APPENDIX C

ARBITRATION AND RIGHTS UNDER COLLECTIVE AGREEMENTS

REPORT OF THE COMMITTEE ON LAW AND LEGISLATION*

During the calendar year 1964, the courts encountered an increasing number of cases involving arbitration and related subjects of national labor policy. By mid-December, there were over 175 reported cases in which courts fashioned federal common law for the enforcement of collective bargaining agreements pursuant to Section 301 of the LMRA. Suits brought by employers, unions and individuals based upon rights arising under Section 301 presented for adjudication novel questions of emerging national labor policy that required the courts to exercise "judicial inventiveness" in keeping with the Supreme Court's exhortation in *Lincoln Mills.*[1]

I. THE SUPREME COURT

Leading the way in this process of fashioning federal law was the Supreme Court, which rendered decisions touching on subjects such as (1) the respective roles of arbitrators and courts in determining questions of procedural arbitrability;[2] (2) the survival of rights in a collective bargaining agreement after a change in ownership of a business;[3] (3) the rights of an individual em-

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1 *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448 (1957).

2 *John Wiley & Sons, Inc.* v. *Livingston,* 376 U.S. 543 (1964) (Goldberg, J., not participating).

3 *Ibid.*

ployee under Section 301;[4] (4) the extent to which courts are preempted from adjudicating disputes arising out of collective bargaining agreements when the subject matter of the dispute is arguably within the competence of the NLRB;[5] and (5) the breach of a key provision of a collective agreement as a defense to the non-breaching party's duty to arbitrate.[6]

A. *John Wiley & Sons, Inc.*

In *John Wiley & Sons, Inc.* v. *Livingston,*[7] the Supreme Court established certain principles for demarcating the respective functions of courts and arbitrators. Interscience Publishers, Inc., a small publishing firm, had a collective bargaining agreement containing an arbitration clause with a union representing its employees. Interscience merged with a large publisher, John Wiley & Sons, Inc. and as a result, it ceased doing business and its memployees were transferred to Wiley, the surviving corporation. Although Wiley had not assumed the obligations of Interscience under the latter's labor contract, the union demanded that Wiley, as successor to Interscience, honor certain vested rights arising out of the Interscience labor contract. Wiley refused to accede to this demand on the grounds that the merger terminated the collective bargaining agreement and that the union had lost its status as the representative of the former Interscience employees when they were commingled with the larger non-unionized Wiley unit. A unanimous opinion written for the Court by Mr. Justice Harlan, contained four significant holdings:

1. The Court held that the question whether the arbitration provisions of the agreement survived the merger is for a court rather than an arbitrator to decide.[8] In the Court's words:

> "The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such

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4 *Humphrey* v. *Moore,* 375 U.S. 335 (1964).
5 *Carey* v. *Westinghouse Elec. Corp.,* 375 U.S. 261 (1964).
6 *Packing House Workers* v. *Needham Packing Co.,* 376 U.S. 247 (1964). The Supreme Court also decided a case concerning the arbitrability of a subcontracting dispute. See text accompanying note 79 *infra.*
7 376 U.S. 543 (1964).
8 *Accord, Hart Sales Corp.* v. *Lubliner,* 56 LRRM 2901, 50 CCH Lab. Cas. Par. 19,157 (N.Y. Sup. Ct. 1964).

> a duty. Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori,* it cannot be compelled to arbitrate if an arbitration clause does not bind it at all."

2. On the merits, the Court held that Wiley, as the successor employer, was obligated to arbitrate the union's grievances in accordance with the terms of the Interscience labor contract. The Court viewed this holding as being compelled by the objectives of the national labor policy, reflected in the established principles of federal law, which "require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." Although conceding that the traditional principles of contract law would not bind an unconsenting successor to a contract, the Court conceived of a collective bargaining agreement not as an ordinary contract but rather as a "generalized code" constituting the "common law of a particular industry or of a particular plant." The Court attempted to limit the breadth of this holding by pointing out that the duty to arbitrate will not survive a change in ownership or corporate structure of an enterprise if there is a lack of substantial continuity of identity in the business or if a union fails to notify a successor-employer of its claim.

Prior to *Wiley,* the federal courts had utilized traditional contract doctrines in refusing to bind a successor-employer to the terms of its predecessor's collective bargaining agreement, absent a showing that the change in ownership or corporate structure was merely a ruse to enable the predecessor employer to evade obligations imposed by its labor contract.[9] Apparently, the federal courts have interpreted the successor-employer holding in *Wiley* to apply not only to merger situations but to every change in corporate ownership in which there is a substantial similarity of operation and identity of the business enterprise before and after the change. The Third Circuit Court of Appeals, in *United*

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[9] *Steelworkers Union* v. *Reliance Universal Inc.,* 56 LRRM 2046, 49 CCH Lab. Cas. Par. 18,854 (N.D. Pa. 1964), *rev'd.,* 56 LRRM 2721, 50 CCH Lab. Case. Par. 19,105 (3rd Cir. 1964); *Wackenhut Corp.,* v. *United Plant Guard Workers,* 55 LRRM 2554, 49 CCH Lab. Cas. Par. 18,794 (9th Cir. 1964), *rehearing opposite conclusion reached,* 56 LRRM 2466.

Steelworkers v. *Reliance Universal, Inc.*[10] and the Ninth Circuit Court of Appeals, in *Wackenhut Corp.* v. *International Union, United Plant Guard Workers,*[11] have held that, based upon *Wiley,* federal labor policy obligates the purchaser of a going business to honor an arbitration clause contained in a collective bargaining agreement entered into by its predecessor.

3. In rejecting *Wiley's* argument that the union's claims were outside the scope of the arbitration clause since the agreement did not embrace post-merger claims and because some grievances arose after the expiration of the contract, the Court held that the union's claims were not so unreasonable as to be regarded as non-arbitrable because the predecessor and the union could have agreed to the accrual of rights during the term of the agreement and the realization of such rights following its expiration. Subsequent to *Wiley,* the Seventh Circuit Court of Appeals in *Piano Workers* v. *Kimball Co.,*[12] rejected a union's claim that the employer was obligated to arbitrate a dispute over seniority rights in the case of the removal of a plant from Chicago to Southern Indiana when the dispute arose after the expiration of the agreement. The Court attempted to distinguish *Wiley* on the grounds that in *Wiley* the dispute over seniority rights arose prior to the termination of the contract and the wholesale transfer of employees could have been accomplished with ease since the new plant was in the same city; whereas, in *Kimball* such a transfer from Chicago to Southern Indiana would be a "drastic change". The Supreme Court reversed this case in a one sentence per curiam opinion citing *Wiley.*[13]

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10 56 LRRM 2721, 50 CCH Lab. Cas. Par. 19,105 (3rd Cir. 1964); *accord, Burt Bldg. Materials Corp.* v. *Local Teamsters Union,* 57 LRRM 2571, 50 CCH Lab. Cas. Par. 51,206 (N.Y. Sup. Ct. 1964); *cf. Schoenholtz* v. *Benley Lingerie Inc.,* 56 LRRM 2799, 49 CCH Lab. Cas. Par. 51,114 (N.Y. Sup. Ct. 1964) (successor corporation, having participated in arbitration, precluded from questioning arbitrator's jurisdiction).

11 56 LRRM 2466, 49 CCH Lab. Cas. Par. 19,058 (9th Cir. 1964).

12 56 LRRM 2644, 50 CCH Lab. Cas. Par. 19,097 (7th Cir. 1964), *rev'd.,* 50 CCH Lab. Cas. Par. 19,382 (U.S. Sup. Ct. 1964).

