the Board had been deferring to arbitrator's decisions "slightly less frequently" than it had previously, and that statistics appeared to show "that Spielberg has always been honored more in the breach than in the observance." He cited *Douglas Aircraft*[28] and *Filmation Associates, Inc.*,[29] as examples of small retreats from *Spielberg,* but he contended that the *Kansas City Star* decision demonstrated the continuing strength of the deferral doctrine. He asserted, "I do not believe the Board should regard the arbitrator as a kind of hearing officer whose role is limited to gathering evidence to permit the Board to make a decision." *Kansas City Star* seems to support that thesis.

2. Run-Away Shops and Potential NLRB Jurisdiction. A decision of the Court of Appeals for the Fifth Circuit raises serious questions about the continuing vitality of the *Enterprise Wheel* doctrine in the area of arbitral remedies and potential NLRB jurisdiction. In *General Warehousemen, Teamsters Local 767* v. *Standard Brands, Inc.*,[30] the court of appeals, sitting *en banc,* partly set aside a prior decision of its panel[31] and held that an arbitrator's remedy for a run-away shop violation of a collective bargaining

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[26]*Id.* at 1324.
[27]Address to 31st National Conference on Labor, 99 LRR 172 (1978).
[28]234 NLRB No. 80, 97 LRRM 1242 (1978).
[29]227 NLRB No. 1721, 94 LRRM 1470 (1977).
[30]579 F.2d 1282, 99 LRRM 2377 (5th Cir. 1978).
[31]560 F.2d 700, 96 LRRM 2682 (5th Cir. 1977).

agreement was repugnant to the National Labor Relations Act. It upheld the arbitrator's finding of contractual violations but vacated that part of his remedy which (1) ordered the transfer of certain employees from the Dallas plant, which the employer was closing, to its newly built replacement plant in Denison 70 miles away and (2) required the seniority of the transferred employees to be dated from the day the new plant opened.

The employees at the Dallas plant had been represented by the Teamsters union under a contract that contained specific clauses relating to plant relocation and transfer rights of bargaining-unit employees, including the following provision: "(e) Should the operation at any location be transferred permanently to a new or existing plant the available jobs at such plant will not be filled until employees of the affected plant have been given reasonable notice and the opportunity to fill them in accordance with their seniority and to transfer to the new plant." The court's *en banc* decision denying application of the arbitrator's transfer remedy, permitting a number of Dallas employees to fill certain jobs scheduled to be transferred to the Denison plant, was based on the existence of representational rights by another union, the International Association of Machinists, which had recently won an election and obtained representational rights at the new location.

Judge Coleman, writing the *en banc* opinion, noted "that if the Denison plant had not been organized prior to the award, it would have been readily enforceable in its entirety." Although there had been no grievance determination or NLRB decision on the subject, the opinion stated that the remedial provisions of the award "would require the employer to violate the terms of another collective bargaining agreement." Accordingly, the award was treated as "repugnant" to the NLRA because it "is in direct irreconcilable conflict with the rights of the Denison employees, under the NLRA, to be represented by the IAM, and through it, to negotiate and contract for wages and working conditions at Denison." Notwithstanding that conclusion, the court stated: "[W]e certainly express no opinion as to whether enforcement of this award in the circumstances of this case would constitute an unfair labor practice in violation of 29 U.S.C. § 158(a)(3). *That is a task for the Board.*"[32]

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[32]Fn. 7 of the *en banc* opinion. Emphasis added.

The far-reaching power to set aside an arbitral remedy, which the *Standard Brands* decision seems to vest in a reviewing court where the asserted conflict with the National Labor Relations Act is only potential, is pointed up by Judge Tuttle's opinion for the panel majority[33] (which was set aside by the *en banc* opinion) and by his dissenting opinion to the *en banc* decision.[34]

Judge Tuttle wrote: "It is one thing for a court to refuse to enforce an arbitration award when the NLRB protests that enforcement would impair Board processes. It is another to 'protect' the Board's processes when no unfair labor practice charge is presently pending and no request for a stay of enforcement has been heard from the Board."[35]

Judge Tuttle noted that there was no facial, indisputable conflict between the arbitrator's award and NLRB action, and, on the contrary, there was a memorandum from the NLRB General Counsel's Division of Advice which expressly allowed the withdrawal of an unfair labor practice charge that complained of the "bumping" of a Denison employee by a transferee from the Dallas plant. The memorandum commented:

> "[T]he Employer's actions in transferring a Dallas employee to Dennison [sic] and applying Dallas seniority to him was considered to have been in compliance with, and, therefore, privileged by the arbitration award . . . [I]t cannot be said that this arbitral award, as modified, unlawfully interferes with the Section 9(a) rights of the Machinists in Dennison."[36]

If the *Standard Brands* decision correctly defines the respective roles of court and arbitrator where potential NLRB jurisdiction exists, the doctrine of limited reviewability of arbitration awards expressed by the Supreme Court in *Enterprise Wheel* will have been significantly eroded. This follows because the Fifth Circuit's decision does not require an actual conflict between arbitral award and NLRB action, but only a court finding that the award is "repugnant" to the act—a finding that was made in *Standard Brands* without even the issuance of an unfair labor practice complaint. [Editor's note: Petition for certiorari was filed in *Standard Brands* on 2/21/79 (No.78-1300); however, on

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[33] *Supra* note 31.

