APPENDIX B

ARBITRATION AND FEDERAL RIGHTS UNDER COLLECTIVE AGREEMENTS

REPORT OF THE COMMITTEE ON LAW AND LEGISLATION FOR 1966*

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The year 1966 proved to be an interesting although not spectacular year for the development of the federal law relating to collective bargaining agreements. Although the year had few surprises, the courts did decide a number of important cases which further clarified or, in a few cases, further confused existing law.

I. GENERAL JUDICIAL PROBLEMS UNDER SECTION 301

A. Statute of Limitations

During the 1965 October Term, the United States Supreme Court handed down only one decision relating to the evolving federal law under Section 301. In *United Automobile Workers*

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The Report was prepared by the Committee's Chairman, Edgar A. Jones, Jr., Professor of Law, University of California, Los Angeles; Member of the Board of Governors, National Academy of Arbitrators; and Peter M. Anderson, Member of the California Bar, associated with O'Melveny & Myers, Los Angeles, California.

This Report treats only selected Railway Labor Act cases. Although all state and federal cases were read, only those are cited which bore some evidence of the facts and reasoning involved. A number of cases were too sparse in factual statement to be helpful. By the end of December there were over 120 reported decisions to be analyzed in the preparation of this Report. Of course, decisions sometimes are late in being reported because they are delayed in filing by the court. Therefore, we make no representation that "all" cases have been encompassed by this Report.

v. *Hoosier Cardinal Corp.*,[1] a case not directly involving arbitration, the Court declined to fashion a uniform federal statute of limitations governing actions under Section 301. Instead it held as a matter of federal law that the appropriate state statute of limitations should apply. The union had sought to recover vacation benefits allegedly due certain employees under the terms of a collective bargaining agreement. After unsuccessful attempts to formulate a cause of action in the Indiana courts, the union filed suit in a federal district court. By this time, however, almost seven years had elapsed since the vacation payments were allegedly due. The federal district court held the action barred by Indiana's six-year statute of limitations on oral contracts. This decision was subsequently affirmed by the Seventh Circuit.[2]

In upholding the application of the Indiana statute, the Supreme Court based its decision primarily on the premise that variations in the periods of limitations would not frustrate the collective bargaining process. In this respect it distinguished the need for uniformity in the more substantive areas of contract interpretation. Lack of uniformity with respect to statutes of limitations would not form an impediment to the consensual process of drafting a collective bargaining agreement. In the Court's mind such statutes would become of concern to the parties only after their consensual relationship had in fact broken down. The Court also found that state statutes of limitations had been repeatedly applied to federal causes of action where no limitation had been established by Congress. It further reasoned that Congress must have realized and therefore intended this result when it failed to specify a limitation for actions under Section 301. At any rate, the Court did not find the need for judicial inventiveness sufficiently compelling in this case as to override this presumed intent.[3]

The Court then approached the problem of whether the trial court was justified in applying the statute for oral as opposed to written contracts. The Court held that as a matter of federal law

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1 383 U.S. 696 (1966), 61 LRRM 2545.
2 346 F.2d 242, 59 LRRM 2448 (7th Cir., 1965).
3 This conclusion was vigorously disputed by Mr. Justice White in a dissenting opinion in which Justices Douglas and Brennan joined. The dissenters contended that a uniform statute of limitations was indeed very desirable and that the necessary judicial inventiveness would be a small matter compared to the decree required by *Lincoln Mills* to form a complete substantive body of law.

the characterization placed on a contract by state law would be upheld unless such characterization were unreasonable or contrary to national labor policy. So here the action could not be said to be based exclusively on the written collective bargaining agreement. An oral contract of employment was a condition to the accrual of individual vacation benefits. Furthermore and perhaps more importantly, the six-year statute on oral contracts would be more consistent with federal policy favoring the expedited disposition of labor disputes than would the 20-year statute for written contracts. The Court therefore concluded that the trial court's characterization was reasonable.

B. Actions Cognizable Under Section 301

In its *Hoosier* decision, the Court also laid to rest any doubt whether union actions to enforce individual claims were cognizable under Section 301. The Court held that they were. It thus spelled the complete demise of the *Westinghouse* case,[4] if indeed *Westinghouse* had any vitality remaining after *Smith* v. *Evening News Assn.*[5]

Other cases in lower federal courts upheld Section 301 jurisdiction. One compelled arbitration under a collective bargaining agreement where the bargaining unit consisted only of supervisors as defined by the Act.[6] Another was brought by a union member against the International Union based upon an alleged violation of the International Constitution.[7] A third was brought to review an order of the National Joint Board.[8]

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[4] *Association of Westinghouse Salaried Employees* v. *Westinghouse Corp.*, 348 U.S. 437 (1955), 35 LRRM 2643.