13 *Piano Workers* v. *Kimball Co.,* 50 CCH Lab. Cas. Par. 19,382 (U.S. Sup. Ct. 1964); see also, *Worcester Stamped Metal Co.* v. *United Steelworkers,* 57 LRRM 2359, 50 CCH Lab. Cas. Par. 19,322 (D. Mass. 1964) (union not barred from arbitrating a grievance arising after the expiration of labor contract); *Office Employees Union* v. *Sheet Metal Workers,* 56 LRRM 2529, 50 CCH Lab. Cas. Par. 19,126 (E.D. Ark. 1964) (grievance arising after cancellation notice but prior to expiration of agreement held arbitrable).

4. Wiley's final objection to arbitration was that the union had failed to comply with the first two steps in the grievance procedure outlined in the Interscience labor agreement. Wiley urged that the question whether the formal pre-requisites to arbitration had been met should be decided by the Court rather than the arbitrator. In holding that questions of procedural arbitrability are for an arbitrator to determine, the Court resolved an issue that had divided the lower federal courts.[14] This conclusion was primarily predicated on the reasoning that procedural issues are usually so inexorably intertwined with the merits of a dispute that it is impossible to separate them. This delineation of the respective roles of arbitrators and courts in determining the arbitrability of an issue has since been observable in the opinions of lower courts.[15] Thus, issues relating to the timeliness of the filing of a grievance,[16] the right to consolidate cases,[17] mootness [18] or prematurity [19] of a grievance, have been left for the arbitrator's determination.

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14 *Compare, Brass Workers Union* v. *American Brass Co.,* 45 LRRM 2379, 38 CCH Lab. Cas. Par. 66,049 (7th Cir. 1959) and *Boston Mut. Life Ins. Co.* v. *Insurance Agents' Union,* 42 LRRM 2513, 35 CCH Lab. Cas. Par. 71,715 (1958) with *Deaton Truck Line, Inc.* v. *Local Union 612, International Bhd. of Teamsters,* 57 LRRM 2728, 47 CCH Lab. Cas. Par. 18,159 (5th Cir. 1963) and *Local 748, International Union of Elec. Workers* v. *Jefferson City Cabinet Co.,* 52 LRRM 2513, 46 CCH Lab. Cas. Par. 18,100 (6th Cir. 1963).

15 See, *Worcester Stamped Metal Co.* v. *United Steelworkers,* 57 LRRM 2359, 50 CCH Lab. Cas. Par. 19,322 (D. Mass. 1964); *Brotherhood of Teamsters* v. *Consolidated Freightways Corp.,* 56 LRRM 3033, 50 CCH Lab. Cas. Par. 19,189 (9th Cir. 1964); *Office Employees Union* v. *Sheet Metal Workers,* 56 LRRM 2529, 50 CCH Lab. Par. 19,126 (E.D. Ark. 1964); *Retail Clerks Union* v. *Kroger Co.,* 56 LRRM 2893, 50 CCH Lab. Cas. Par. 19,146 (E.D. Ark. 1964); *United Steelworkers* v. *American Int'l Aluminum Corp.,* 56 LRRM 2682, 50 CCH Lab. Cas. Par. 19,104 (5th Cir. 1964); *International Union, UAW* v. *Daniel Radiator Corp.,* 55 LRRM 3001, 49 CCH Lab. Cas. Par. 18,815 (5th Cir. 1964). *But see, Long Island Lumber Co.* v. *Martin,* 50 CCH Lab. Cas. Par. 51,216 (N.Y. Sup. Ct. 1964) (procedural arbitrability to be determined by arbitrator only when tied into the merits of the dispute).

16 *Avco Corp.* v. *Mitchell,* 57 LRRM 2119, 50 CCH Lab. Cas. Par. 19,221 (6th Cir. 1964); *Amalgamated Assn. of Street, Elec. Ry. & Motor Coach Employees* v. *Trailways of New England, Inc.,* 56 LRRM 2186, 49 CCH Lab. Cas. Par. 19,081 (D. Mass. 1964); *Maioglio* v. *Dining Room Employees Union,* 56 LRRM 2681, 50 CCH Lab. Cas. Par. 51,118 (N.Y. Sup. Ct. 1964).

17 *Local 469, International Bhd. of Teamsters* v. *Hess Oil & Chemical Corp.,* 55 LRRM 2475, 49 CCH Lab. Cas. Par. 18,822 (D. N.J. 1964).

18 *Standard Screw Co.* v. *International Union, UAW,* 56 LRRM 2978, 50 CCH Lab. Cas. Par. 19,172 (6th Cir. 1964).

19 *Ibid.*

B. *Rights of Individual Employees Under Section 301*

In 1962, the Supreme Court decided *Smith* v. *Evening News*,[20] which opened the door for individual employees to maintain suits under Section 301.[21] In January 1964, the Court handed down *Humphrey* v. *Moore*,[22] which shed more light on the complex subject of the remedies available for the effectuation of individual rights under collective bargaining agreements. *Humphrey* held that individual employees could maintain an action under Section 301 to enjoin the enforcement of a joint union-employer settlement agreement allegedly constituting a breach of the union's duty of fair representation. The majority conceived of the union's duty of fair representation to be an implied contractual duty, whereas Justices Goldberg and Brennan, who concurred in the result, viewed the employees' rights as flowing from the NLRA rather than from the labor agreement.

Based upon the holdings in *Smith* and *Humphrey*, courts have been busy formulating federal law to govern the enforcement of individual rights in collective agreements. It is clear that the individual must exhaust all available remedies established by the grievance machinery of the labor contract before bringing suit against the employer for breach of contract based upon an arbitrable grievance.[23] Thus, an individual's failure to comply with the time limitations prescribed by the grievance procedure will bar his suit even if the individual was ignorant of such a limitation.[24] Absent a showing that a union failed to represent the employee fairly, the employee will also be barred if the union

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20 371 U.S. 195 (1962).

21 See, e.g., *Harmon* v. *Martin Bros. Container and Timber Products Corp.*, 56 LRRM 2025, 48 CCH Lab. Cas. Par. 18,699 (D. Ore. 1964).

22 375 U.S. 335 (1964).

23 *Aguayo* v. *Jones & Laughlin Steel Corp.*, 50 CCH Lab. Cas. Par. 19,373 (Mich. Cir. Ct. 1964); *Ware* v. *General Steel Indus., Inc.*, 50 CCH Lab. Cas. Par. 51,207 (Mo. Ct. App. 1964); *Broniman* v. *Great Atl. & Pac. Tea Co.*, 56 LRRM 2505, (E.D. Mich. 1964); *Kennedy* v. *Bell Tel. Co.*, 56 LRRM 2153, 49 CCH Lab. Cas. Par. 18,991 (Pa. C.P. 1964); *Lo Bue* v. *Pennsylvania RR.*, 56 LRRM 2656, 49 CCH Lab. Cas. Par. 51,113 (N.Y. Sup. Ct. 1964); *Smith* v. *General Elec. Co.*, 55 LRRM 2474, 49 CCH Lab. Cas. Par. 51,074 (Wash. 1964). *But see, Thommen* v. *Consol. Freightways*, 57 LRRM 2292, 50 CCH Lab. Cas. Par. 19,229 (D. Ore. 1964) (exhaustion not required where grievance machinery only effective in disputes between union and employer and contains no provision for redress of employee grievances).

24 *Smith* v. *General Elec. Co.*, *supra* note 23, *Kennedy* v. *Bell Tel. Co.*, *supra* note 23.

refuses to process his grievance [25] or if there is an unfavorable settlement of his grievance by a joint union-employer committee.[26] Also, the employee has no right to compel [27] or stay [28] arbitration or to personally arbitrate a grievance [29] and if the grievance is arbitrated the employee is bound by the award.[30] The individual employee has no standing to vacate [31] or enforce [32] the award.

