Appendix B

ARBITRATION AND FEDERAL RIGHTS UNDER COLLECTIVE AGREEMENTS IN 1971 *

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While 1971 may not have produced as important a decision affecting arbitration as the 1970 Supreme Court decision in *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*,[1] the increased volume of litigation attests to continued ferment and development in the arbitral arena. During 1971 the volume of reported appellate litigation affecting arbitration in the federal sector rose significantly from the prior year, due in large part to the *Boys Markets* decision, and due to the continued large number of cases by individual employees alleging a breach of a collective bargaining agreement on the part of the employer and a breach of the duty of fair representation on the part of the union.[2] State litigation would appear to be at about the same volume as the previous year, indicating the pervasive federal influence in regard to labor arbitration processes. The following breakdown of the 1971 case law indicates clearly the continued development of the

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[1] 398 U.S. 235, 74 LRRM (1970). See Curtin, "Boys Markets and the No-Strike Injunction," 57 *A.B.A.J.* 863 (1971); Cassel, "The Labor Injunction to Enforce No-Strike Provisions," 22 *Lab.L.J.* 229 (1971).

[2] Approximately 260 federal court cases alone have been reported through February 1972 which are of direct concern in this report, a significant rise over the previous year when the number of such cases approximated 150. This report deals principally with federal actions under Sec. 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. 185, although all cases from other jurisdictions touching upon arbitration were studied and considered for inclusion. In addition, there are a large number of Railway Labor Act (RLA) cases, civil rights decisions, and National Labor Relations Board (NLRB) opinions which are referred to only where they are sufficiently significant for the purposes of this report. State appellate court opinions also have been included in this report, but opinions of state trial courts, such as the New York Supreme Court, have generally been omitted. While a case may stand for several points of law in the arbitration field, the authors have attempted to cite cases in the areas of their greatest significance. This report is not necessarily exhaustive of all appellate litigation involving labor arbitration.

national labor policy favoring voluntary settlement of labor disputes through grievance-arbitration mechanisms rather than by resort to the courts.

I. Supreme Court Decisions

During 1971 there were a number of decisions handed down by the U. S. Supreme Court relating to the arbitral process. Probably the most important decision was the inconclusive decision affirming by an equally divided Court the decision of the Sixth Circuit Court of Appeals in *Dewey* v. *Reynolds Metals Co.*[3] The Sixth Circuit had held than an employee who claimed religious discrimination by reason of his discharge for refusing to work on Sundays was bound by an adverse arbitration award and could not thereafter bring an action on the same issue against the employer under Title VII of the Civil Rights Act of 1964. In its denial of a rehearing, the Sixth Circuit had specifically disagreed with the contrary holding of the Fifth Circuit in *Hutchings* v. *U.S. Industries, Inc.*,[4] indicating that in its opinion the Fifth Circuit decision did not comport with the national policy favoring arbitration in the resolution of all labor disputes as reaffirmed by *Boys Markets*, in that the purpose of arbitration would be thwarted if awards are held by the courts to be binding on employers only and not on employees. The Sixth Circuit compared an arbitrator's award to that of a court judgment which should be binding on "both parties." The court did not discuss to what extent an employee as distinguished from the union can actually be considered to be a party. Thus, the status of the law in regard to the binding effect of prior arbitration decisions in civil rights cases remains in doubt.

In a decision under the Railway Labor Act, the Supreme Court held in *Chicago & North Western Ry.* v. *United Transportation Union*[5] that the Norris-LaGuardia Act did not bar the courts from enjoining a strike in order to enforce the duty under the RLA requiring carriers and unions "to exert every reasonable

[3] 402 U.S. 689, 3 FEP Cases 508 (1971), *aff'g by an equally divided Court,* 429 F.2d 324, 2 FEP Cases 687, 869 (6th Cir. 1970).

[4] 428 F.2d 303, 2 FEP Cases 725 (5th Cir. 1970).

[5] 402 U.S. 570, 77 LRRM 2337 (1971), *on remand* 330 F.Supp. 646, 78 LRRM 2001 (N.D. Ill.). The applicable statutory provisions involved are 45 U.S.C. 152 First of the RLA, 29 U.S.C. 104, 107, and 108 of the Norris-LaGuardia Act. For a good subsequent and lengthy summary of this area of the law, see *Erie Lackawanna Ry.* v. *Lighter Captains, Local 996, ILA,* 338 F. Supp. 955, 79 LRRM 2637 (D. N.J. 1972).

effort to make and maintain agreements." In another case arising under the RLA, the Supreme Court held that employee rights involved in the merger of railroads must be adjudicated by the federal courts under the Interstate Commerce Act, and a railroad and a union could not enter into a new agreement reducing benefits of the employees involved and settling the question of damages by arbitration.[6]

In a case involving the question of the conflict of Section 301 rights with causes of action under other federal statutes, the Supreme Court held in *U. S. Bulk Carriers, Inc.* v. *Arguelles*[7] that Section 301 merely added an optional remedy and did not abrogate the remedy of a seaman's statute that permits seamen to sue for wages in federal courts, so that the seaman was not required to exhaust grievance and arbitration procedures under a collective bargaining agreement before exercising the prior seaman's remedy. The Supreme Court also held in a five-to-four decision than an Idaho state court lacked jurisdiction of a suit by an individual employee against a union that procured his discharge from employment under a union security clause of a collective bargaining agreement.[8] The court relied on the preemption doctrine set forth in its *Garmon*[9] decision, citing the federal concern and pervasive regulation in this area of the law, and holding that the matter was within the exclusive jurisdiction of the NLRB.

Under the jurisdictional-dispute provisions of the NLRA, the Supreme Court also held unanimously, reversing the lower court, that not only must the unions be a party to an agreed-upon method of settlement, but the employer must also be a party, and

[6] *Nemitz* v. *Norfolk & Western Ry.*, 404 U.S. 37, 78 LRRM 2721 (1971), *aff'g* 436 F.2d 841, 76 LRRM 2340 (6th Cir. 1971).

[7] 400 U.S. 351, 76 LRRM 2161 (1971). See also, in regard to the relationship of arbitration and the Fair Labor Standards Act, *Iowa Beef Packers, Inc.* v. *Thompson,* 405 U.S. 228, 20 WH Cases 488 (1972), dismissing a writ of certiorari as improvidently granted where the Iowa Supreme Court, 19 WH Cases 1060, had held that employees could sue for overtime compensation without utilizing the grievance and arbitration procedures under the union contract. The U.S. Supreme Court noted in its dismissal that the contract applied only to grievances "pertaining to a violation of the agreement." Mr. Justice Douglas dissented on the ground that the holding of the Iowa court should be affirmed.

[8] *Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 77 LRRM 2501 (1971). See also *Peltzman* v. *American Radio Assn.,* 79 LRRM 2539 (N.Y. Sup. Ct. 1971).

[9] *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 43 LRRM 2838 (1959). The majority and dissenting opinions discussed at length the case of *Machinists* v. *Gonzales,* 356 U.S. 617, 42 LRRM 2135 (1958), the majority distinguishing it from Lockridge and the dissenters being unable to do so.

where it is not, the NLRB must hear the dispute under Section 10(k) of the LMRA.[10] The Court stressed at length the voluntary nature of private settlement mechanisms and the NLRB's deferral thereto.[11] Thus, the existing procedure of the NLRB in jurisdictional-dispute cases was upheld.[12]

II. Rights of Individual Employees Under Section 301

Actions by employees predicated upon Section 301 jurisdiction and the *Vaca* [13] case continued at a very high level during 1971, but qualitatively exhibited the same lack of success. As evidenced by the *Lockridge* case discussed above, jurisdiction of the court under a Section 301 theory can be a formidable obstacle where the subject matter is arguably protected by Section 7 of the LMRA, or arguably prohibited by Section 8, thus being within the exclusive jurisdiction of the NLRB. If the court should find that the proper focus of concern is conduct regulated by the NLRB, the employee may find his action is preempted under the Supreme Court's *Garmon* decision, and as a practical matter be left without a remedy if the NLRB six-month statute of limitations has run, or if the General Counsel refuses to issue complaint.[14] In the usual case the federal district court has original jurisdiction of all actions predicated under Section 301, even if begun in state courts.[15] Where an employer is attempting to vacate an arbitration award in a state court, the federal court may apply the abstention doctrine to a collateral suit under the civil rights laws by the employee involved and retain jurisdiction until the state action is completed.[16] In one rather unusual case a federal district court granted remand of a state court action by

[10] *NLRB* v. *Plasterers, Local 79,* 404 U.S. 116, 78 LRRM 2897 (1971).

[11] The Court made no reference to the NLRB decision in *Collyer Insulated Wire,* 192 NLRB No. 150, 77 LRRM 1931 (1971), decided three months previously, and which is discussed at length later in this report, but the language of the Court regarding deferral to arbitration would appear to be favorable to the NLRB's present position.

[12] See, for example, *Bricklayers, No. 3 of Kansas City (Winn-Senter Constr. Co.),* 194 NLRB No. 74, 78 LRRM 1660 (1971).

[13] *Vaca* v. *Sipes,* 386 U.S. 171, 64 LRRM 2369 (1967).

[14] See Mr. Justice Douglas' dissenting opinion in the *Lockridge* case, 77 LRRM at 2513. However, Mr. Justice Douglas' alleged difficulties with an employee's exhausting the NLRB procedures as against bringing his own cause of action with his own counsel would appear to be misplaced.

[15] *Guaracino* v. *Communications Workers, Local 2552,* 330 F.Supp. 679, 79 LRRM 2025 (E.D. Pa. 1971). In regard to employee actions and the jurisdiction of the National Railroad Adjustment Board under the Railway Labor Act, see *Fabian* v. *B & O RR.,* 320 F. Supp. 573, 77 LRRM 2313 (N.D. Ohio 1970).

[16] *Steele* v. *Haley,* 451 F.2d 1105, 79 LRRM 2173 (1st Cir. 1971), *reman'g with directions to retain jurisdiction,* 355 F.Supp. 659, 79 LRRM 2170 (D. Mass. 1971).

employees alleging violation of a collective bargaining agreement by the reduction of mileage allowances, holding that the claim was based on Louisiana, not federal, law.[17] Employee actions predicated upon other constitutional or statutory theories appear to encounter some of the same problems as 301 actions.[18]

Reported decisions of successful employee actions frequently involve issues related to damages. Thus, in a wrongful discharge action the Eighth Circuit held[19] that the district court erred in limiting an employee's recovery from the date of discharge to the date of expiration of contract in view of the strong likelihood of future employment and renewal of the contract. The court also discussed the damages recoverable against the union in a case where it was found that the union breached its duty of fair representation by wrongfully inducing the employer to discharge the employee and in bad faith by failing to process a grievance in regard to the discharge. The Eighth Circuit also held that the employee could recover for mental distress due to the union's alleged violation of its statutory duty to avoid intentional discrimination.