[5] 371 U.S. 195 (1962), 51 LRRM 2646. Unlike *Smith*, *Hoosier* is on all fours with *Westinghouse* to the extent that it involves a union action to enforce individual rights. Although *Westinghouse* was expressly overruled in *Smith*, the latter involved an action by individual employees rather than a union. See also *Ludwig Honold Mfg. Co.* v. *Fletcher*, 63 LRRM 2314 (E.D. Pa., 1966) where a court found it had jurisdiction under Section 301 to review an arbitration award granting to individual employees certain seniority rights.

[6] *Isbrandtsen Co.* v. *Dist. 2, MEBA*, 62 LRRM 2488 (E.D. N.Y., 1966). In reaching its decision the court relied primarily on secondary boycott and emergency dispute cases.

[7] *Anderson* v. *Hoffa*, 63 LRRM 2585 (M.D. Tenn., 1966).

[8] *Sheet Metal Workers' Union* v. *Aetna Corp.*, 359 F.2d 1, 62 LRRM 2106 (1st Cir., 1966).

One of the most interesting cases in this area during the year was *Seltzer & Co.* v. *Livingston.*[9] Here the employer had signed a recognition agreement in which it agreed to enter into a collective bargaining contract incorporating the terms found in a majority of the union's contracts. The recognition agreement expressly made disputes arising thereunder subject to arbitration. When the parties could not agree on the terms of the collective bargaining contract, the union instituted a court action to compel arbitration. Expressly declining to follow the First Circuit's 1957 *Potter Press*[10] decision to the contrary, the federal district court ordered arbitration on the question of what the substantive terms of the contract would be. The decision was affirmed *per curiam* by the Second Circuit.[11]

C. Parties to the Action

Although the Railway Labor Act differs substantially in many respects from the National Labor Relations Act, decisions by the Supreme Court in the one area have often portended future developments in the other.[12] The Supreme Court's decision in *Transportation-Communications Employees Union* v. *Union Pacific Railroad Co.*[13] is quite suggestive in this respect. It involved an action by the Telegraphers to enforce a work assignment award of the National Railroad Adjustment Board. The dispute had originally been brought before the NRAB by the Telegraphers. They claimed that the railroad had incorrectly awarded the manning of certain computerized equipment to the Railway Clerks rather than the Telegraphers. Pursuant to Section 3 First (j), the NRAB gave notice of the proceedings to the Clerks. They declined to participate, but reserved the right to initiate their own proceedings should the jobs of their members be subsequently affected. Faced with this refusal, the NRAB nonetheless proceeded and decided that the Telegraphers were contractually entitled to the disputed work.

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9 253 F. Supp. 509, 61 LRRM 2581 (S.D. N.Y., 1966).
10 *Boston Printing Pressmen's Union* v. *Potter Press,* 241 F.2d 787, 39 LRRM 2524 (1st Cir., 1957).
11 *Seltzer & Co.* v. *Livingston,* 361 F.2d 218, 62 LRRM 2079 (2d Cir., 1966).
12 See, *e.g., Railway Telegraphers* v. *Chicago and North Western Ry.,* 362 U.S. 330 (1960), 45 LRRM 3104, and *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964), 57 LRRM 2609; *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448 (1957), 40 LRRM 2113, and *IAM* v. *Central Airlines, Inc.,* 372 U.S. 682 (1963), 52 LRRM 2803.
13 63 LRRM 2481 (1966).

The Supreme Court agreed with the lower courts that the award should not be enforced. The Court reasoned that the NRAB could not possibly determine the whole dispute without the Clerks being made a party or without at least considering the Clerks' collective bargaining agreement. The case was remanded to the NRAB to offer the Clerks an opportunity to participate and, whether or not they again refused, for a determination of the entire dispute by reference to both contracts.[14]

The Court's disposition of this case presents an intriguing contrast to its decision in *Carey*.[15] There the Court compelled arbitration of a work dispute under Section 301 in spite of the fact that only one of the two unions involved would presumably be a party to the arbitration. But Mr. Justice Black wrote a vigorous dissent on due-process grounds, reasoning essentially that a trilateral dispute was not resolvable in a bilateral proceeding. There was only one mention made to *Carey* in Justice Black's opinion for the Court in *Union Pacific*. It was a "Cf." reference to it as a footnote to a statement that the jurisdiction of the NRAB should not be frustrated by a premature judicial action, If indeed the rationale of the *Carey* case was that it was premature at that stage to require a joinder of the second union, one could well argue that the Court may yet require the possibility of such a joinder by arbitrators later in the proceedings.[16] The effect would be to allow the initial determination of joinder feasibility to be made by the arbitrator.