If the employee can show a breach of the union's duty of fair representation he can bring suit against the union and employer on the basis of *Humphrey*,[33] and exhaustion of remedies may not be required.[34] Federal courts will not be deprived of jurisdiction because the union conduct which is the subject of the action is arguably an unfair labor practice,[35] but it is not so clear that the

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25 *Billinski* v. *General Motors Corp.*, 56 LRRM 2312, 50 CCH Lab. Cas. Par. 51,117 (N.Y. Sup. Ct. 1964); *Broniman* v. *Great Atl. & Pac. Tea Co.*, 56 LRRM 2505 (E.D. Mich. 1964); *Pacilio* v. *Pennsylvania RR.*, 56 LRRM 2542, 50 CCH Lab. Cas. Par. 19,117 (S.D.N.Y. 1964).

26 *Zeaner* v. *Highway Truck Drivers & Helpers Union*, 57 LRRM 2361, 50 CCH Lab. Cas. Par. 19,330 (E.D. Pa. 1964); *Bieski* v. *Eastern Auto. Forwarding Co.*, 56 LRRM 2775, 50 CCH Lab. Cas. Par. 19,122 (D. Del. 1964); *Cortez* v. *California Motor Express Co.*, 49 CCH Lab. Cas. Par. 51,084 (Cal. Dist. Ct. App. 1964).

27 *Brandt* v. *United States Lines, Inc.*, 55 LRRM 2665, 49 CCH Lab. Cas. Par. 18,733 (S.D.N.Y. 1964); *cf. Mine Workers* v. *Martin Marietta Corp.*, 55 LRRM 2592, 49 CCH Lab. Cas. Par. 18,798 (7th Cir. 1964).

28 *King Records, Inc.* v. *Brown*, 57 LRRM 2351, 50 CCH Lab. Cas. Par. 51,202 (N.Y. App. Div. 1964); *McKevitt* v. *Arrow Co.*, 57 LRRM 2282, 50 CCH Lab. Cas. Par. 51,171 (N.Y. Sup. Ct. 1964).

29 *Scaglione* v. *Yale Express System, Inc.*, 50 CCH Lab. Cas. Par. 51,133 (N.J. Sup. Ct. Ch. 1964).

30 See, *e.g.*, *Corbin* v. *Friendly Frost Stores, Inc.*, 56 LRRM 2592, 49 CCH Lab. Cas. Par. 51,090 (N.Y. Sup. Ct. 1964).

31 *Corbin* v. *Friendly Frost Stores, Inc., supra* note 30; *Newspaper and Mail Deliverers' Union* v. *Publishers' Assn. of New York City*, 50 CCH Lab. Cas. Par. 51,199 (N.Y. Sup. Ct. 1964); *Pernice* v. *Burns Bros. Inc.*, 57 LRRM 2286, 50 CCH Lab. Cas. Par. 51,187 (N.Y. Sup. Ct. 1964); *New York Joint Board of Amalgamated Clothing Workers* v. *Rogers Peet Co.*, 56 LRRM 3008, 50 CCH Lab Cas. Par. 51,144 (N.Y. Sup. Ct. 1964).

32 *Steiner* v. *Cornell Util. Inc.*, 56 LRRM 2880, 50 CCH Lab. Cas. Par. 51,132 (N.Y. Sup. Ct. 1964).

33 *Fuller* v. *Highway Truck Drivers and Helpers Union*, 57 LRRM 2065, 50 CCH Lab. Cas. Par. 19,240 (E.D. Pa. 1964); *Tully* v. *Fred Olson Motor Serv. Co.*, 56 LRRM 2960, 50 CCH Lab. Cas. Par. 19,198 (Wisc. Cir. Ct. 1964); *Wolko* v. *Highway Truck Drivers and Helpers Union*, 56 LRRM 3005, 50 CCH Lab. Cas. Par. 19,195 (E.D. Pa. 1964). State courts require a showing of individual discrimination, bad faith, arbitrary action or fraud on behalf of the union. See *Sheremet* v. *Chrysler Corp.*, 56 LRRM 2102, 49 CCH Lab. Cas. Par. 51,063 (Mich. 1964); *D'Ottavio* v. *New York Shipping Assn.*, 55 LRRM 2756, 49 CCH Lab. Cas. Par. 51,040 (N.Y. Sup. Ct. 1964).

34 See, e.g., *Fuller* v. *Highway Truck Drivers and Helpers Union supra*, note *33*.

35 *Hiller* v. *Liquor Salesmen's Union*, 50 CCH Lab. Cas. Par. 19,374 (2d Cir. 1964).

employee has standing to bring an action against his union for unfair administration of the contract without joinder of the employer since there is authority to indicate that such an action does not arise under Section 301 and that the matter is within the exclusive jurisdiction of the NLRB.[36] Also, recent cases have buried the remaining remnants of *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*[37] by establishing the proposition that unions can enforce uniquely personal contract rights of their members under Section 301.[38] The courts have reasoned that a contrary rule would have the impractical result of requiring each member to file a separate suit in a state court.

C. *The Concurrent Jurisdiction of Courts, Arbitrators and the NLRB*

The *Smith* case established the proposition that state and federal courts are not ousted of jurisdiction over suits arising under Section 301 merely because the conduct which is the subject of the dispute is arguably an unfair labor practice within the exclusive competence of the NLRB.[39] In *Carey* v. *Westinghouse Elec. Corp.*,[40] the Supreme Court rearticulated the doctrine of concurrent jurisdiction of courts and arbitrators over suits for the enforcement of collective bargaining agreements. The Court held that the availability of a Section 10 (k) proceeding did not bar a union from compelling an employer to arbitrate a work assignment dispute. The lower federal courts have closely adhered to

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36 See, e.g., *Fuller* v. *Highway Truck Drivers and Helpers Union,* 57 LRRM 2065, 50 CCH Lab. Cas. Par. 19,240 (E.D. Pa. 1964); *Tully* v. *Fred Olson Motor Serv.* Co., 56 LRRM 2960, 50 CCH Lab. Cas. Par. 19,198 (Wisc. Cir. Ct. 1964). However, a suit by a union member against his union has been allowed under the Railway Labor Act, see, *e.g., Gainey* v. *Brotherhood of Ry, and S.S. Clerks,* 56 LRRM 2279, 49 CCH Lab. Cas. Par. 19,057 (E.D. Pa. 1964); *cf. Harper* v. *Randolph,* 56 LRRM 2130, 49 CCH Lab. Cas. Par. 18,960 (D. N.Y. 1964) (employer also joined); see, *Day* v. *Northwest Div.,* 55 LRRM 2456, 49 CCH Lab. Cas. Par. 18,856 (Ore. 1964).

37 348 U.S. 437 (1954).

38 *International Union, UAW* v. *Hoosier Cardinal Corp.,* 50 CCH Lab. Cas. Par. 19,383 (S.D. Ind. 1964); *United Steelworkers* v. *Copperweld Steel Co.,* 56 LRRM 2364, 49 CCH Lab. Cas. Par. 19,023 (W.D. Pa. 1964); *Retail Clerks Union* v. *Alfred M. Lewis, Inc.,* 55 LRRM 2326, 48 CCH Lab. Cas. Par. 18,740 (9th Cir. 1964).

39 *Accord, Fuller* v. *Highway Truck Drivers and Helpers Union,* 57 LRRM 2065, 50 CCH Lab. Cas. Par. 19,240 (E.D. Pa. 1964).

40 375 U.S. 261 (1964).

the mandate of *Smith* and *Carey* and have uniformly held that it is no defense to arbitration,[41] or to the enforcement of an arbitration award,[42] that the subject matter of the grievance is arguably within the jurisdiction of the NLRB. The decisions have been bottomed on the logic that proceedings before the NLRB and arbitration proceedings involve different rights and issues. Arbitration involves the enforcement of private contractual rights whereas NLRB proceedings are designed to safeguard an employee's statutory rights.