In another wrongful discharge action in which 10 years of litigation had already elapsed and in which the existence of a contract was in dispute, a district court refused to refer the question of wrongful termination of employment to arbitration once the existence of the contract has been established by a jury, on the ground that such procedure would be inefficient judicial administration.[20] In general, employee 301 actions against pension and welfare funds appear to be somewhat more successful than wrongful discharge and other employee actions.[21]

One of the major hurdles facing any employee action under

[17] *Lambright* v. *Red Ball Motor Freight, Inc.*, 335 F.Supp. 28, 79 LRRM 2397 (W.D. La. 1971).

[18] See, for example, *Linscott* v. *Millers Falls Co.*, 440 F.2d 14, 76 LRRM 2994 (1st Cir. 1971) (First Amendment case); *Tirino* v. *Local 164, Restaurant Employees*, 77 LRRM 2289 (E.D. N.Y. 1970) (Labor-Management Reporting and Disclosure Act [LMRDA] case); but see *Reardon* v. *Penn-Central Transp. Co.*, 76 LRRM 2654 (N.D. Ohio 1971) (Interstate Commerce Commission).

[19] *Richardson* v. *Communications Workers, Local 7495*, 443 F.2d 974, 77 LRRM 2566 (8th Cir. 1971, *rev'g* 77 LRRM 2565 (D. Neb. 1970). Damages, of course, must be proved, as evidenced by *Leon* v. *Thorlief Larsen & Son, Inc.*, 77 LRRM 2364 (Ill. App. 1971).

[20] *Smith* v. *Pittsburgh Gage & Supply Co.*, 76 LRRM 2776 (W.D. Pa. 1971).

[21] *Lavella* v. *Boyle*, 444 F.2d 910, 77 LRRM 2329 (D.C. Cir. 1971); but see *Knoll* v. *Phoenix Steel Corp.*, 325 F.Supp 666, 77 LRRM 2038 (E.D. Pa. 1971); compare *Blankenship* v. *Boyle*, 337 F.Supp. 296, 79 LRRM 2183 (D. D.C. 1972).

301 is surviving a motion for summary judgment or a motion to dismiss. Thus, there must be a contract in existence with a grievance procedure that could be thwarted by the arbitrary, capricious, or bad-faith conduct on the part of a union if violated by an employer.[22] Furthermore, the employees must in timely fashion utilize the grievance procedure; and even when they do, the union is not required to process every grievance to arbitration.[23] Allegations of misrepresentation or mere negligence on the part of a union are not sufficient to state a cause of action.[24] Thus, the First Circuit, in dismissing a count in a complaint of unfair representation brought by an employee who was injured on the job and claimed that the union was negligent in its safety inspection, held that the union was only held to a duty of good-faith representation and not a general duty of due care.[25]

The question whether the employee has properly and sufficiently alleged a breach of duty of fair representation on the part of a labor organization and/or a breach of contract by an employer is frequently a close question of law upon which appellate courts frequently disagree with lower courts.[26] A plaintiff is only required to state a claim upon which relief can be granted and his claim is not defeated with bland generalizations about collective bargaining agreements not giving individual workers any personal rights.[27] While the fact that the union made a good-faith concession in plaintiff's case in exchange for a concession in another dispute is not in itself sufficient to establish a breach of duty of fair representation, the deliberate sacrifice of an individual as a consideration for other objectives would be improper.[28] Also, a district court held that an employer's summary denial of grievances amounting to unilateral bad faith, which

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[22] *Olsieski* v. *Transco Plastics Corp.*, 78 LRRM 2494 (N.D. Ohio 1971); *Scruggs* v. *Hormel & Co.*, 464 SW.2d 730, 77 LRRM 2693 (Tex. Civ. App. 1971).

[23] *Orphan* v. *Furnco Constr. Co.*, 325 F.Supp. 1220, 77 LRRM 2126 (N.D. Ill. 1971); see also *Matzer* v. *Florsheim Shoe Co.*, 270 NE.2d 75, 76 LRRM 2941 (Ill. App. 1971).

[24] *Bowlin* v. *UAW*, 77 LRRM 2909 (W.D. Tenn. 1971); *Sims* v. *Papermakers*, 26 Mich. App. 129, 182 NW.2d 90, 76 LRRM 2494 (1970).

[25] *Brough* v. *Steelworkers*, 437 F.2d 748, 76 LRRM 2430 (1st Cir. 1971). The court remanded to the state court the employee's common-law negligence count against the union.

[26] See *Williams* v. *Dana Corp.*, 442 F.2d 412, 77 LRRM 2135 (6th Cir. 1971), *on remand*, 54 F.R.D. 473, 79 LRRM 2121 (E.D. Mich.); *Reid* v. *McDonnell Douglas Corp.*, 443 F.2d 408, 77 LRRM 2609 (10th Cir. 1971).

[27] *Plant* v. *Local 199, Laborers*, 324 F.Supp. 1021, 76 LRRM 2922 (D. Del. 1971); see also 331 F.Supp. 73, 77 LRRM 2810 for LMRDA phase of the same case.

[28] *Local 13, Longshoremen* v. *Pacific Maritime Assn.*, 441 F.2d 1061, 77 LRRM 2160 (9th Cir. 1971).

frustrated and made the grievance procedure ineffective, was sufficient to state a cause of action against the employer only.[29]

Where arbitration has been held and has resulted in an award which is either insufficient or adverse to the employees involved, the latter cannot collaterally attack the award by instituting a 301 action for breach of contract, especially where no effort was made to set aside the award, absent adequate allegations of arbitrary, discriminatory, or bad-faith conduct on the part of the union.[30] Further, employees normally have no standing to sue to vacate an award, absent fraud, deceit, breach of the duty of fair representation by the union, or substantial inadequacy of the grievance procedure.[31] The Second Circuit, however, refused to stay a 301 action against a union for breach of the duty of fair representation pending arbitration of the issues involved where the plaintiffs had alleged a "sweetheart arrangement" between the union and the employers, the court noting that some issues of fair-representation actions are not arbitrable or resolvable in a third-party action.[32]

As for the grievance procedure itself, where a union accepts and investigates a grievance and reasonably believes that the case could not be arbitrated successfully, an allegation of arbitrariness or bad faith cannot be sustained.[33] Nor may an employee unreasonably refuse to accept a settlement of his grievance arrived at between the union and the employer and, thereafter, bring a wrongful discharge action.[34] Also, where the union reasonably believes the chances for successful arbitration are slight, it may condition arbitration upon an agreement by the employees involved to pay the expenses thereof.[35] In cases involving refusal

[29] *Chapman* v. *United Aircraft Corp.*, 329 F.Supp. 735, 78 LRRM 3062 (E.D. Pa. 1971).

[30] *Allessandrini* v. *Musicians, Local 802*, 439 F.2d 699, 76 LRRM 2880 (2d Cir. 1971); *Burroughs* v. *Sterling Transit Co.*, 77 LRRM 2621 (C.D. Calif. 1971); *Elrod* v. *Teamsters*, 77 LRRM 2619 (C.D. Calif. 1971); *Howerton* v. *Christenson Co.*, 76 LRRM 2937 (N.D. Calif. 1971); *Haworth* v. *White Stack Towing Co.*, 183 SE.2d 320, 78 LRRM 2613 (S.C. Sup. Ct. 1971).

[31] *Harris* v. *Chemical Leamen Tank Lines, Inc.*, 437 F.2d 167, 76 LRRM 2257 (5th Cir. 1971).

[32] *Sheridan* v. *Liquor Salesmen's Union*, 444 F.2d 393, 77 LRRM 2883 (2d Cir. 1971), *rev'g* 77 LRRM 2881 (E.D. N.Y. 1971).

[33] *Sarnelli* v. *Meat Cutters, Local 33*, 333 F.Supp. 228, 79 LRRM 2317 (D. Mass. 1971); *Gremaud* v. *Granite City Steel Co.*, 277 NE.2d 1, 78 LRRM 3096 (Ill. App. 1971).

[34] *Savage* v. *Cook Coffee Co.*, 79 LRRM 2485 (N.D. Ohio 1971).

[35] *Encina* v. *Lava Boot Co.*, 448 F.2d 1264, 78 LRRM 2382 (5th Cir. 1971).

to arbitrate, the test for a breach of the duty of fair representation is not whether the grievance had merit, but whether the union dealt with the employee's claim in bad faith or in an arbitrary manner.[36] Mistake or poor tactics on the part of the union representative processing the grievance is not enough to constitute unfair representation.[37]

However, where an arbitration hearing is actually held, employees appear to be having somewhat greater success in attacking the fairness of the grievance and arbitration procedure itself. Thus, where it is found by the court that the plaintiff did not receive full and fair representation in the grievance and arbitration proceedings, his fair-representation claim will not be summarily dismissed.[38] In a Ninth Circuit case, reversing the district court, it was noted that the repeated attempts by Spanish-speaking plaintiffs to exhaust contractual remedies had met without result and, due to the language barrier, the minority group union members had been effectively deprived of an opportunity to participate either in the negotiation of the collective bargaining contract or in the enjoyment of its benefits.[39] However, where an employee has had a fair hearing on his grievance, the fact that initial steps of the procedure violated due process will not necessarily affect the award.[40] Where the union fairly presented the employee's claim, the presence of the aggrieved employee at the arbitration hearing is not crucial,[41] but, if present, the employee may have a duty to make any objection to the proceedings known to the arbitrator.[42]

One of the more common types of employee suits are those following the sale, merger, or change in an employer's operations, most of which cases involve joint employer-union committee procedures under Teamster contracts. Where the dispute is taken in good faith by the union through the grievance machinery and results in an award that is final and binding under the collective

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[36] *Lowe* v. *Hotel Employees, Local 705*, 36 Mich. App. 66, 79 LRRM 2527 (1971).

[37] *Dickinson* v. *Roadway Express, Inc.*, 78 LRRM 2657 (S.D. Ohio 1971).

[38] *Steinman* v. *Spector Freight System, Inc.*, 441 F.2d 599, 77 LRRM 2412 (2d Cir. 1971).

[39] *Retana* v. *Elevator Operators, Local 14*, 453 F.2d 1018, 79 LRRM 2272 (9th Cir. 1972).

[40] *Otto* v. *Houston Belt & Terminal Ry.*, 319 F.Supp. 262, 77 LRRM 2027 (S.D. Tex. 1970).