In the lower federal courts in other cases involving proper parties, it was held that individual union officers may not be subject to a damage suit[17] under Section 301, but may properly

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[14] In his dissent, Mr. Justice Fortas, joined by Chief Justice Warren, disputed the premise that only one union could be awarded the work in question. He reasoned that if the railroad had in fact given the work to both unions in their respective collective bargaining agreements, the railroad should be bound by the consequences of its own actions and should compensate both groups of employees.

[15] *Carey* v. *Westinghouse Elec. Corp.*, 375 U.S. 261 (1964), 55 LRRM 2042.

[16] For further discussion on this point, see Jones, "On Nudging & Shoving The National Steel Arbitration Into A Dubious Procedure," 79 *Harv. L. Rev.* 327 (1965); Bernstein, "Nudging & Shoving All Parties to a Jurisdictional Dispute Into Arbitration: The Dubious Procedure of National Steel," 78 *Harv. L. Rev.* 784 (1965); Jones, "An Arbitral Answer to a Judicial Dilemma: The Carey Decision and Trilateral Arbitration of Jurisdictional Disputes," 11 *UCLA L. Rev.* 327 (1964). See also Bernstein and Jones, "Jurisdictional Dispute Arbitration: The Jostling Professors," 14 *UCLA L. Rev.* 347 (1966).

[17] *Hearst Corp.* v. *Pressmen's Union*, 61 LRRM 2702 (S.D. Cal., 1966).

be defendants when relief other than damage is sought.[18] It has also been held that individual employees are proper but not indispensable or necessary parties to a union's suit to compel arbitration of the employees' grievances.[19]

D. Obligations of Successors

There were a number of decisions in 1966 relating to the duty of a purchaser of a business to arbitrate under a collective bargaining agreement previously entered into between the seller and the union. In these cases, the courts were called upon for further interpretation of the Supreme Court's decision in *John Wiley & Sons* v. *Livingston*.[20]

Arbitration was not ordered in 1966 in a majority of the cases in which the successor question was raised. The most important of these, by far, was *McGuire* v. *Humble Oil & Refining Co.*[21] Humble Oil & Refining Co. had purchased a retail coal and fuel business formerly owned by Weber & Quinn. The employees at Weber & Quinn had been covered by a collective agreement and were represented by a union other than that which represented Humble's employees. Immediately after the purchase, both operations were completely integrated. The Humble collective agreement was applied to all employees. The ousted union sued to compel arbitration under the Weber & Quinn contract. Humble then petitioned for a Board clarification of the bargaining unit. The Labor Board upheld Humble's contention that the Weber & Quinn operation was no longer a separate bargaining unit. It found it to be an "accretion" to the larger Humble unit. In light of this determination by the Board, the Second Circuit refused to order arbitration under the Weber & Quinn contract. The court reasoned that to do so would be to contravene the status of the Humble union as the exclusive bargaining representative.[22]

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18 *Wanzer & Sons* v. *Milk Drivers Union*, 249 F. Supp. 664, 61 LRRM 2376 (N.D. Ill., 1966).

19 *UAW* v. *General Electric Co.*, 251 F. Supp. 650, 61 LRRM 2432 (W.D. Ark., 1966).

20 376 U.S. 543 (1964), 55 LRRM 2769.

21 355 F.2d 352, 61 LRRM 2410 (2d Cir., 1966).

22 The court, however, did agree, in accord with *Wackenhut Corp.* v. *United Plant Guard Workers*, 332 F.2d 954, 56 LRRM 2466 (9th Cir., 1964) and *Steelworkers* v. *Reliance Universal, Inc.*, 355 F.2d 891, 56 LRRM 2721 (3d Cir., 1964), that the rationale of *Wiley* applies to purchases as well as mergers.