Several cases involved the sequence of interaction of courts and arbitrators. The pendency of NLRB proceedings to resolve a work assignment dispute did not deprive a federal court of jurisdiction to grant injunctive relief requiring the assignment of other disputed work to union members.[43] However, a federal district court granted an employer's motion to stay arbitration of the issue whether the employer had violated a union contract by refusing to discharge striker replacements where an NLRB trial examiner had found that the union had violated the NLRA by preventing the replacements from joining the union.[44] The court viewed a stay of arbitration as being proper because of the futility of requiring arbitration of the identical question already determined by the trial examiner.

In a suit brought by the NLRB,[45] another district court enjoined a union from implementing an alleged hot cargo clause by demanding arbitration of a grievance arising under it pending

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41 *United Steelworkers* v. *American Int'l Aluminum Corp.*, 56 LRRM 2682, 50 CCH Lab. Cas. Par. 19,104 (5th Cir. 1964); *International Union of Elec. Workers* v. *Westinghouse Elec. Corp.*, 55 LRRM 2953, 49 CCH Lab. Cas. Par. 18,838 (S.D. N.Y. 1964); *United Steelworkers* v. *Westinghouse Elec. Corp.*, 55 LRRM 2201, 48 CCH Lab. Cas. Par. 18,732 (Pa. 1964); *cf. Todd Shipyards Corp.* v. *Industrial Union of Marine Workers*, 56 LRRM 2784, 50 CCH Lab. Cas. Par. 19,180 (E.D. N.Y. 1964); Nor will courts grant a stay of arbitration on this ground. See *Restaurant League of New York, Inc.* v. *Townsend*, 55 LRRM 2768, 49 CCH Lab. Cas. Par. 18,838 (S.D. N.Y. 1964); *United Steelworkers* v. *Westinghouse Elec. Corp.*, 55 LRRM 2201, 48 CCH Lab. Cas. Par. 18,732 (Pa. 1964).

42 *Amalgamated Assn. of Street Employees* v. *Trailways of New England Inc.*, 56 LRRM 2186, 49 CCH Lab. Cas. Par. 19,081 (D. Mass. 1964).

43 *Local Union 499, Int'l Bhd. of Elec. Workers* v. *Iowa Power & Light Co.*, 55 LRRM 2161, 49 CCH Lab. Cas. Par. 18,818 (S.D. Iowa 1964).

44 *Kentile, Inc.* v. *Local 457, United Rubber Workers*, 55 LRRM 3011, 49 CCH Lab. Cas. Par. 18,937 (E.D. N.Y. 1964).

45 *McLeod* v. *American Fed'n. of Television & Radio Artists*, 56 LRRM 2615, 49 CCH Lab. Cas. Par. 19,063 (S.D.N.Y. 1964).

the Board's determination of the validity of the clause. The court noted that the fact situation was not within the realm of Section 301 since the unfair labor practice was not the *conduct* which breached a clause of the contract, but rather the clause itself. But, the Fifth Circuit Court of Appeals in another case between two unions,[46] ordered arbitration of a grievance under an interunion no-raiding agreement notwithstanding the fact that the NLRB had already held a hearing on the subject matter of the dispute.

The concurrent jurisdiction of the NLRB may have some effect upon the scope of arbitration or the enforceability of an award. A state court has held that a prior NLRB decision finding that the employer's removal of a plant took place after the expiration of the union contract, was in good faith and was for economic reasons, precluded a union from relitigating these same issues before an arbitrator.[47] The Second Circuit Court of Appeals has refused to enforce, as contrary to federal law, that part of an arbitration submission agreement which purported to prohibit the union from filing unfair labor practice charges.[48]

On the other side of the coin, there were cases dealing with the effect upon the NLRB of the concurrent jurisdiction vested in arbitrators. The Seventh Circuit held that the Board did not abuse its discretion in dismissing an unfair labor practice complaint where the subject matter of the complaint had been decided by an arbitrator pursuant to the provisions of a collective bargaining agreement; it was not claimed that the arbitrator's award was tainted by fraud, collusion or a serious procedural irregularity.[49]

The First Circuit denied enforcement of an NLRB order requiring reinstatement of two employees found by the Board to have been discharged for engaging in union activities.[50] The

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[46] *International Bhd. of Firemen* v. *International Assn. of Machinists,* 50 CCH Lab. Cas. Par. 19,351 (5th Cir. 1964); *but see, Belsinger Signs, Inc.* v. *International Bhd. of Elec. Workers,* 57 LRRM 2383, 50 CCH Lab. Cas. Par. 19,296 (D.C. Cir. 1964).

[47] *Blue Bird Knitwear Co.* v. *Livingston,* 56 LRRM 2022, 49 CCH Lab. Cas. Par. 51,070 (N.Y. Sup. Ct. 1964).

[48] *Lodge 743, Int'l. Assn. of Machinists* v. *United Aircraft Corp.,* 56 LRRM 2629, 50 CCH Lab. Cas. Par. 19,247 (2d Cir. 1964).

[49] *Ramsey* v. *NLRB,* 55 LRRM 2441, 49 CCH Lab. Cas. Par. 18,749 (7th Cir. 1964).

[50] *Raytheon Co.* v. *NLRB,* 55 LRRM 2101, 48 CCH Lab. Cas. Par. 18,684 (1st Cir. 1964).

NLRB trial examiner found that the employer had used a work stoppage as a pretext for firing the employees. The court held that this finding was unsupported by substantial evidence, in light of other evidence and an arbitrator's decision upholding the discharges. In *Square D Co.* v. *NLRB*,[51] the Ninth Circuit held that an employee's refusal to furnish data required by a union in connection with the processing of grievances relating to the operation of the employer's incentive system was an inadequate basis for the Board's finding that the employer violated Section 8 (a) (5). The incentive plan was not covered by the contract. Disputes concerning the operation of the plan were expressly excluded from the grievance procedure. The union failed to submit to an arbitrator the question whether the requested data was relevant to the legitimate union function. The court noted that arbitration would not have been required if the dispute were over the applicability of the violation of a duty not only prescribed by contract but also imposed directly by the Act.

D. *The Demise of the Quid Pro Quo Argument*

In *Packing House Workers* v. *Needham Packing Co.*,[52] the Supreme Court smothered what little spark there was left in the *quid pro quo* defense to arbitration. That reasoning would have held that alleged breaches of a labor agreement released the nonbreaching party from the duty of arbitrating grievances covered by the arbitration clause. The Court held that a union's breach of a no-strike clause did not amount to such a repudiation of the contract as to relieve the employer of his obligation to arbitrate.[53] In the Court's view, the arbitration and no-strike clauses were not so intertwined, even though the arbitration clause provided for arbitration of employee's grievances at the union's request only. The lower federal courts, relying on the language contained

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51 56 LRRM 2147, 49 CCH Lab. Cas. Par. 18,955 (9th Cir. 1964). *Contra, Timkin Roller Bearing Co.*, v. *NLRB*, 54 LRRM 2785, 48 CCH Lab. Cas. Par. 18,656 (6th Cir. 1964), *cert. denied*, 376 U.S. 971 (1964) (enforcing the Board's 8 (a) (5) order).

52 376 U.S. 247 (1964).