[41] *Ampagoomian* v. *Johnson Motor Lines, Inc.*, 331 F.Supp. 262, 78 LRRM 2752 (D. R.I.); *Davidson* v. *Local 1189, UAW*, 332 F.Supp 374, 78 LRRM 2545 (D. N.J. 1971).

[42] *Heltsley* v. *Dist. 23, Mine Workers*, 477 S.W.2d 134, 78 LRRM 2633 (Ky. App. 1971).

bargaining agreement, the courts generally find no breach of the duty of fair representation and hold that the award is not reviewable on the merits.[43] The difficulty in these cases, especially where dovetailing on seniority is involved, is that the union frequently represents both contending groups of employees and is thereby accused of representing the interests of the prevailing employees over that of the losing group. However, in any case, the courts look to the good faith of the union and no breach of the duty of fair representation is found if the positions of both sides were fully and fairly presented to, and considered by, the arbitration panel, or if the matter was settled in good faith in some other fashion.[44] In one case it was held that the employees themselves may bring an action to require the employer to follow contract procedures in regard to a change in operations.[45]

One of the major stumbling blocks for employee actions under 301 is the requirement that the employee exhaust all available remedies. The bold assertion that exhaustion of grievance procedures would be futile is not sufficient, and it is plaintiff's burden to present a satisfactory explanation for not attempting to exhaust the grievance procedure.[46] Some courts speak in terms of exhaustion not being required in a fair-representation proceeding, but such a statement should be taken in the context of plaintiff's allegations of conspiracy, bad faith, or willful and wanton misconduct on the part of the union, rendering attempts on the part of the employee to fulfill the requirement a futility.[47]

[43] *Trueblood* v. *Pilot Freight Carriers, Inc.*, 78 LRRM 2715 (M.D. N.C. 1971); *Andrus* v. *Convoy Co.*, 77 LRRM 2675 (N.D. Calif. 1971); *Williams* v. *Pacific Motor Trucking Co.*, 76 LRRM 2534 (N.D. Calif. 1971).

[44] *Price* v. *Teamsters*, 79 LRRM 2231 (E.D. Pa. 1970); *Morris* v. *Werner-Continental, Inc.*, 78 LRRM 2654 (S.D. Ohio 1971); *Dean* v. *Roadway Express, Inc.*, 78 LRRM 2160 (M.D. N.C. 1971); *Theel* v. *Four Lakes Concrete Corp.*, 76 LRRM 2260 (W.D. Wis. 1971); see also in the railroad industry *Hyatt* v. *N.Y. Central RR*, 444 F.2d 1397, 77 LRRM 2880 (7th Cir. 1971); *Cole* v. *Seaboard Coast Line RR*, ... F.2d ...., 76 LRRM 2529 (4th Cir. 1971); but see in a civil rights action by a Negro employee where the court held that white employees whose seniority might be adversely affected were indispensable parties. *Banks* v. *Seaboard Coast Line RR*, 51 F.R.D. 304, 3 FEP Cases 332 and 632 (N.D. Ga. 1970 and 1971).

[45] *Sappington* v. *Associated Transport, Inc.*, 54 F.R.D. 202, 79 LRRM 2494 (D. Md. 1972).

[46] *Fulsom* v. *United-Buckingham Freight Lines, Inc.*, 324 F.Supp. 135, 78 LRRM 2186 (W.D. Mo. 1970); *Tagliarini* v. *New York Shipping Assn.*, 78 LRRM 2091 (E.D. N.Y. 1971).

[47] *Ruzicka* v. *General Motors Corp.*, 336 F.Supp 824, 79 LRRM 2327 (E.D. Mich. 1972); *Zamora* v. *Massey-Ferguson, Inc.*, 336 F.Supp. 588, 79 LRRM 2440 (S.D. Iowa 1972); *Glus* v. *Murphy Co.*, 329 F.Supp. 563, 3 FEP Cases 1094 (W.D. Pa. 1971); *Meaders* v. *Chrysler Corp.*, 3 FEP Cases 747 (E.D. Mich. 1971); *Pompey* v. *General Motors Corp.*, 385 Mich. 537, 189 NW.2d 243, 3 FEP Cases 913 (1971).

Where an employee failed to timely exercise his or her contract rights, a union's attempt thereafter to secure redress does not amount to a waiver of the exhaustion requirement.[48] Also, a finding of a failure to exhaust *intra*-union remedies, as distinguished from remedies under a collective bargaining agreement, was the basis for dismissal of employee actions in a significant number of cases during the past year. It is important to note that most of these reported dismissals involved the Automobile Workers, which is one of the few labor organizations having a constitutionally independent public review board which can overrule union action at lower levels.[49]

III. General Judicial Problems Under 301

A. Actions Cognizable Under 301

In addition to the usual actions to compel arbitration or enforce an award by unions or employers, and the numerous employee fair-representation actions, Section 301 lends itself to other types of law suits based upon the contractual relationship affecting relations. The Ninth Circuit held this past year that a local union which is not a party to the contract between its parent union and an employer cannot attempt to vacate an award under that contract, even though the local acted as an agent of the international union for the initial processing of the grievance.[50] The lack of a collective bargaining agreement in jurisdictional disputes where the noncontracting labor organization attempts to obtain work assigned to another labor organization by the employer makes 301 jurisdiction inapplicable, so that only a damage (tort) action alleging interference with contractual relations or inducement of a breach of contract, rather than using a straight contract theory, may have to be brought by an injured employer.[51] Also, 301 jurisdiction may be lacking where there are other fora to hear the claim, such as allegations by employees of a

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[48] *Berry* v. *Michigan Bell Tel. Co.*, 319 F.Supp. 401, 76 LRRM 2674 (E.D. Mich. 1967).

[49] *Cacavas* v. *General Motors Corp.*, 444 F.2d 1506, 77 LRRM 2845 (6th Cir. 1971); *Harris* v. *Continental Aviation & Eng. Corp.*, 79 LRRM 2398 (N.D. Ohio 1972); *Sciacca* v. *Wine Salesmen's Union, Local 18*, 78 LRRM 2817 (S.D. N.Y. 1971); *Jackson* v. *Chrysler Corp.*, 78 LRRM 2745 (S.D. Ind. 1971); *Foley* v. *Chrysler Corp.*, 78 LRRM 2744 (S.D. Ind. 1971); *Sedlarik* v. *General Motors Corp.*, 78 LRRM 2232, 54 F.R.D. 230, 77 LRRM 3029 (W.D. Mich. 1971); *Imbrunnone* v. *Chrysler Corp.*, 336 F.Supp. 1223, 77 LRRM 2690 (E.D. Mich. 1971).

[50] *Local 13, Longshoremen* v. *Pacific Maritime Assn.*, *supra* note 28.

[51] *San Antonio Trades Council* v. *Warrior Constructors, Inc.*, 446 SW.2d 815, 78 LRRM 2016 (Tex. Civ. App. 1971).

conspiracy to deprive them of work opportunities, which has been held to be within the exclusive jurisdiction of the NLRB.[52]

A number of cases during the past year involved interesting questions of individual liability in 301 actions. In an action for breach of contract combined with a tort action for malicious interference with the employer's business due to a violation of a no-strike clause, a district court dismissed the 301 count as to a union official on the ground that 301 makes no provision for such liability.[53] This, of course, is consistent with the Supreme Court's *Atkinson* decision, which said that Congress did not intend to provide duplicative remedies against both unions and union officials in light of the unfortunate American experience with individual liability in *Danbury Hatters*.[54] The district court left intact the employer's count under state law for punitive damages for the malicious tort by the union and its agent, holding that the tort claim was not inconsistent with the contract claim or contrary to federal labor policies. In another case, the Seventh Circuit reiterated that there can be no individual employee liability under Section 301 for breach of a no-strike clause by union members in defiance of their union.[55] However, an Illinois district court held than an employer could maintain a 301 action against individual union members for breach of a no-strike clause if the proofs showed that the union members were acting solely and only on their own behalf and not in furtherance of a union plan and where the union did not request or authorize their strike action, the court holding that in such case the employees should be individually bound by the collective bargaining agreement.[56]

Employees have been given rights of action by Section 301 either under a collective bargaining agreement or under a union's constitution and bylaws. Thus, a widow of a union member recovered damages against a local union for breach of its contrac-

[52] *Burroughs* v. *Sterling Transit Co., supra* note 30; *Elrod* v. *Teamsters, supra* note 30.

[53] *Anderson, Inc.* v. *Bricklayers, Local 10,* 77 LRRM 3157 (S.D. Miss. 1971).

[54] *Atkinson* v. *Sinclair Refining Co.,* 370 U.S. 238, 50 LRRM 2433 (1962) and *Loewe* v. *Lawlor,* 208 U.S. 274 (1908). Of course, *Atkinson* dealt with union officials and not individual employees with no union responsibilities. The question of individual liability for employees other than union officials was specifically left open by the courts in *Atkinson.*

[55] *Sinclair Oil Corp.* v. *Chemical Workers,* 452 F.2d 49, 78 LRRM 2603 (7th Cir. 1971), *rev'g* 78 LRRM 2601 (N.D. Ind. 1969).

[56] *DuQuoin Packing Co.* v. *Meat Cutters,* 321 F.Supp. 1230, 77 LRRM 2574 (E.D. Ill. 1971).

tual duty under the union constitution and bylaws to assist the member in gaining employment, where it was shown that the employer had breached the collective bargaining agreement and the union failed to press for vindication of the member's right to employment.[57] A district court held that it had no jurisdiction over an employee's action against an employer and a union for a declaratory judgment that a collective bargaining agreement is void or for injunctive relief suspending operation of a contract until it is submitted to the employees for a ratification vote.[58] The court held that the union constitution and bylaws did not require ratification and an employer is not obligated to insist upon ratification, and that the NLRB had exclusive jurisdiction to determine whether execution of the contract without ratification was improper. The Tenth Circuit held that a union member could not enforce in a 301 action a seniority provision of his union constitution, since the provision was found to be unlawful under the LMRA.[59]

An international union's attempt to eliminate dual locals based on race in violation of Title VII of the Civil Rights Act of 1964 was the basis of a suit by the predominantly black local, which sought under 301 to enjoin the international from canceling the local's charter and expelling it for refusal to merge with a predominantly white local.[60] The district court held that the international's action was proper under its constitution, that the local had been given a fair hearing, and that the dual local pattern violated Title VII. In another case, a local whose charter had been withdrawn after merger of the employer with another company was partially successful in its suit against the new local, the international union, and the new employer.[61] The court held that the international breached its duty of fair representation owed the employees of the old local when it interpreted an

[57] *Gray* v. *Asbestos Workers, Local 51,* 447 F.2d 1118, 78 LRRM 2291 (6th Cir. 1971).