In two other cases, the courts forestalled arbitration when they found that changes made by the purchaser destroyed the "substantial continuity of identity" required to compel arbitration. In one case, the buyer purchased a drug store, did not hire any of the seller's employees, and made certain changes in the operation of the store. Arbitration was denied even though the seller's collective bargaining agreement was expressly binding on "successors." [23] The second case involved the sale of an automobile sales and service agency. The facts were similar to the first except here there was no successor clause in the collective agreement. Arbitration again was denied.[24] On the other hand, in a third case the issue had gone to arbitration. The arbitrator's award was enforced against a successor who operated a business at the same location, with the same equipment, and with the same employees.[25]

Wiley was also invoked in a somewhat different context during the year. In *Monroe Sander Corp.* v. *Livingston* [26] a parent corporation sought to close down one subsidiary and to transfer its functions to a newly acquired second subsidiary at a different location. The union at the first plant thereupon brought an action to compel arbitration as to its job rights at the second plant. The Court found that a sufficient continuity of identity existed between the two plants. It held that the second subsidiary was bound by the arbitration clause of the first. This was so even though the second subsidiary was unorganized and had its full complement of employees.

E. Effects of the Norris-LaGuardia Act

The year 1966 produced a number of conflicting decisions as to the scope of the Norris-LaGuardia Act as interpreted by the Supreme Court in *Sinclair Refining Co.* v. *Atkinson.*[27] The most frequently encountered question in this area has been whether a suit to enjoin a breach of a no-strike clause may be removed from a state to a federal court. A federal district court in Tennessee

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[23] *Retail Store Employees Union, Local 954* v. *Lane's of Findlay, Inc.*, 63 LRRM 2445 (N.D. Ohio, 1966).
[24] *Cooksey* v. *Lou Ehlers Cadillac*, 63 LRRM 2425 (Calif. Super. Ct., 1966).
[25] *In re Dupre Lingerie Inc.*, 62 LRRM 2738 (N.Y. Sup. Ct., 1966).
[26] 63 LRRM 2545 (S.D. N.Y., 1966).
[27] 370 U.S. 195 (1962), 50 LRRM 2420.

held that such a suit could be removed not only where the complaint included a prayer for an injunction and "general relief" [28] but also where the complaint included only a prayer for an injunction.[29] On the other hand, two other federal district courts followed the lead of the Third Circuit in the *American Dredging* case [30] and denied removal of similar injunctive actions.[31]

The question of whether a federal court can enforce an arbitration award which orders striking employees back to work or orders them to perform a specific type of work has also caused the courts difficulty. The Fifth Circuit has indicated in *dicta* that enforcement of an arbitrator's award requiring employees to return to work may not be meaningfully distinguishable from a court injunction to the same end. *Sinclair* may preclude the former as well as the latter.[32] In contrast, the Third Circuit came to the opposite conclusion where an arbitrator ordered employees to unload vessels in those instances where the unloading time had been delayed by the employer.[33] Certiorari has been granted by the Supreme Court in the latter case.

F. Damages Allowable

Distinguishing the Third Circuit's decision in the *Brooks Shoe* case,[34] a federal district court this year awarded exemplary damages to an employer in a damage action against a union for breach of a no-strike clause.[35] The court held that exemplary damages may be awarded in unusual situations where it can be shown that they will promote industrial peace. In two other cases, the courts have refused to award attorneys' fees in actions to enforce or set aside arbitration awards.[36]

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28 *Avco Corp.* v. *Aero Lodge 735, IAM,* 63 LRRM 2014 (M.D. Tenn., 1966).
29 *Oman Construction Co.* v. *IBT, Local 327,* 63 LRRM 2033 (M.D. Tenn., 1966).
30 *American Dredging Co.* v. *Local 25, Marine Division, IUOE,* 338 F.2d 837, 57 LRRM 2407 (3d Cir., 1964).
31 *California Packing Corp.* v. *ILWU,* 253 F. Supp. 597, 62 LRRM 2264 (D. Haw., 1966); *Kroger Co.* v. *Milk Drivers,* 61 LRRM 2692 (S.D. Ohio, 1966).
32 *Steamship Co.* v. *Maritime Union,* 360 F.2d 63, 62 LRRM 2083 (5th Cir., 1966).
33 *Philadelphia Marine Trade Assn.* v. *ILA, Local 1291,* 365 F.2d 295, 62 LRRM 2791 (3d Cir., 1966).
34 *Shoe Workers* v. *Brooks Shoe Mfg. Co.,* 298 F.2d 277, 49 LRRM 2346 (3d Cir., 1962). The court found that in *Brooks Shoe* the situation had deteriorated beyond the point of remedy and exemplary damages would thus not have promoted industrial peace.
35 *Wanzer & Sons* v. *Milk Drivers Union,* 249 F. Supp. 664, 61 LRRM 2376 (N.D. Ill., 1966).
36 *Lee Co.* v. *Printing Pressmen,* 62 LRRM 2727 (D. Conn., 1966); *Retail Clerks* v. *Seattle Department Stores Assn.,* 62 LRRM 2706 (W.D. Wash., 1966).