53 For cases following *Needham* see, *Brotherhood of Locomotive Firemen & Enginemen* v. *Kennecott Copper Corp.*, 50 CCH Lab. Cas. Par. 19,353 (10th Cir. 1964); *United Mine Workers* v. *Roncco*, 57 LRRM 2277, 50 CCH Lab. Cas. Par. 19,286 (D. Wyoming 1964); *United Steelworkers* v. *American Int'l Aluminum Corp.*, 56 LRRM 2682, 50 CCH Lab. Cas. Par. 19,104 (5th Cir. 1964).

in *Drake Bakeries, Inc.* v. *Local 50, Bakery & Confectionery Workers,*[54] had already reached the same conclusion.[55]

Cases decided in the wake of *Needham* have indicated a material breach of a labor contract may permit the non-breaching party to rescind all provisions of the contract except for the agreement to arbitrate.[56] But they also hold that even bilateral breaches will not relieve either party of its obligation to arbitrate in the absence of the repudiation by the other party of its duty to arbitrate.[57]

II. ACTIONS FOR THE ENFORCEMENT OF COLLECTIVE BARGAINING AGREEMENTS UNDER SECTION 301

A. *The Norris-La Guardia Act and the Courts*

In a number of cases, the courts (both state and federal) were confronted with the question whether the anti-injunction provisions of the Norris-La Guardia Act prevented them from dispensing effective injunctive relief for the violation of certain clauses of collective agreements. The principal issue concerned judicial enforcement of the no-strike clause. Ever since *Sinclair Ref. Co.* v. *Atkinson,*[58] (Atkinson I) which held that the Norris-La Guardia Act bars a federal court from enjoining a strike in violation of a no-strike clause, there has been speculation as to whether state courts must also honor the anti-injunction prohibitions of the Norris-La Guardia Act. This question was specifically reserved by the Supreme Court in *Charles Dowd Box Co.* v. *Courtney.*[59]

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54 370 U.S. 254 (1962).
55 *Amalgamated Assn. of Street Employees* v. *Trailways of New England,* 56 LRRM 2186, 49 CCH Lab. Cas. Par. 19,081 (D. Mass. 1964); *International Union of Elec. Workers* v. *General Elec. Co.,* 56 LRRM 2289, 49 CCH Lab. Cas. Par. 19,009 (2d Cir. 1964).
56 See *Local Joint Executive Board, Hotel & Restaurant Employees* v. *Nationwide Downtowner Motor Inns, Inc.,* 56 LRRM 2819, 50 CCH Lab. Cas. Par. 19,163 (W.D. Mo. 1964).
57 *Minnesota Joint Board, Amalgamated Clothing Workers* v. *United Garment Mfg. Co.,* 50 CCH Lab. Cas. Par. 19,313 (8th Cir. 1964).
58 370 U.S. 195 (1962).
59 368 U.S. 502 (1962).

State and federal courts called upon to exercise removal jurisdiction have interpreted Norris-La Guardia literally by holding that its terms do not preempt a state court from issuing an anti-strike injunction.[60] Even the existence of a state anti-injunction law patterned after Norris-La Guardia has been held not to preclude a state court from enjoining a strike in violation of a no-strike clause. The reasoning is that an action for the breach of a labor contract does not arise out of a labor dispute.[61] Additionally, a federal appellate court has held that an action brought in a state court to enjoin the violation of a no-strike clause based solely upon state created rights is non-removable since the federal court lacks subject-matter jurisdiction.[62] However, a district court has refused to remand a similar action on the theory that Section 301 vested it with jurisdiction, notwithstanding that the court was powerless to grant the relief requested.[63] In three cases, federal courts grappled with the related question whether the provisions of Norris-La Guardia prohibited them from enjoining an employer from engaging in conduct in breach of a collective agreement. A federal appellate court has held that a federal court is not precluded by Norris-La Guardia from directing an employer to comply with contract provisions requiring wage adjustments.[64] The court reasoned that Norris-La Guardia does not apply to suits falling under Section 301 if the conduct to be compelled does not fall within a "specific provision" of Norris-La Guardia. Another court, in holding that a federal court enjoin an employer from moving its plant pending arbitration of a grievance questioning the propriety of the move, found that a court vested with the power to compel arbitration also has the "collateral power" to insure that the arbitration decision is not rendered futile and

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60 *Eastern Freightways, Inc.* v. *Deperno,* 57 LRRM 2299, 50 CCH Lab. Cas. Par. 51,185 (N.Y. Sup. Ct. 1964); *Radio Corp. of America* v. *Local 780, I.A.T.S.E.,* 55 LRRM 2478, 48 CCH Lab. Cas. Par. 18,716 (Fla. Dist. Ct. App. 1964); see *American Dredging Co.* v. *Local 25, Marine Div. Int'l. Union of Operating Engineers,* 50 CCH Lab. Cas. Par. 19,294 (5th Cir. 1964).

61 *Eastern Freightways, Inc.* v. *Deperno, supra* note 60; *Perry & Sons* v. *Robilotto,* 47 CCH Lab. Cas. Par. 50,894 (N.Y. Sup. Ct. 1964).

62 *American Dredging Co.* v. *Local 25, Marine Div. Int'l. Union of Operating Engineers,* 50 CCH Lab. Cas. Par. 19,294 (5th Cir. 1964).

63 *Food Fair Stores, Inc.* v. *Retail Clerks Union,* 55 LRRM 2655, 49 CCH Lab. Cas. Par. 18,839 (E.D. Pa. 1964).

64 *Retail Clerks Union* v. *Alfred M. Lewis, Inc.,* 55 LRRM 2326, 48 CCH Lab. Cas. Par. 18,740 (9th Cir. 1964).

ineffective.[65] However, still another federal court has indicated that federal courts are rendered powerless by Norris-La Guardia to enjoin conduct pending arbitration.[66]

B. *Compelling Arbitration—Staying Proceedings—Judicial Attitude*

The majority of reported cases in 1964 dealing with the sequential interaction of the judicial and the arbitral processes have involved suits to compel arbitration, to stay proceedings pending arbitration, and to enforce or vacate arbitration awards. In all of these cases, resolution of the ultimate issue hinged upon a preliminary determination of the following pivotal issues.

1. *Arbitrability*

In general, the courts appeared to be following the *laissez-faire* policy dictated by the *Steelworker Trilogy* by ordering arbitration of all grievances unless positively assured, after resolving all doubts in favor of coverage, that the arbitration clause "is not susceptible of an interpretation that covers the dispute."[67] The courts have liberally interpreted clauses providing for arbitration of grievances concerning the "interpretation and application" of the terms of the contract. Under similar broad arbitration clauses, the following grievances were held arbitrable: subcontracting of work;[68] discharge of warehouse employees whose work had been removed to a warehouse in another location;[69] reclassification of jobs;[70] elimination of a Christmas bonus;[71] status of a pension

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65 *International Union, UAW* v. *Seagrave Fire Apparatus Div. of F.W.D. Corp.*, 56 LRRM 2874, 50 CCH Lab. Cas. Par. 19,138 (S.D. Ohio 1964).

66 *International Union of Workers* v. *General Elec. Co.*, 56 LRRM 2891, 50 CCH Lab. Cas. Par. 19,167 (S.D. N.Y. 1964).

67 *Cohen Bros. Dress Corp.* v. *Minkoff*, 56 LRRM 2062, 49 CCH Lab. Cas. Par. 51,054 (N.Y. Sup. Ct. 1964); *Powers* v. *Poch*, 56 LRRM 2944, 50 CCH Lab. Cas. Par. 51,126 (N.Y. App. Div. 1964); See, *Retail Clerks Union* v. *Kroger Co.*, 56 LRRM 2893, 50 CCH Lab. Cas. Par. 19,146 (E.D. Ark. 1964); *International Union of Elec. Workers* v. *Westinghouse Elec. Corp.*, 55 LRRM 2223, 48 CCH Lab. Cas. Par. 18,712 (2d Cir. 1964); *cf. Pure Milk Assn.* v. *Wisconsin Employment Relations Board*, 57 LRRM 2354, 50 CCH Lab. Cas. Par. 51,054 (N.Y. Sup. Ct. 1964).

68 *United Steelworkers* v. *Westinghouse Elec. Corp.*, 55 LRRM 2201, 48 CCH Lab. Cas. Par. 18,732 (Pa. 1964).

69 *General Warehousemen & Employees Union* v. *American Hardware Supply Co.*, 55 LRRM 2776, 49 CCH Lab. Cas. Par. 18,864 (3rd Cir. 1964).