[58] *Hernandez* v. *National Packing Co.,* 330 F.Supp. 1265, 78 LRRM 2381 (D. P.R. 1971).

[59] *Patterson* v. *Motion Picture Operators, Local 513,* 446 F.2d 205, 78 LRRM 2068 (10th Cir. 1971), *aff'g* 78 LRRM 2065 (N.D. Okla. 1970); but see *Frederickson* v. *System Federation No. 114,* 436 F.2d 764, 75 LRRM 2670 (9th Cir. 1970), which held under the RLA that employees could enforce the obligation of the union to negotiate the dovetailing of seniority required by the union constitution.

[60] *Musicians, Local 274* v. *Fed. of Musicians,* 329 F.Supp. 1226, 77 LRRM 2900 (E.D. Pa. 1971).

[61] *Local 4076, Steelworkers* v. *Steelworkers,* 338 F.Supp. 1154, 1164, 79 LRRM 2508 (W.D. Pa. 1971), *summary judgment denied,* 327 F.Supp. 1400, 77 LRRM 2614 (1971).

unambiguous arbitration award providing for the dovetailing of seniority as requiring placement of the employees of the merged company at the bottom of the seniority list of the purchasing employer. The court further held that the local may not seek damages for the breach of the arbitration award, but that the individual employees may seek such damages.

The First Circuit recently discussed at length the concurrent jurisdiction of federal district courts and the Puerto Rico labor board for breach of collective bargaining contracts. The court held that in such a proceeding the Puerto Rico board was acting as a court and the action was removable to the federal district court without the need for exhausting the administrative remedies before the board.[62] The court emphasized, however, that where both parties agree, they can still submit their dispute to the board, and that such submission may be of advantage to the parties where the proceedings may be readily conducted in Spanish. Actions for a breach of contract under 301 and for damages for unlawful secondary picketing under Section 303 of the NLRA may be combined.[63] The California Supreme Court dismissed an employer's damage action for a breach of a no-strike clause, finding that the employer could have had but did not seek arbitration of the dispute.[64] In an action by employees alleging sex discrimination under Title VII, the employer was permitted to bring a cross-claim against the union under Section 301 for indemnification.[65]

Some actions on collective bargaining agreements take on the nature of specific performance of contractual obligations,[66] and a number of cases deal with pension and insurance plans. In one unusual case where the employees chose a new bargaining agent, the Eighth Circuit held that there was no automatic termination of a pension plan negotiated with the former bargaining agent, and that the employer must negotiate any changes in the plan

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[62] *Volkswagen, Inc.* v. *Puerto Rico Labor Bd.*, 454 F.2d 38, 79 LRRM 2246 (1st Cir. 1972), *aff'g* 331 F.Supp. 1043, 78 LRRM 2367 (D. P.R. 1971); the federal removal statute is located at 28 U.S.C 1441.

[63] *Mason-Rust* v. *Local 682, Teamsters,* 324 F.Supp. 839, 77 LRRM 3045 (E.D. Mo. 1971).

[64] *Rounds Co.* v. *Teamsters,* 484 F.2d 1397, 77 LRRM 2386 (Calif. Sup. Ct. 1971).

[65] *Osborne* v. *McCall Printing Co.*, 4 FEP Cases 276 (S.D. Ohio 1972).

[66] See *Sappington* v. *Associated Transport, Inc., supra* note 45; *Johnson* v. *Goodyear Tire & Rubber Co.,* 79 LRRM 2041 (S.D. Tex. 1971); see also *Peters* v. *Chicago Wesley Hospital,* 273 NE.2d 538, 77 LRRM 3019 (Ill. App. 1971).

with the new bargaining representative.[67] In another case involving a plant closure, the Second Circuit rejected the union's attempt to enforce an actuarial determination regarding the employer's liability to an industry-wide employee pension fund, affirming the lower court finding that the agreement to submit to the actuary was ambiguous, and remanding the matter to the actuarial consultant "as if it were an arbitration." [68] Trustees under pension funds also resort to 301 actions to recover unpaid royalties. In one case it was held that such an action was not subject to arbitration since the pension fund was not a party to the collective bargaining agreement.[69] In another action, the trustees were barred by an NLRB settlement from recovering trust fund payments owing more than six months prior to the settlement agreement even though the trustees and the union refused to formally join in the agreement.[70]

Courts are frequently faced with union or employee actions under pension and insurance agreements to determine coverage or for payment of claims.[71] In one such case where a union and an injured employee brought action for damages and a declaratory judgment regarding coverage under an insurance policy, the court held that such a suit was not subject to 301 jurisdiction since violation of a contract between an employer and a union was not involved, but the action was for recovery of a money judgment on an insurance contract.[72] In another action, the court turned down a request by local unions, who were new members of a joint trust fund, to take part in the election of trustees, holding that the selection of trustees was controlled by the declaration of trust.[73]

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[67] *Brick & Clay Workers* v. *District 50*, 439 F.2d 311, 76 LRRM 2813 (8th Cir. 1971).

[68] *Clark* v. *Kraftco Corp.*, 447 F.2d 933, 78 LRRM 2134 (2d Cir. 1971), *denying appeal* of 76 LRRM 2716 (S.D. N.Y. 1971).

[69] *Boyle* v. *North Atlantic Coal Corp.*, 331 F.Supp. 1107, 78 LRRM 2411 (W.D. Pa. 1971).

[70] *Carpenters, Local 971 Vacation Trust* v. *Sargent Fixture Co.*, 77 LRRM 2981 (D. Nev. 1971).

[71] *DePaoli* v. *Boyle*, 447 F.2d 334, 77 LRRM 2984 (D.C. Cir. 1971); *Lee* v. *Nesbitt*, ... F.2d ..., 77 LRRM 2926 (9th Cir. 1971); *Lavella* v. *Boyle*, *supra* note 21; *Electrical Workers, IUE* v. *General Electric Co.*, 337 F.Supp. 817, 79 LRRM 2402 (S.D. N.Y. 1972); *Box* v. *Boilermaker Health and Welfare Fund*, 253 So.2d 326, 79 LRRM 2584 (Ala. App. 1971).

[72] *Steelworkers* v. *Mesker Bros. Ind., Inc.*, 327 F.Supp. 578, 78 LRRM 2088 (E.D. Mo. 1971).

[73] *Local 169, Teamsters* v. *Teamsters Health and Welfare Fund of Philadelphia*, 327 F.Supp. 260, 77 LRRM 2945 (E.D. Pa. 1971).

In regard to federal employment, the Second Circuit had occasion to consider the application of Section 301 to suits by federal employee unions under the 1970 Postal Reorganization Act.[74] The case involved the imposition of a trusteeship under provisions of the union constitution, and the court found that the Act extended jurisdiction of 301 suits for violations of contracts to labor organizations representing employees of the United States Postal Service. In cases involving public employment, the enforcement of collective bargaining contracts depends upon a close analysis of the statutory provisions and the public policy involved.[75]

B. Existence of a Contract

Courts have the right to make the initial determination whether or not a contract exists and whether the parties have agreed to be bound by a contract, and the interpretation of ambiguous terms of a collective bargaining agreement are left for arbitrators.[76] In employee wrongful-discharge actions, the existence of a contract can be left to the determination of a jury,[77] and courts may find an agreement even though it has not yet been reduced to writing by the parties.[78] However, an employer who is not a party to an association contract cannot be held to have adopted such contract merely by employing union members and paying fringe benefits directly to them on the job.[79] Reference to a master agreement by an individual contract must be specific to bind an employer.[80]

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[74] *Letter Carriers* v. *Sombrotto,* 449 F.2d 915, 78 LRRM 2550 (2d Cir. 1971), *rev'g* 78 LRRM 2549 (S.D. N.Y.). The relevant statutory provision is located at 39 U.S.C. 1208 (b).

[75] *Norton Teachers Assn.* v. *Town of Norton,* 79 LRRM 2576 (Mass. Sup. Jud. Ct. 1972); *Bd. of Ed., Union Free Town School Dist. No. 3* v. *Associated Teachers of Huntington, Inc.,* 319 N.Y.S. 2d 469, 78 LRRM 2109 (N.Y. App. 1971); *Barner* v. *City of Lansing,* 27 Mich. App. 669, 183 NW.2d 877, 76 LRRM 3054 (1970); *Troy Civil Employees Assn.* v. *City of Troy,* 76 LRRM 3061 (N.Y. App. 1971).

[76] *Steelworkers* v. *Rome Plow Co.,* 437 F.2d 881, 76 LRRM 2246 (5th Cir. 1970), *aff'g* 321 F.Supp. 1170, 76 LRRM 2242 (N.D. Ga.); *Dean Truck Line, Inc.* v. *Local 667, Teamsters,* 327 F.Supp. 1335, 77 LRRM 2540 (N.D. Miss. 1971). As to the existence of a contract being issue of fact, see *Patrolmen's Benevolent Assn.* v. *City of New York,* 27 NY.2d 410, 76 LRRM 2634 (1971), *on remand,* 76 LRRM 3087 (N.Y. Sup. Ct.).

[77] *Smith* v. *Pittsburgh Gage Supply Co., supra* note 20.

[78] *Stereotypers, No. 1* v. *L. I. Daily Press Pub. Co.,* 79 LRRM 2284 (E.D. N.Y. 1971); compare *Scruggs* v. *Hormel & Co., supra* note 22.

[79] *Local 529, Carpenters* v. *Bracy Development Co.,* 321 F.Supp. 869, 76 LRRM 2156 (W.D. Ark. 1971).

[80] *Orange Belt Dist. Council of Painters* v. *Stubblefield & Sons,* 437 F.2d 754, 76 LRRM 2742 (9th Cir. 1971), holding that the employer's contract with the plaintiff union which referred to "an executed current agreement with the appropriate

Ratification by the membership is not essential to the existence of a contract and an effective arbitration clause, unless the contract itself or the union constitution makes such ratification a condition precedent to the effectiveness of the contract.[81] Among the issues that courts must face in determining the existence of a contract are the authority of the agents of the parties and mutual mistake or fraud.[82] In one case a court had to decide whether a special agreement which provided for severance pay as part of a strike settlement controlled an arbitration award and whether the collective bargaining agreement applied, the court holding that the latter applied.[83] Courts will also reform a collective bargaining agreement where the final document omitted a term accepted by the parties.[84] In one unusual case where a local attempted to withdraw from a joint pension and welfare fund with two other locals in order to set up and make contributions to a new and separate fund, the court held that there was an issue of fact as to the right of the local to withdraw and as to the rights of pensioners and other parties in the event of such withdrawal.[85]

Various types of agreements have been found to be subject to Section 301 jurisdiction. Thus, a sole stockholder was sued by trustees of a welfare fund for back payments under a guarantee which he signed and which was found to be a contract within the meaning of Section 301.[86] A memorandum of understanding was held to be a contract subject to specific performance under 301, but the court nevertheless refused damages to the union since the uncertainty in the memorandum could have been

union" was not specific enough to bind the nonmember employer to the standard agreement; *Roostertail Inc.* v. *Page,* 32 Mich. App. 94, 188 NW.2d 224, 78 LRRM 2427 (1971), involving an individual entertainer's contract incorporating by reference a contract with an arbitration clause.