[34] 99 LRRM at 2387. The dissenting opinion was also joined by Judges Wisdom, Goldberg, Rubin, and Vance.

[35] 96 LRRM at 2685.

[36] *Standard Brands, Inc.*, 1976–77 CCH NLRB ¶ 20,020, at 32–030, quoted in the panel majority decision, 96 LRRM at 2685.

6/28/79 it was dismissed under S. Ct. Rule 60 following settlement of the case after the Teamsters Union was certified as bargaining representative of the employees at the Denison plant.]

C. Boys Markets[37] *Injunctions—Status Quo Injunctions Sought by Unions Pending Arbitration*

Teamsters Local 71 v. *Akers Motor Lines, Inc.*[38] was a case in which the Fourth Circuit Court of Appeals affirmed the issuance of an injunction obtained by a union to prevent a company in the process of liquidating its business from further encumbering its capital assets pending completion of an arbitration case concerning layoffs and earned vacation monies for laid-off employees.

The company was engaged in the interstate trucking business, handling "general commodities." Because it was unable to handle "special commodities" at the rate provided in the collective agreement, it negotiated with the union in 1975 for a rider exempting special commodities from the collective agreement. In October 1977, the company began to liquidate its general commodities division, selling and encumbering its tractors, trailers, and other assets. By February 1978, it had laid off all but two of its approximately 1200 drivers and had hired 166 nonunion drivers. Between September 29, 1977, and March 1, 1978, the union filed seven grievances, two alleging that the company was trying to freeze out the union and the others relating to vacation-pay violations.

The union then sought its injunction, which the federal district court granted because of the danger that the subject matter of the arbitration might be irreparably dissipated. The Fourth Circuit affirmed, relying upon its 1976 decision in *Lever Bros. Co.* v. *Int'l Chemical Workers Union Local 217,*[39] in which it had declared that: "An injunction to preserve the *status quo* pending arbitration may be issued either against a company or against a union . . . where it is necessary to prevent conduct by the party enjoined from rendering the arbitral process a hollow formality. . . ."

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[37]*Supra* note 1.
[38]582 F.2d 1336, 99 LRRM 2601 (4th Cir. 1978).
[39]554 F.2d 115, 123, 95 LRRM 2438, 2443 (4th Cir. 1976).

The company asserted that its liquidation activities, unlike a *Boys Markets* strike, were not in response to the disputes, to which the court replied that the employer's motives were irrelevant, for "[i]f Akers-Central is allowed to continue its process of liquidation and disposition of assets, any victory by the union at the arbitration table may be meaningless."

Although the circuit court agreed with the lower court's treatment of the issue of injunctive relief, it criticized the district judge's aggressive fact finding on the merits of the subject grievances. It pointed out that the judge had thereby exceeded his traditional function in equity, which was to make only those findings necessary to a determination of the plaintiff's likelihood of success on the merits: "[A] plaintiff . . . need only establish that the position he will espouse in arbitration is sufficiently sound to prevent the arbitration from being a futile endeavor."[40] The district judge was also criticized for his refusal to issue an order restricting the use of evidence developed through discovery at the injunction in the subsequent arbitration proceedings. But since the prejudice flowing from these two errors was deemed minimal, the circuit court declined to modify the order.

This decision demonstrates that the logic of *Boys Markets,* which had its inception as a device to enjoin strikes over arbitrable grievances, has inevitably led to a broader application whereby a court issues its injunction as an equitable remedy to protect a broad range of subject matter including the process of arbitration itself. Hence, *Boys Markets* becomes as useful to unions as it has been to employers. Such a use conforms this type of injunction to the practice that has prevailed under the Railway Labor Act[41] since the Supreme Court's decision in *Locomotive Engineers* v. *Missouri-Kansas-Texas R.R. Co.,*[42] where the Court noted that by the time an Adjustment Board (statutory arbitration board) issued a decision, it might well be impossible to make the grieving employees whole in any realistic sense:

> "If this be so, the action of the district judge . . . would operate to preserve [the Board's] jurisdiction by preventing injury so irrepa-

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[40] ___F.2d at ___, 99 LRRM at 2605, quoting *Lever Bros.*, 554 F.2d at 120.
[41] 45 U.S.C. §§ 151–88.
[42] 363 U.S. 528, 46 LRRM 2429 (1960).

rable that a decision of the Board in the unions' favor would be but an empty victory.

"It is true that preventing the Railroad from instituting the change imposed upon it the burden of maintaining what may be a less efficient and more costly operation. The balancing of these competing claims of irreparable hardship is, however, the traditional function of the equity Court, the exercise of which is reviewable only for abuse of discretion."