70 *United Steelworkers* v. *General Elec. Co.*, 55 LRRM 2519, 49 CCH Lab. Cas. Par. 18,752 (6th Cir. 1964).

71 *Newspaper Guild* v. *Tonawanda Publishing Corp.*, 55 LRRM 2222, 49 CCH Lab. Cas. Par. 51,614 (N.Y. App. Div. 1964).

plan;[72] disciplinary actions taken against certain employees;[73] plant removal;[74] damages for an alleged unlawful strike;[75] transfer of work during a strike;[76] refusal to allow a union representative to be present at an interview with an employee suspected by the employer of committing a misdeed;[77] inability of a union and an employer to agree upon a trust agreement with respect to a health and welfare plan.[78]

However, in a *per curiam* opinion, a divided Supreme Court affirmed a ruling that where arbitration was expressly restricted to the provisions of the contract, and the contract was silent on the question of subcontracting work, a dispute was not arbitrable [79] which arose out of the contracting out of work. In a libel and slander action brought by a member of the union against his employer, a court refused to stay the action pending arbitration, although the contract provided for arbitration of all grievances arising "under, out of, or in connection with or in relation to this agreement . . . ."[80]

Most courts adopted a strict approach in requiring clear and unambiguous exclusionary language in the collective agreement

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72 *Local 30, Philadelphia Leather Workers' Union* v. *Hyman Brodsky & Son Corp.*, 56 LRRM 2121, 49 CCH Lab. Cas. Par. 18,987 (E.D. Pa. 1964). It should be noted that the court also held that the employer's action in shutting down its plant and the union's claim of severance pay were not arbitrable since these matters were not covered by the contract.

73 *Amalgamated Assn. of Street Employees* v. *Trailways of New England, Inc.*, 56 LRRM 2186, 49 CCH Lab. Cas. Par. 19,081 (D. Mass. 1964) (discharge); *Brewer Dry Dock Employees' Assn.*, v. *Brewer Dry Dock Co.*, 56 LRRM 2991, 49 CCH Lab. Cas. Par. 51,028 (N.Y. Sup. Ct. 1964).

74 *Belock Instrument Corp.* v. *Local 479, Int'l. Union of Elec. Workers*, 56 LRRM 2928, 49 CCH Lab. Cas. Par. 51,061 (N.Y. Sup. Ct. 1964).

75 *Fifth Ave. Coach Lines, Inc.* v. *Transport Workers Union*, 50 CCH Lab. Cas. Par. 19,290 (4th Cir. 1964).

76 *Local 56, United Packinghouse Workers* v. *DuQuoin Packing Co.*, 57 LRRM 2268, 50 CCH Lab. Cas. Par. 19,260 (7th Cir. 1964).

77 *Humble Oil & Ref. Co.* v. *Independent Indus. Workers' Union*, 57 LRRM 2112, 50 CCH Lab. Cas. Par. 19,210 (5th Cir. 1964).

78 *Builders' Assn. of Kansas City* v. *Greater Kansas City Laborers Dist. Council of Int'l. Hod Carriers*, 55 LRRM 2199, 48 CCH Lab. Cas. Par. 18,709 (8th Cir. 1964).

79 *Independent Petroleum Workers* v. *American Oil Co.*, 50 CCH Lab. Cas. Par. 19,340 (U.S. Sup. Ct.) (Goldberg, J., not participating); see also, *Boeing Co.* v. *International Union, UAW*, 56 LRRM 2833, 50 CCH Lab. Cas. Par. 19,153 (E.D. Pa. 1964); *Local 30, Philadelphia Leather Workers' Union* v. *Hyman Brodsky & Son Corp.*, 56 LRRM 2121, 49 CCH Lab. Cas. Par. 18,987 (E.D. Pa. 1964); *Sperry Gyroscope Co.* v. *Local 50, Int'l. Union of Elec. Workers*, 49 CCH Lab. Cas. Par. 51,076 (N.Y. Sup. Ct. 1964).

80 *Kriege* v. *Zepnick*, 55 LRRM 2440, 49 CCH Lab. Cas. Par. 51,062 (N.Y. Sup. Ct. 1964).

in order to exclude a dispute from arbitration.[81] However, if an exclusionary clause is clear and unambiguous, the matter will be held to be not arbitrable.[82] For example, a court found the dispute to be non-arbitrable where it considered a collective agreement provision that the right to designate where work was performed was a "management prerogative."[83] Management prerogatives were expressly excluded from arbitration. However, the fact that a dispute falls within a management function clause will not automatically exclude the dispute from arbitration.[84] The Sixth Circuit has held that Section 301 does not empower federal courts to compel arbitration of future contractual provisions.[85]

Two federal appellate courts divided on the question whether evidence of bargaining history is admissible to determine arbitrability. The Ninth Circuit held that it is proper for a court to consider bargaining history and other extraneous evidence in determining arbitrability.[86] The weight of authority sided with the Second Circuit,[87] however, which held that questions of exclusion of grievances are to be determined from the language of the contract alone,[88] and thus by the arbitrator rather than the court.

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81 See *Desert Coca Cola Bottling Co.* v. *General Sales Drivers Union,* 56 LRRM 2933, 50 CCH Lab. Cas. Par. 19,156 (9th Cir. 1964); *Marble Products Co.* v. *Local 155, United Stone Workers,* 56 LRRM 2967, 50 CCH Lab. Cas. Par. 19,164 (5th Cir. 1964); *Proctor & Gamble Mfg. Co.,* 56 LRRM 2275, 49 CCH Lab. Cas. Par. 19,037 (E.D. N.Y. 1964).

82 *Communication Workers* v. *New York Tel. Co.,* 55 LRRM 2275, 48 CCH Lab. Cas. Par. 18,836 (2d Cir. 1964).

83 *Boeing Co.* v. *International Union, UAW,* 56 LRRM 2833, 50 CCH Lab. Cas. Par. 19,230 (E.D. Pa. 1964).

84 *Local 12298, Dist. 50, United Mine Workers* v. *Bridgeport Gas Co.,* 55 LRRM 2563, 49 CCH Lab. Cas. Par. 18,777 (2d Cir. 1964).

85 *Austin Mailers Union* v. *Newspapers, Inc.* 55 LRRM 2693, 49 CCH Lab. Cas. Par. 18,819 (6th Cir. 1964).

86 *Communication Workers* v. *Pacific Northwest Bell Tel. Co.,* 57 LRRM 2703, 50 CCH Lab. Cas. Par. 19,249 (9th Cir. 1964); see also, *United Brick & Clay Workers* v. *A. P. Green Fire Brick Co.,* 57 LRRM 2159, 50 CCH Lab. Cas. Par. 19,266 (E.D. Mo. 1964).

87 *International Union of Elec. Workers* v. *General Elec. Co.,* 56 LRRM 2289, 49 CCH Lab. Cas. Par. 19,009 (2d Cir. 1964).

88 See *Boeing Co.* v. *International Union, UAW,* 56 LRRM 2833, 50 CCH Lab. Cas. Par. 19,153 (E.D. Pa. 1964); *Linton's Lunch* v. *Restaurant Guild Chain Store Employees,* 56 LRRM 3038, 50 CCH Lab. Cas. Par. 19,212 (E.D. Pa. 1964); *International Union of Elec. Workers* v. *Westinghouse Elec. Corp.,* 55 LRRM 2953, 49 CCH Lab. Cas. Par. 18,838 (S.D. N.Y. 1964); *cf., A. S. Abell Co.* v. *Baltimore Typographical Union,* 50 CCH Lab. Cas. Par. 19,326 (4th Cir. 1964).