[81] Compare *In re Globe Seaways, Inc.,* ... F.2d ..., 79 LRRM 2067 (2d Cir. 1971) *aff'g* 337 F.Supp. 26, 76 LRRM 3036 (S.D. N.Y.), with *Midland Glass Co.* v. *Smith* 331 F.Supp. 88, 77 LRRM 3035 (D. N.J. 1971). For the refusal of a local union to accept the contract it had negotiated after its international had negotiated a larger pay scale, see *Local 287, Teamsters (Pittsburgh-Des Moines Steel Corp.),* 193 NLRB No. 160, 78 LRRM 1540 (1971).

[82] See, for example, *Local Joint Executive Bd. of Spokane* v. *Spokane Lodge 22, BPOE,* 443 F.2d 403, 77 LRRM 2731 (9th Cir. 1971), and note 86 *infra.*

[83] *Humble Oil & Refining Co.* v. *Local 866, Teamsters,* 447 F.2d 229, 78 LRRM 2123 (2d Cir. 1971), *aff'g* 321 F.Supp. 374, 77 LRRM 2166, 2173 (S.D. N.Y. 1970).

[84] *Concrete Technology Corp.* v. *Laborers, Local 252,* 3 Wash. App. 869, 76 LRRM 2711 (1970).

[85] *Grandview Dairy, Inc.* v. *Local 284, Milk Drivers,* 78 LRRM 2051 (S.D. N.Y. 1971).

[86] *Thomas* v. *Old Forge Coal Co.,* 329 F.Supp. 1000, 77 LRRM 2972 (M.D. Pa. 1971).

avoided by greater clarity in drafting the agreement.[87] In another case the court held that an employer's personnel procedures and policies did not constitute an individual contract apart from the collective bargaining agreement upon which an employee could bring a 301 action.[88] In another case a union's claim for compensatory wage payments under a collective bargaining agreement was found to have been extinguished by an accord and satisfaction entered into by the parties.[89]

C. Survival of Contractual Rights

Problems are continually posed to the courts in 301 actions by the expiration or termination of a collective bargaining agreement and by the cessation of business by the employer due to sale of the employing entity or closure or transfer of the business. The most important current pending development in this area of the law is the case of *Burns Intl. Detective Agency* v. *NLRB*,[90] which is awaiting decision before the U. S. Supreme Court. In the *Burns* case the Second Circuit upheld an NLRB finding that Burns is a successor employer and, as such, was required to recognize and bargain with the union that had been certified as representative of the employees of the predecessor employer in view of the fact that Burns performed the same services as the predecessor and a majority of Burns' employees were employed by the predecessor employer. However, the court refused to enforce that part of the NLRB order that required Burns to honor the collective bargaining contract between the predecessor employer and the union, holding that the NLRB order was contrary to the Supreme Court's decision in *H. K. Porter Co.* v. *NLRB*,[91] which held that the NLRB and the courts are without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement. The Second Circuit rejected the NLRB's reliance on the Supreme Court decision in *John Wiley & Sons* v. *Livingston* [92] which held that in appropriate circumstances a successor employer may be required

[87] *Longshoremen, Local 21* v. *Reynolds Metals Co.*, 76 LRRM 2658 (D. Ore. 1971), also holding that the company was bound by the acts of its agent in negotiating the memorandum of understanding.
[88] *Berry* v. *Michigan Bell Tel. Co., supra* note 48.
[89] *Communication Equipment Workers* v. *Western Electric Co.*, 328 F.Supp. 240, 78 LRRM 2149 (D. Md. 1971).
[90] 441 F.2d 911, 77 LRRM 2081, 3058, and 3059 (2d Cir. 1971), *cert. granted*, 404 U.S. 822, 78 LRRM 2463 (1971).
[91] 397 U.S. 99, 73 LRRM 2561 (1970).
[92] 376 U.S. 543, 55 LRRM 2769 (1964).

to arbitrate with the union under its agreement with a predecessor employer, the court noting that a contrary finding could lead to serious inequities, not only for the employer but also for the union, which could be bound to the contract with the predecessor employer. Accordingly, the forthcoming decision of the Supreme Court promises to establish an important precedent as to the rights and obligations of successor employers and the survival of contractual obligations.

It is clear that where the old business has been closed and a new consolidated company opened in a different location with different employees, no successorship can be found.[93] The courts look to the continuity of the business operation to determine whether the employing industry has retained its identity to a sufficient degree to make it reasonable that the successor employer be required to recognize the incumbent union.[94] As previously noted, a union can be a successor to another union for purposes of the pension plan negotiated between the employer and the predecessor.[95]

The pending sale or closure of a business has led to injunctive proceedings by labor organizations attempting to protect contractual rights. In one case a district court granted an injunction preventing the sale of a ship where the collective bargaining agreement explicitly forbade such a sale unless the prospective purchaser assumed the collective bargaining agreement and where an arbitrator had ruled under the contract that the proposed sale was forbidden, notwithstanding the employer's contention that the contractual provision in question violated both antitrust laws and the hot-cargo provision of the LMRA.[96] However, another court refused a preliminary injunction pending arbitration of a grievance over an employer's decision to phase out its plant, the court holding that the union's remedy at law was adequate if the arbitrator decided that the company violated the collective bargaining agreement.[97] Other plant-closure cases frequently involve the question of contractual benefits due employ-

[93] *Printing Pressmen, No. 447* v. *Pride Papers Corp.*, 445 F.2d 361, 77 LRRM 2654 (2d Cir. 1971); *cf.*, *McLeod* v. *Maritime Union*, 329 F.Supp. 151, 77 LRRM 2848 (S.D. N.Y. 1971).

[94] *Paul* v. *Alco Plating Corp.*, 21 Calif. App. 3d 362, 78 LRRM 2925 (1971).

[95] *Brick & Clay Workers* v. *District 50*, *supra* note 67.

[96] *Maritime Union* v. *Commerce Tankers Corp.*, 325 F.Supp. 360, 76 LRRM 2602 (S.D. N.Y. 1971); *cf. McLeod* v. *Maritime Union*, *supra*, note 93.

[97] *Rochester Independent Workers, Local 1* v. *General Dynamics Corp.*, 76 LRRM 2540 (W.D. N.Y. 1970).

ees, such as pension benefits.[98] In one case involving the payment of vacation pay for workers left unemployed by reason of a plant shutdown, the court held that the employer's unilateral act in closing the plant removed the obligation of the employees of working until the anniversary date set in the collective bargaining agreement for the accrual of vacation pay, since the employer made satisfaction of the contract condition impossible, the court specifically referring to the decisions of labor arbitrators in similar cases.[99]

It is clear that the expiration of a contract does not necessarily render causes of action thereunder moot. In one case a court gave judgment to a union, including attorney fees, in an action to recover insurance premiums for the last month of an insurance agreement where through inadvertence of the parties the separate collective bargaining agreement had expired a month before.[100] In continuation of the now-famous subcontracting dispute under the Supreme Court's *Fibreboard* decision, the courts rejected the union's suit for damages for contracting out the maintenance work on the ground that the union's notice to modify the contract served to terminate the contract, so that at the time of subcontracting there was no contract and the employer's failure to negotiate in good faith with the union did not serve to extend the contract.[101] In another case a district court refused to find that a union's letter agreeing to work under an existing contract served as a legal extension of that agreement, so as to permit the employer to obtain an injunction under the agreement to prevent employees from refusing overtime under a *Boys Markets* theory.[102]

D. Multiparty Arbitration

Cases involving the question of multiparty arbitration almost always involve jurisdictional disputes between labor organizations

[98] *Clark* v. *Kraftco Corp., supra* note 68; *Knoll* v. *Phoenix Steel Corp., supra* note 21.

[99] *Local 186, Packinghouse Workers* v. *Armour & Co.,* 446 F.2d 610, 78 LRRM 2061 (6th Cir. 1971), *rev'g* 78 LRRM 2054 (E.D. Tenn. 1970).

[100] *Steelworkers* v. *Butler Mfg. Co.,* 439 F.2d 1110, 77 LRRM 2057 (8th Cir. 1971), *aff'g* 77 LRRM 2053 (W.D. Mo. 1970); see also *Concrete Technology Corp.* v. *Laborers, Local 252, supra* note 84.

[101] *Steelworkers, Local 1304* v. *Fibreboard Paper Products Corp.,* 435 F.2d 556, 76 LRRM 2403 (9th Cir. 1970), *aff'g* 285 F.Supp. 282, 76 LRRM 2397 (N.D. Calif. 1968); the Supreme Court finding of a refusal to bargain by the employer in regard to subcontracting is *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203, 57 LRRM 2609 (1964).

[102] *Herald Co.* v. *Hopkins,* 325 F.Supp. 1232, 77 LRRM 2199 (N.D. N.Y. 1971).

in regard to the assignment of work, and courts continue to encourage tripartite arbitration wherever such a procedure will enhance the resolution of the underlying dispute. Thus, a Michigan district court urged ad hoc tripartite arbitration in its denial of a union's request for an injunction against an employer assigning work to a second union pursuant to two arbitration decisions under the second union's contract in which the plaintiff union did not participate.[103] However, where the parties agreed on the jurisdiction of each union involved and the only question was whether the employer violated the contract by assigning work to nonmembers of one union, the second union not being affected by any award, only bipartite arbitration was ordered.[104]

As noted above, the recent Supreme Court decision in the *Plasterers* case emphasized the voluntary nature of the arbitral process in that an employer cannot be pressured to become a party to a private method of settlement of jurisdictional disputes where the unions, but not the employer, are parties to an agreed method of settlement. A union has also been prevented from enforcing a contractual provision which required the employer to use only subcontractors who agree to pay employees in accordance with contract benefits and to submit any disputes to the grievance procedure of the collective bargaining agreement, since such a contractual provision may be in violation of the hot-cargo provision of the LMRA.[105]

E. Miscellaneous Procedural Problems

Courts are frequently presented with questions relating to the actual conduct of arbitration proceedings and various procedural problems incident thereto. Courts will not delve into the arbitrator's process of reasoning employed to reach the award as long as there is substantial evidence to support it.[106] Neither will courts consider issues that were not presented to the arbitrator for consideration, such as expiration of the contract.[107] In another case, a court did not permit employees in a fair-representation

[103] *Die Sinkers, Lodge 110* v. *General Motors Corp.*, 77 LRRM 3065 (E.D. Mich. 1971).