2. *Existence of Contract*

Federal courts have jurisdiction of suits arising under Section 301 regardless of the merit of the averment as to the existence of the labor contract.[89] As *Wiley* indicates, it is for courts rather than arbitrators to determine whether there is an agreement to arbitrate.[90] The courts will not require arbitration prior to determining the existence of the contract or of the agreement to arbitrate.[91]

3. *Defenses Based on State Policy*

The courts undermined defenses to arbitration predicated on state laws or public policy, reasoning that these state interests are subordinate to the principles of national labor policy. The court upheld a union's right to arbitrate the question of "just cause" in the discharge of an employee involved in a violation of the state gambling laws.[92] A state court held that it could specifically enforce an arbitration clause in a collective agreement, notwithstanding the fact that the arbitration clause ran afoul of the state constitution.[93]

C. *Enforcement of Awards*

In accordance with the Trilogy's limitation of the scope of judicial review of arbitration awards, the courts universally purported to avoid reviewing the merits of an arbitrator's award.[94]

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89 See *Roadway Express, Inc.* v. *General Teamsters Union,* 56 LRRM 2085, 49 CCH Lab. Cas. Par. 18,932 (3rd Cir. 1964); *Contessa Lingerie, Inc.* v. *Undergarment Workers,* 55 LRRM 2667, 49 CCH Lab. Cas. Par. 18,766 (S.D. N.Y. 1964).

90 See, *e.g., Restaurant League of New York, Inc.* v. *Townsend,* 57 LRRM 2135, 50 CCH Lab. Cas. Par. 51,170 (N.Y. Sup. Ct. 1964).

91 *Davis* v. *Lakeside Hosp.,* 57 LRRM 2142, 50 CCH Lab. Cas. Par. 51,192 (N.Y. Sup. Ct. 1964); *Genesco, Inc.* v. *Joint Council 13, United Shoe Workers,* 56 LRRM 2487, 49 CCH Lab. Cas. Par. 18,983 (S.D. N.Y. 1964).

92 *Jenkins Bros.* v. *Local 5623, United Steelworkers,* 56 LRRM 2058, 49 CCH Lab. Cas. Par. 18,958 (D. Conn. 1964).

93 *Interstate Bakeries Corp.* v. *Bakery Wagon Drivers Union,* 57 LRRM 2167, 50 CCH Lab. Cas. Par. 51,176 (Ill. 1964).

94 *Avco Corp.* v. *Mitchell,* 57 LRRM 2119, 50 CCH Lab. Cas. Par. 19,221 (6th Cir. 1964); *Highway Truck Drivers Union* v. *Motor Transport Labor Relations, Inc.* 56 LRRM 3019, 50 CCH Lab. Cas. Par. 19,244 (E.D. Pa. 1964); *Local 400, Bldg. Service Employees* v. *Mite Maintenance Corp.,* 49 CCH Lab. Cas. Par. 51,079 (N.Y. Sup. Ct. 1964); See also to the same effect under the RLA: *Brotherhood of Railroad Trainmen* v. *Chicago, Milwaukee, St. Paul & Pacific R.R.,* 56 LRRM 2137, 50 CCH Lab. Cas. Par. 19,305 (D.C. Cir. 1964); *Brotherhood of Locomotive Firemen* v. *Chicago Burlington & Quincy R.R.,* 55 LRRM 2089, 48 CCH Lab. Cas. Par. 18,680 (D.C. Cir. 1964).

Thus, a summary judgment of enforcement was proper in a suit to enforce an arbitration award where the employer's only defense was that "no evidence was presented to the arbitrator upon which an award could be granted . . . ." [95] However, some courts scrutinized arbitration awards on the stated basis of determining whether the arbitrator exceeded his authority under either the contract or the submission agreement. Usually courts tended to find that the arbitrator had not exceeded his jurisdiction.[96] Thus, in an arbitration proceeding concerning a discharge, an arbitrator did not exceed his authority when he found the discharge was unjustified, but nevertheless directed the union to find another job for the employee. The Fifth Circuit held that an arbitration award ordering reinstatement of an employee with back pay was not beyond the arbitrator's authority even though the award did not specify the particular subsection of the agreement relied upon by the arbitrator and the agreement did not expressly provide for a back pay remedy.[97] Similarly, an arbitrator's decision finding that employees were wrongfully discharged, and determining the amount of back pay, did not exceed the scope of the question submitted, *i.e.*, whether there should be back pay, since the submission agreement did not expressly deny the arbitrator the power to consider this question.[98]

In some instances, however, courts appeared to review the merits independently in holding that the arbitrator exceeded his authority.[99] An award ordering reinstatement and back pay was held to exceed the arbitrator's authority since the question was not submitted for his determination and was not directly covered

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95 *Fontainebleau Hotel Corp.* v. *Hotel Employees' Union,* 55 LRRM 2439, 49 CCH Lab. Cas. Par. 18,750 (5th Cir. 1964).

96 *Atchison, Topeka & Santa Fe Ry.* v. *Brotherhood of Railroad Trainmen,* 57 LRRM 2222, 50 CCH Lab. Cas. Par. 19,250 (Cal. D. Ct. App. 1964); *Harlam Realty Co.* v. *Chartier,* 50 CCH Lab. Cas. Par. 51,221 (N.Y. Sup. Ct. 1964). *But cf. Gunther* v. *San Diego & Arizona Ry.,* 57 LRRM 2083, 50 CCH Lab. Cas. Par. 19,219 (9th Cir. 1964) (NRAB exceeded jurisdiction in creating medical board).

97 *Minute Maid Co.* v. *Citrus Workers Union,* 56 LRRM 2095, 49 CCH Lab. Cas. Par. 18,935 (5th Cir. 1964).

98 *Local 2130, Int'l. Bhd. of Elec. Workers* v. *Bally Case & Cooler, Inc.,* 56 LRRM 2831, 50 CCH Lab. Cas. Par. 19,178 (E.D. Pa. 1964).

99 *H. K. Porter Co.* v. *United Saw Workers,* 56 LRRM 2534, 49 CCH Lab. Cas. Par. 19,065 (4th Cir. 1964); *Truck Drivers Union* v. *Ulry-Talbert Co.,* 55 LRRM 2979, 49 CCH Lab. Cas. Par. 18,883 (8th Cir. 1964).

by the terms of the collective agreement.[100] A state court held that an arbitrator had no power to make wage increases retroactive since the union contract provided that the arbitrator's awards were to be effective as of the date the awards were rendered.[101]

Courts took a flexible approach in dealing with disputes over the interpretation of awards. Where changed conditions gave rise to an ambiguity in an award,[102] or when differing interpretations of an award generated a collateral dispute,[103] the matter was resubmitted to the arbitrator for clarification. But where an award was clear and unambiguous a court itself added clarifying language.[104]

D. *Arbitration and Courts Generally*

The following cases, having at least an indirect effect upon arbitration, cannot be pigeon-holed into any of the foregoing categories.

1. A court enjoined the arbitration of a grievance pending final disposition of a judicial proceeding praying for a declaratory judgment that the grievance was not arbitrable, since the purpose of the declaratory judgment proceedings would have been defeated if an award had been rendered on the merits.[105]

2. A union seeking to compel arbitration under Section 301 was not entitled to a preliminary injunction requiring the employee to arbitrate since such relief would prematurely afford the union the complete relief sought.[106] Although a stay of an action

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100 *Kansas City Luggage Workers Union* v. *Neevel Luggage Mfg. Co.*, 55 LRRM 2153, 48 CCH Lab. Cas. Par. 18,693 (8th Cir. 1964); see also, *Appleton* v. *Judy Bond, Inc.* 49 CCH Lab. Cas. Par. 51,085 (N.Y. Sup. Ct. 1964).

101 *Local 1205, Int'l, Bhd. of Teamsters* v. *New York Lumber Trade Assn.*, 55 LRRM 3022, 49 CCH Lab. Cas. Par. 51,073 (N.Y. Sup. Ct. 1964).

102 *Kennedy* v. *Continental Transp. Lines, Inc.*, 56 LRRM 2663, 50 CCH Lab. Cas. Par. 19,140 (W.D. Pa. 1964).