[104] *Operating Engineers, Local 150* v. *Corley Bldrs.*, 76 LRRM 3005 (N.D. Ill. 1971).

[105] *Hoffman* v. *Teamsters, Local 386*, 77 LRRM 2049 (E.D. Calif. 1971).

[106] *Dean Truck Line, Inc.* v. *Local 667, Teamsters, supra* note 76.

[107] *Mogge* v. *Dist. 8, Machinists*, 454 F.2d 510, 78 LRRM 2939 (7th Cir. 1971); see also *Southwestern Bell Tel. Co.* v. *Communications Workers, Local 6222*, 454 F.2d 1333, 78 LRRM 2833, 79 LRRM 2480 (5th Cir. 1971), *rev'g* 324 F. Supp. 830, 76 LRRM 3032 (S.D. Tex. 1971).

action to collaterally attack an arbitration award, where the employees had failed to object to the arbitration proceedings on the ground that the arbitrator had received political contributions from the union when he ran for public office.[108] Also, the Second Circuit refused to stay an employee fair-representation action while the union and the employer involved arbitrated the issues, holding that fair-representation issues were not arbitrable or resolvable in a third-party action, but the denial of the stay was conditioned on plaintiff's making available to the union and the employers all evidence in their control needed for the prosecution of the pending arbitration.[109] In another case where an employer refused to cooperate in an arbitration proceeding, a Michigan court in remanding the case to the trial court held that the extent the employer was bound by the arbitration proceeding was a question of fact.[110]

In dispute over whether a union can submit dissimilar grievances to a single arbitrator, it was held that the arbitrator's award was not valid even though he relied on the experience of others and his general background in labor law and arbitration in arriving at his award.[111] Since the contract provided no guide to the question of multiple arbitrations, the court held that resort to external principles was appropriate. Another court enforced an arbitration award in a discharge case even though the basis for a tripartite arbitration panel's finding was ambiguous.[112] The court also found that the standard of proof beyond a reasonable doubt which the panel imposed upon the employer to determine just cause was unfair to the employer, but the panel did not exceed its authority in applying this standard. In the same case the court held that the employer was not denied due process because the impartial arbitrator conducted an experiment in the absence of the parties, where neither party objected to his request for the materials for the experiment and it was performed in the presence of the employer and union representatives of the panel.

The question of production of evidence before an arbitrator was involved in some decisions. In one well-written opinion, a

[108] *Heltsley* v. *Dist. 23, Mine Workers, supra* note 42.
[109] *Sheridan* v. *Liquor Salesmen's Union, supra* note 32.
[110] *Roostertail, Inc.* v. *Page, supra* note 80.
[111] *Chemical Workers, Local 728* v. *Imco Container Co.*, 78 LRRM 2014 (S.D. Ind. 1971).
[112] *New England Telephone & Tel. Co.* v. *Telephone Workers*, 77 LRRM 3051 (D. Mass. 1971).

district court held that the arbitrator had jurisdiction to reopen a hearing for the purpose of issuing a subpoena requiring the employer to produce an investigatory file on the employee whose discharge was the subject matter of the hearing, since the hearing was closed under mutual mistake of fact by the parties.[113] The court also held that it did not have authority to enforce a subpoena issued by the arbitrator and served pursuant to state law, but the court under its concurrent enforcement jurisdiction and the Federal Arbitration Act sua sponte required the employer to produce the disputed investigatory file for an *in camera* inspection by the arbitrator. In another case, however, the court denied a motion by the union to enforce a subpoena of certain books and papers of the employer, where the arbitrator had already taken the union's request under advisement pending further study of the case and a determination as to the relevancy of the documents in question.[114] The court cited the accepted principle that it is the duty of the arbitrator to make procedural decisions in the course of an arbitration proceeding, at least in the first instance; that the union should not burden two fora with the same issue; and that the intervention of the court *in medias res* can only serve to impair the integrity of the arbitration process.

The question of exhaustion of contractual and intra-union remedies permeates throughout many court cases, and some of the more important cases have been referred to in other portions of this report. In general, exhaustion is a factual issue to be determined by the court, and even where contractual or intra-union remedies exist, resort to the courts may be had where it is sufficiently alleged and proven that attempts to exhaust such remedies were either ignored or thwarted.[115] It is axiomatic that before a court can entertain a 301 suit, proper service of process must be made, and in one recent case it was held that service on an officer of the local union did not give the court jurisdiction over the international union since the officer was not an agent or representative of the international at the time of service.[116]

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[113] *Lodge 1746, Machinists* v. *United Aircraft Corp.*, 329 F. Supp. 283, 77 LRRM 2596 (D. Conn. 1971). The applicable provision of the Federal Arbitration Act is located at 9 U.S.C. 7.

[114] *Local 757, Teamsters* v. *Borden, Inc.*, 78 LRRM 2398 (S.D. N.Y. 1971).

[115] *See Frederickson* v. *System Federation No. 114, supra* note 59; *Local 4076, Steelworkers* v. *Steelworkers, supra* note 61.

[116] *Ragsdale Co.* v. *Local 509, Teamsters*, 79 LRRM 2219, (D. S.C. 1972).

IV. Compelling Arbitration and Review of Awards

A. Strikes and Injunctions—Boys Markets *Aftermath*

As could be expected, the largest increase in reported decisions during 1971 were cases arising under the *Boys Markets* decision in 1970 by the Supreme Court, which case and the early cases decided thereunder were discussed at length in last year's report. In brief, the *Boys Markets* decision departed from prior precedent and held that an employer may obtain injunctive relief against a strike by a union in breach of a no-strike clause in a collective bargaining agreement where the grievance was subject to arbitration under the contract, the employer was ready and willing to proceed to arbitration of the dispute, and the employer would suffer irreparable injury by reason of the union's breach of its no-strike obligation. The numerous decisions handed down during 1971, while making no startling departure from the state of the law established during the previous year, did help to clarify the rights and obligations of employers and unions who attempt to invoke the *Boys Markets* rationale, and some of these cases are discussed hereinafter.

It is clear that to obtain a *Boys Markets* injunction there must be an arbitrable dispute, but the Fifth Circuit has stressed in reversing a denial of an injunction that the trial court must not substitute its judgment for the arbitrator's and decide the substance of the question for arbitration, but only decide whether the claim is on its face governed by the contract, thereby making the parties bound to arbitrate the question.[117] In the same case the court of appeals held that the public policy favoring arbitration was even stronger since a public utility was involved, and the fact that there was a new contract between the parties did not render the matter moot, since the underlying dispute was not settled. Once a court finds that the application of *Boys Markets* is appropriate, in addition to granting an injunction against the strike and ordering arbitration, it may also order the petitioning employer to maintain the status quo and to make no alterations affecting the dispute pending resolution of the grievance procedure.[118] It is also clear that state courts have concurrent

[117] *Southwestern Bell Tel. Co.* v. *Communications Workers, Local 6222, supra* note 107. For sample injunctive orders see *Pittsburgh Press Co.* v. *Printing Pressmen,* 78 LRRM 2528 (W.D. Pa. 1971); *Caribe Hilton Hotel* v. *Asociacion de Empleados de Casino,* 324 F.Supp. 492, 77 LRRM 2622 (D. P.R. 1971).

[118] *Great Lakes Dredge & Dock Co.* v. *Great Lakes Tug & Dredge Region,* 78 LRRM 2192 (N.D. Ohio 1971); *Stein Printing Co.* v. *Atlanta Typographical Union,*

jurisdiction to grant such injunctions and that such actions are removable to the federal courts which—at least under some circumstances—will honor the state court injunctions.[119]

The enjoining court must also find a no-strike clause in the collective bargaining agreement, but the mandatory arbitration provision of the contract may be found to give rise to an implied no-strike provision upon which the court will base its injunction.[120] Courts will also enforce an arbitration award which orders the union to stop a strike in violation of its collective bargaining agreement, and the expiration of the contract does not render the injunction moot.[121] The court must also find a strike or work stoppage in existence, regardless of whether intra-union formalities in regard to authorizing the strike have been followed.[122]

A number of interesting cases involving the existence of a strike have arisen in regard to employees' honoring the picket line of another union. Courts have granted injunctions and ordered arbitration as to whether there is a violation of the employees' no-strike clause, where the arbitration provision is sufficiently broad to cover the dispute and agents of the union either have sanctioned the work stoppage or at least are equivocal in regard to the actions of the employees.[123] However, injunctions in such cases have been refused where the contract does not provide for the presentation of a grievance by the employer.[124] Where a court found that the union did not sanction or authorize the

No. 48, 329 F.Supp. 754, 77 LRRM 3084 (N.D. Ga. 1971); *American Can Co.* v. *Pulp Workers,* 77 LRRM 2633 (D. Ore. 1971). (Both employer and union required by court to post bond.)

[119] *Malone & Hyde, Inc.* v. *Teamsters, Local 327,* 76 LRRM 2633, 2379 (M.D. Tenn. 1971); *Carpenters Dist. Council of Jacksonville* v. *Waybright,* 248 So.2d 176, 78 LRRM 2208 (Fla. App. 1971).

[120] *Stein Printing Co.* v. *Atlanta Typographical Union, No. 48, supra* note 118, following the leading case for implying such a clause, *Local 174, Teamsters* v. *Lucas Flour Co.,* 369 U.S. 95, 49 LRRM 2717 (1962); but compare *Rochester Tel. Corp.* v. *Communications Workers,* 78 LRRM 2213 (W.D. N.Y. 1971), where the court found no basis for implying a no-strike clause but did grant an injunction regarding the destruction of property.

[121] *Pacific Maritime Assn.* v. *Longshoremen,* 454 F.2d 262, 79 LRRM 2116 (9th Cir. 1971); *cf. Atlantic-Richfield Co.* v. *Oil Workers,* 447 F.2d 945, 78 LRRM 2364 (7th Cir. 1971).

[122] Compare *Pavino Constr. Ltd.* v. *Local 269, Plumbers,* 78 LRRM 2389 (S.D. N.Y. 1971), with *Stereotypers, No. 1* v. *L. I. Daily Press Pub. Co., supra* note 78.

[123] *Amstar Corp.* v. *Meat Cutters,* 79 LRRM 2425 (E.D. La. 1972); *General Cable Corp.* v. *Local 1798, IBEW,* 333 F.Supp. 331, 77 LRRM 3123 (W.D. Tenn. 1971).

[124] *General Cable Corp.* v. *Local 1644, IBEW,* 331 F.Supp. 478, 77 LRRM 3053 (D. Md. 1971); *Avco Corp.* v. *Local 787, UAW,* 325 F Supp. 588, 77 LRRM 2014 (M.D. Pa. 1971).

strike of its members, so that no violation of the no-strike clause was present, an injunction was refused, the court noting that individual union members as a matter of principle may refuse to cross the picket line of another union.[125]

It is clear that the parties must be contractually bound to arbitrate the dispute in question, and where the union has not given up its right to strike in the contract, it would seem as though the Norris-LaGuardia Act prohibits the issuance of an injunction.[126] Although the question may not yet be definitely settled, the last step of the grievance procedure must contain a compulsory or mandatory arbitration provision or no injunction can be granted.[127] Even where there is such a contractual provision, the complaining party must make a demand for arbitration of the dispute or his request for an injunction will be denied.[128] In one case a court held that *Boys Markets* was not applicable to a strike by employees who were dissatisfied with the representation of their own union, the court holding that an issue of representation for the NLRB was presented.[129]

Unions, as well as employers, have been able to take advantage of injunctions pending arbitration of a dispute in such cases as the discontinuance or transfer of an operation,[130] a reduction in the work force,[131] or to prevent subcontracting while expedited arbitration takes place.[132] However, a union was denied an injunction restraining an employer from discontinuing group health insurance premiums during a strike where the insurance policy provided for a cessation of coverage on the day that an employee

[125] *Ourisman Chev. Co.* v. *Automotive Lodge, Machinists,* 77 LRRM 2084 (D. D.C. 1971).

[126] *Emery Air Freight Corp.* v. *Local 295, Teamsters,* 449 F.2d 586, 78 LRRM 2466 (2d Cir. 1971), *rev'g* 77 LRRM 3062 (E.D. N.Y.); *Standard Food Products Corp.* v. *Brandenburg,* 436 F.2d 964, 76 LRRM 2367 (2d Cir 1970), *rev'g* 76 LRRM 2366 (E.D. N.Y.); *Schlage Lock Co.* v. *Machinists,* 77 LRRM 3056 (N.D. Calif. 1970). The applicable provisions of the Norris-LaGuardia Act are located at 29 U.S.C. 101, 107.

[127] *Associated General Contractors* v. *Teamsters,* 454 F.2d 1324, 79 LRRM 2555 (7th Cir. 1972); *Morning Telegraph* v. *Powers,* 450 F.2d 97, 78 LRRM 2710 (2d Cir. 1971).

[128] *Elevator Mfrs. Assn.* v. *Elevator Constructors, Local 1,* 331 F.Supp. 165, 78 LRRM 2215 (S.D. N.Y. 1971).

[129] *Lanco Coal Co.* v. *Southern Labor Union,* 320 F.Supp. 273, 76 LRRM 2249 (N.D. Ala. 1970).

[130] *Local 294, IUE* v. *Three Rivers Indus., Inc.,* 78 LRRM 2090 (D. Mass. 1971); *Maritime Union* v. *Commerce Tankers Corp., supra* note 96.

[131] *Steelworkers* v. *Blaw-Knox Foundry & Mill Machinery, Inc.,* 319 F.Supp. 636, 76 LRRM 2665 (W.D. Pa. 1970).

[132] *IUE* v. *Radio Corp. of America,* 77 LRRM 2201 (D. N.J. 1971).

has "ceased active work." [133] As in the case of an employer's request, the courts are required before issuing an injunction to balance the equities between the parties and to find irreparable injury to the plaintiff union, lack of substantial harm to the defendant, and no other adequate remedy at law.

Consistent with the Supreme Court precedent, an employer has been held to be precluded from collecting damages for breach of a no-strike clause if the dispute could have been arbitrated and the employer at no time sought to invoke the arbitration remedy.[134] Where the contract does not provide for initiation of a grievance by the employer, the latter may maintain a damage action for breach of the contract by the union's strike action, and the union is not entitled to a stay of the proceedings to permit arbitration.[135] Whether the contract requires arbitration of a breach of a no-strike clause so that the employer is precluded from bringing his damage action may be an issue of fact to be resolved at trial of the action.[136]

As previously noted, under the 1971 decision of the Supreme Court in the *Chicago & North Western* case, injunctions may be permitted to enforce duties under the Railway Labor Act, although courts frequently refuse such injunctions in minor disputes where existing administrative or grievance procedures provide an adequate remedy.[137] A district court refused an injunction regarding the reduction of benefits where the employer had agreed to arbitrate the dispute under a permissive arbitration clause, the court holding that once the employer invoked arbitration, the union was also required to submit the dispute to arbitration.[138]

The violation of a *Boys Markets* injunction by a union has led to contempt citations, with the plaintiff recovering expenses and

[133] *Utility Workers, Local 369* v. *Boston Edison Co.*, 77 LRRM 2495 (D. Mass. 1971); *cf. Herald Co.* v. *Hopkins, supra* note 102.
[134] *Rounds Co.* v. *Teamsters, supra* note 64.
[135] *Illinois Bell Tel. Co.* v. *Local 399, IBEW*, 330 F.Supp. 302, 78 LRRM 2087 (S.D. Ill. 1971).
[136] *H & M Cake Box, Inc.* v. *Bakery Workers*, 454 F.2d 716, 79 LRRM 2492 (1st Cir. 1972), *rev'g* 79 LRRM 2941 (D. Mass. 1971).
[137] *Teamsters* v. *Braniff Intl. Airways, Inc.*, 437 F.2d 1272, 76 LRRM 2650 (5th Cir. 1971), *aff'g* 76 LRRM 2649 (N.D. Tex. 1970); *Teamsters* v. *Modern Air Transport, Inc.*, 76 LRRM 2664 (S.D. Fla. 1970); but compare *Seaboard World Airlines, Inc.* v. *Transport Workers*, 443 F.2d 437, 77 LRRM 2452 (2d Cir. 1971).
[138] *UTU* v. *Norfolk & Western Ry.*, 332 F.Supp. 1170, 79 LRRM 2179 (N.D. Ohio 1971).

attorney fees, and heavy fines being levied,[139] unless the injunction is held improper on appeal.[140] The Third Circuit held that the improvident or erroneous issuance of an injunction entitled the union to recover its expenses or damages and attorney fees under the injunction bond required by Section 7 of the Norris-LaGuardia Act, which bond requirement applied to *Boys Markets* injunctions, and the liability of the employer was not limited to the amount of the injunction bond.[141]

B. Suits Compelling or Staying Arbitration

Many of the nonroutine issues in cases compelling arbitration have been discussed or cited above. In keeping with the national policy favoring arbitration of contractual disputes, the courts are rightfully reluctant to intrude into the arbitral arena of the "law of the shop." [142] Where there is a broad arbitration clause, "only the most forceful evidence of a purpose to exclude a claim from arbitration can prevail against a demand for arbitrating the dispute." [143] Employers as well as unions may be entitled to an order compelling arbitration.[144]

Both substantive and procedural issues, such as timeliness and waiver, are for the arbitrator under the leading case of *Wiley* v. *Livingston*,[145] and both types of issues are usually considered in the same arbitration proceeding. However, in one case where

[139] *Restaurant Associated Indus., Inc.* v. *Local 71, Restaurant Employees*, 78 LRRM 2559 (E.D. N.Y. 1971), *on contempt*, 79 LRRM 2503 (1972); *Stearns-Roger Corp.* v. *Millwrights, Local 1182*, 77 LRRM 2776, 2777 (D. Ariz. 1971).

[140] *Emery Air Freight Corp.* v. *Local 295, Teamsters*, *supra* note 126; *New York Tel. Co.* v. *Local 1101, CWA*, 445 F.2d 39, 77 LRRM 2785 (2d Cir. 1971), *rev'g* 77 LRRM 2780 (S.D. N.Y. 1971) where the restraining order was meant to apply only to a limited dispute and the order had been broadly drafted ex parte by the employer.

[141] *U.S. Steel Corp.* v. *Mine Workers*, 456 F.2d 483, 79 LRRM 2518 (3rd Cir. 1972), *rev'g* 317 F.Supp. 1070, 77 LRRM 2030, 2308, and 2312 (W.D. Pa. 1970).

[142] *Peerless Pressed Metal Corp.* v. *IUE*, 451 F.2d 18, 78 LRRM 2828 (1st Cir. 1971); see also the discussion in *IUE* v. *General Electric Co.*, 450 F.2d 1295, 78 LRRM 2867 (2d Cir. 1971), *aff'g* 325 F.Supp. 910, 77 LRRM 2657 (S.D. N.Y. 1971).

[143] *Local 1987, IBEW* v. *Control Products Co.*, 330 F.Supp. 250, 78 LRRM 2629 (W.D. Pa. 1971); see also *Lodge 15, Machinists* v. *Cameron Iron Works*, 444 F.2d 1295, 78 LRRM 2867 (2d Cir. 1971), *aff'g* 77 LRRM 2779 (S.D. Tex. 1970); *Burns Intl. Detective Agency* v. *Navarro*, 322 N.Y.S.2d 418, 78 LRRM 2094 (1971).

[144] *Linbeck Constr. Corp.* v. *Carpenters*, 79 LRRM 2314 (S.D. Tex. 1971); *United Aircraft Corp.* v. *Lodge 743, Machinists*, 77 LRRM 3136 (D. Conn. 1971).

[145] *Supra* note 92; see, for example, *Tobacco Workers, Local 317* v. *Lorillard Corp.*, 448 F.2d 949, 78 LRRM 2273 (4th Cir. 1971); *Steelworkers* v. *McGraw-Edison*, 79 LRRM 2214 (N.D. Ala. 1971); *District 50, Allied Workers* v. *Brockway Pressed Metals, Inc.*, 328 F.Supp. 1258, 77 LRRM 2940 (W.D. Pa. 1971); *Transit Union, Div. 1205* v. *Greyhound Lines, Inc.*, 323 F.Supp. 219, 77 LRRM 2238 (D. Mass. 1971); *Lomac Containers, Inc.* v. *Textile Workers*, 76 LRRM 3052 (N.D. Ohio 1971); *Curtis Productions, Inc.* v. *Writers Guild*, 315 N.Y.S.2d 740, 76 LRRM 2174 (1970).

certiorari has been granted by the Supreme Court and is presently pending, the Seventh Circuit upheld a district court's denial of arbitration, holding that the union's suit was barred by laches because of its two-year delay in notifying the employer of the existence of the dispute.[146] The circuit court distinguished the *Wiley* case as involving untimeliness with respect to some procedural prerequisite deriving from the grievance process itself, rather than a situation involving the determination of whether the union's delay in notifying the employer of the existence of the dispute prejudiced the employer's ability to respond as found in the present case.