103 *Transport Workers Union* v. *Philadelphia Transp. Co.*, 55 LRRM 3014, 49 CCH Lab. Cas. Par. 18,979 (E.D. Pa. 1964).

104 *International Union, UAW* v. *Fafnir Bearing Co.*, 56 LRRM 2518, 49 CCH Lab. Cas. Par. 51,106 (Conn. 1964).

105 *Linton's Lunch* v. *Restaurant Guild Chain Store Employees*, 55 LRRM 2906, 49 CCH Lab. Cas. Par. 18,975 (E.D. Pa. 1964).

106 *United Steelworkers* v. *C. F. Wright Steel & Wire Co.*, 56 LRRM 2879, 50 CCH Lab. Cas. Par. 19,169 (D. Mass. 1964).

pending arbitration can be analogized to an equitable restraint of legal proceedings, it cannot be deemed an injunction appealable under 28 USC Section 1292 (a) (1).[107] A court will not grant a summary judgment in an action brought by a union alleging the employee's noncompliance with an arbitrator's award when the factual question of compliance is in issue.[108]

3. A court may judicially enforce a hot cargo agreement under Section 301 since judicial enforcement does not constitute coercion within the meaning of Section 8 (b) (4) (ii) (B) of the NLRA, under which a union is forbidden from seeking enforcement of a hot cargo agreement through coercion and restraint.[109] A court refused to enforce an award to the extent it could be interpreted as leaving in effect a contract provision providing for the checkoff of union dues for a period longer than one year, since such a provision is violative of Section 302 (c) (4) of the Taft-Hartley Act.[110] An employer's suit for damages under Section 303 of the Taft-Hartley Act seeking damages for alleged secondary boycott activities need not be stayed pending arbitration.[111]

4. A suit by a union under Section 301 was dismissed for lack of jurisdiction where the employer's business activities were entirely intra state and did not affect interstate commerce.[112] The trustees who administer a union trust fund are indispensable parties in a suit brought to recover monies allegedly due to the fund under the terms of a collective agreement.[113]

5. According to New York courts, an arbitrator has the right to issue injunctive relief [114] and to subpoena records of a corpora-

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107 *Alexander* v. *Pacific Maritime Assn.*, 56 LRRM 2156, 49 CCH Lab. Cas. Par. 18,956 (9th Cir. 1964).
108 *Engineers Assn. of Arma, Local 418, Int'l. Union of Elec. Workers* v. *American Bosch Arma Corp.*, 57 LRRM 2093, 50 CCH Lab. Cas. Par. 19,190 (E.D. N.Y. 1964).
109 *Local Union 48, Sheet Metal Workers* v. *Hardy Corp.*, 56 LRRM 2462, 49 CCH Lab. Cas. Par. 19,050 (5th Cir. 1964).
110 *Puerto Rico Dist. Council of United Bhd. of Carpenters* v. *Quintana*, 56 LRRM 2391, 49 CCH Lab. Cas. Par. 18,980 (D. Puerto Rico 1964).
111 *Twin Excavating Co.* v. *Local Union 731, Excavating Employees*, 57 LRRM 2110, 50 CCH Lab. Cas. Par. 19,227 (7th Cir. 1964).
112 *Local 384, Int'l. Bhd. of Teamsters* v. *Patane*, 57 LRRM 2040, 50 CCH Lab. Cas. Par. 19,186 (E.D. Pa. 1964).
113 *International Bhd. of Teamsters* v. *Kebert Constr. Co.*, 55 LRRM 2482, 49 CCH Lab. Cas. Par. 18,814 (W.D. Pa. 1964).
114 See, *Griffin* v. *American Bosch Arma Corp.*, 55 LRRM 2761, 49 CCH Lab. Cas. Par. 51,025 (N.Y. Sup. Ct. 1964).

tion;[115] however, an award restraining an infant employee from soliciting for a telephone answer service any clients of a former employer is unenforceable since infancy is a perfect defense in a contract for personal services.[116]

6. Orders of the NRAB do not have the effect of arbitration awards and federal courts enforcing NRAB awards may conduct a *de novo* review of both money and non-money awards.[117]

7. A settlement agreement reached during arbitration proceedings has the same standing as an arbitration award and can be enforced under Section 301.[118]

8. In a breach of contract action under Section 301, an employer did not breach a labor contract by terminating a group of senior employees in accordance with a company policy of compulsory retirement at age 65, which policy was uniformly followed.[119] In an action for wrongful discharge, a court affirmed a lower court's finding that resignations submitted by the employees in question were not obtained by constructive coercion on the part of the employer.[120] A court held that the status of a certified union as exclusive bargaining representative and the provisions of a labor agreement between the employer and union relating to the collection and remittance of checked-off dues remained in effect until a rival union was certified by the NLRB.[121]

A court refused to reverse an earlier decision holding an employer liable for damages upon its failure to respect seniority rights upon the relocation of its plant after the expiration of the union contract under which such rights accrued.[122] The em-

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115 See, *Contessa Lingerie, Inc.* v. *Undergarment Workers Union,* 55 LRRM 2783, 49 CCH Lab. Cas. Par. 51,052 (N.Y. Sup. Ct. 1964).
116 *Cliffcorn Answering Serv., Inc.* v. *United Tel. & Communication Answering Service Union,* 57 LRRM 2237, 50 CCH Lab. Cas. Par. 51,167 (N.Y. Sup. Ct. 1964).
117 *Brotherhood of R.R. Trainmen* v. *Louisville & Nashville R.R.,* 56 LRRM 2739, 50 CCH Lab. Cas. Par. 19,102 (5th Cir. 1964).
118 *Amalgamated Meat Cutters* v. *M. Feder & Co.,* 57 LRRM 2145, 50 CCH Lab. Cas. Par. 19,277 (E.D. Pa. 1964).
119 *Cashner* v. *United States Steel Corp.,* 55 LRRM 2386, 49 CCH Lab. Cas. Par. 18,770 (6th Cir. 1964).
120 *Allied Oil Workers Union* v. *Ethyl Corp.,* 55 LRRM 2111, 49 CCH Lab. Cas. Par. 19,785 (5th Cir. 1964).
121 *United Elec. Workers* v. *Westinghouse Elec. Corp.,* 56 LRRM 2283, 49 CCH Lab. Cas. Par. 19,020 (E.D. Pa. 1964).
122 *Zdanok* v. *Glidden Co.,* 55 LRRM 2249, 48 CCH Lab. Cas. Par. 18,724 (2d Cir. 1964).

ployer's objection that the original decision resulted from the erroneous application to a controversy governed by federal law was rejected and the court indicated that state law may be resorted to in order to ascertain the law that will best effectuate federal labor policy.

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COMMITTEE MEMBERS

The members of the 1964-65 Law and Legislation Committee of National Academy of Arbitrators were: Edgar A. Jones, Jr., Professor of Law and Director of the Law-Science Research Center, University of California, Los Angeles (Chairman); Harry Abrahams, Marion Beatty, Joseph Brandschain, Alfred A. Colby, Alex Elson, Howard G. Gamser, Robert F. Koretz, Bernard P. Lampert, Berthold W. Levy, Whitley P. McCoy, Maurice H. Merrill, Richard Mittenthal, Thomas T. Roberts, Meyer S. Ryder, Carl R. Schedler, Russell A. Smith, Clarence M. Updegraff, and Carl A. Warns, Jr.

The Committee's Chairman acknowledges with gratitude the valuable assistance of William D. Gould, Esq., of the Los Angeles Bar, in the preparation of this Report.

This Report treats only selected Railway Labor Act cases. Although all other state and federal cases were read, only those are cited which bore some evidence of the facts and reasoning involved. A number of cases, particularly in New York, were too skimpily stated to be meaningful.

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