Only in cases where the dispute on its face is not covered by the collective bargaining agreement or where there is no clause in the contract which could cover the dispute will arbitration be denied.[147] For example, in a case involving the discontinuance of a business and the request by the union for severance pay even though the contract contained no explicit provision for severance pay, the court held that the arbitration clause covered the dispute since the termination of the employer-employee relationship concerns "any term or condition of employment" within the meaning of the contract.[148] Two cases involving the discharge of Playboy Club "bunnies" under similar Restaurant Employees Union contracts illustrate the problem of contract coverage. The contract in question permitted arbitration of discharges related to union activity, but it specifically excepted and provided an alternative procedure in cases of discharges for loss of "bunny image." The Sixth Circuit granted arbitration of a grievance which originally was processed under the loss of "bunny image" section of the contract but before completion of the grievance procedure was refiled as a discharge for union activity, not agreeing with the district court that the union was merely attempting to sidestep the bargained-for grievance procedure.[149] A New York district court, however, stayed an arbitration proceeding where the union

[146] *Operating Engineers, Local 150* v. *Flair Builders, Inc.*, 440 F.2d 557, 76 LRRM 2595 (7th Cir. 1971), *aff'g* 76 LRRM 2594 (N.D. Ill. 1969), *cert. granted* Dec. 7, 1971.

[147] *Local 644, Carpenters* v. *Walsh Constr. Co.*, 79 LRRM 2150 (S.D. Ill. 1972); *Lodge 2036, Machinists* v. *Hudson Mfg. Co.*, 331 F.Supp. 361, 78 LRRM 2341 (D. Minn. 1971); *Rubber Workers, Local 102* v. *Lee Natl. Corp.*, 76 LRRM 2861 (S.D. N.Y. 1971); *Local 881, Teamsters* v. *Grey Line Sightseeing Tours*, 77 LRRM 2975 (D. Nev. 1969).

[148] *Howard & Co.* v. *Daley*, 27 NY.2d 285, 76 LRRM 2281 (1970).

[149] *Restaurant Employees* v. *Playboy Clubs Int'l., Inc.*, 454 F.2d 703, 79 LRRM 2399 (6th Cir. 1972), *rev'g* 324 F.Supp. 859, 76 LRRM 3038 (S.D. Ohio 1971).

did not claim the discharge was for union activity and it was clear that the grievance was brought under the loss of "bunny image" provisions of the contract.[150]

Actions for damages under a collective bargaining agreement may cause a court to stay a damage action pending completion of the agreed-upon arbitration procedure,[151] unless it can be shown that recourse to the grievance procedure would clearly be futile.[152] Even where past practice may be to the contrary but contract coverage is vague or ambiguous, courts will compel arbitration,[153] and in the process may even reform the contract.[154] Where a contract provides that either party may submit a grievance to arbitration, it has been held that the grieving union cannot unilaterally withdraw its request for arbitration and file a case with the NLRB instead, thereby destroying the employer's arbitration rights under the contract.[155] Even though arbitration under the contract is merely advisory, the courts will compel arbitration if the parties have clearly agreed to submit their disputes to such advisory arbitration.[156]

C. Confirming or Vacating Awards

Judicial review of an arbitration award is limited to determining whether the arbitrator's decision exceeds the authority granted by the collective bargaining agreement, and the court may not substitute its judgment for that of the arbitrator.[157] Thus, arbitration awards will be vacated or set aside only where the award is contrary to the unambiguous terms of the collective bargaining agreement and to the assent of the parties to be

[150] *Playboy Clubs Intl., Inc.* v. *Restaurant Employees,* 321 F.Supp. 704, 76 LRRM 2419 (S.D. N.Y. 1971).

[151] *Mason-Dixon Lines, Inc.* v. *Local 560, Teamsters,* 443 F.2d 807, 77 LRRM 2454 (3rd Cir. 1971).

[152] *Wagner* v. *Columbia Hospital Dist.,* 485 P.2d 421, 78 LRRM 2169 (Ore. Sup. Ct. 1971), holding that the allegation of a conspiracy between the employer and the union is sufficient to establish the futility of submitting the claim to arbitration.

[153] *Local 702, Plumbers* v. *Nashville Gas Co.,* 76 LRRM 2417 (M.D. Tenn. 1970).

[154] *Concrete Technology Corp.* v. *Laborers, Local 252, supra* note 84.

[155] *United Aircraft Corp.* v. *Canel Lodge 700, Machinists,* 77 LRRM 3167 (D. Conn. 1971).

[156] *Clarkston Bd. of Ed.* v. *Cracovia,* 321 N.Y.S.2d 496, 77 LRRM 2834 (1971).

[157] *Communications Equip. Workers* v. *Western Elec. Co.,* .... F.2d ...., 77 LRRM 2624 (4th Cir. 1971); *Humble Oil & Refining Co.* v. *Local 866, Teamsters, supra* note 83; *Chemical Workers, Local 728* v. *Imco Container Co., supra* note 111; *Communications Workers, Local 6572* v. *Arkansas Western Gas Co.,* 329 F.Supp. 896, 77 LRRM 3143 (W.D. Ark. 1971), the court holding in the enforcement of the award that the union was not entitled to attorney fees where the company had in good faith raised its defense to the award.

bound by arbitration,[158] or unless there is some substantial defect in the arbitration proceedings such as disqualification of the arbitrator for failure to disclose a relationship with one of the parties.[159] A New York district court confirmed an arbitration award at the request of the employer, enforcing a tentative wage agreement under a wage reopener clause, where the arbitrator had found that the union engaged in bad-faith bargaining by causing the employees to reject the tentative agreement, thereby preventing ratification.[160] This was the second round in the court for the parties, since arbitration had been originally ordered by the court pursuant to a *Boys Markets* injunction of a strike called by the union when the employer put the new wage rates into effect.

The award of an arbitrator may be modified by the court in order to give it an enforceable interpretation.[161] Although an arbitration award need not be a model of clarity to merit enforcement,[162] in one case a district court refused to enforce an award of a joint committee where the award was neither "certain" nor "complete," but appeared to state a principle of general applicability.[163] Prior arbitration awards may be cited as precedent in subsequent declaratory judgment actions brought under Section 301 to interpret a collective bargaining agreement.[164] One court held that an arbitrator's award in a classification dispute continues until the parties negotiate a reclassification, and attempts by

[158] *Amanda Bent Belt Co.* v. *Auto Workers,* 451 F.2d 1277, 79 LRRM 2023 (6th Cir. 1971); *In re Globe Seaways, Inc., supra* note 81; *District 9, Machinists* v. *Olin Mathieson Chemical Corp.,* 78 LRRM 2949 (E.D. Mo. 1971); in public employment see *Sheahan* v. *Worcester School Committee,* 270 NE.2d 912, 77 LRRM 3128 (Mass. Sup. Jud. Ct. 1971); under the Railway Labor Act see *Railroad Signalmen* v. *Chicago, Milwaukee, St. Paul & Pacific RR,* 444 F.2d 1270, 77 LRRM 2838 (7th Cir. 1971).

[159] *Colony Liquor Distributors* v. *Local 669, Teamsters,* 28 NY.2d 596, 77 LRRM 2331 (1971); *cf. Heltsley* v. *Dist. 23, Mine Workers, supra* note 42.

[160] *Communications Workers* v. *Amer. Tel. & Tel. Co. (Long Lines Dept.),* 76 LRRM 2208 (S.D. N.Y. 1970).

[161] See, for example, *Steelworkers* v. *Amax Aluminum Mill Products, Inc.,* 451 F.2d 740, 78 LRRM 2784 (9th Cir. 1971); *Roosevelt Hospital* v. *Local 1191, Drug & Hospital Union,* 315 N.Y.S.2d 747, 76 LRRM 2253 (1970).

[162] *Pulp & Paper Mill Workers, Locals 359 and 361* v. *Allied Paper, Inc.,* 447 F.2d 1344, 78 LRRM 2288 (5th Cir. 1971); *New England Tel. & Tel. Co.* v. *Telephone Workers, supra* note 112; see under Railway Labor Act *Todd* v. *Northwest Airlines, Inc.,* 440 F.2d 1113, 76 LRRM 2706 (9th Cir. 1971), *aff'g* 76 LRRM 2700 (W.D. Wash. 1969).

[163] *Electrical Contractors Assn.* v. *Local 103, IBEW,* 327 F.Supp. 1177, 77 LRRM 2911 (D. Mass. 1971).

[164] *Oil Workers* v. *Mobil Oil Co.,* 441 F.2d 651, 77 LRRM 2062 (3rd Cir. 1971); *Lumber Workers Local 2589, Carpenters* v. *Hines Lumber Co.,* 77 LRRM 2059 (D. Ore. 1971).

the employer to reopen the contract after the award does not affect the binding nature of the award.[165] An award may be enforced on a counterclaim to a declaratory-judgment action by the opposite party.[166]

Courts do not permit successive piecemeal presentations of cases, either before an arbitrator or on appeal to the courts, but require all issues to be raised and argued the first time.[167] Thus, in a case discussing a number of procedural problems, a court of appeals upheld the refusal of the lower court to remand an arbitration case for a new hearing where a reluctant witness changed her mind and agreed to testify after the close of the hearing.[168] The court pointed out that in an arbitration proceeding the parties are bound by the record as made before the arbitrator and, in contrast to a judicial proceeding, the arbitrator has no authority to reopen and rehear a case. The court held that to hold otherwise would undercut the finality and usefulness of arbitration as "an expeditious and generally fair method of *settling* disputes." The court further upheld the arbitrator's exclusion of certain evidence, holding that even if such exclusion was erroneous in the eyes of the court, the better rule is that an award will not be vacated unless it "compels the violation of law or conduct contrary to accepted public policy."

Outside parties usually have no standing to attack an arbitration award or to step in the shoes of one of the parties to the contract,[169] unless it is found that there is potential conflict of an award with another statute, such as the NLRA, in which case the arbitration proceeding may be stayed.[170] It has been held that in public employment there must be statutory authorization to per-

[165] *Amphill Rayon Workers* v. *Du Pont Co.*, 438 F.2d 1359, 76 LRRM 2789 (4th Cir. 1971).

[166] *Dean Truck Line, Inc.* v. *Local 667, Teamsters, supra* note 76.

[167] *Local 616, IUE* v. *Byrd Plastics, Inc.*, 438 F.2d 973, 76 LRRM 2730 (3d Cir. 1971), *rev'g* 76 LRRM 2728 (W.D. Pa. 1970); see also *Mogge* v. *Dist. 8, Machinists, supra* note 107.

[168] *Newspaper Guild, Local 35* v. *Washington Post Co.*, 442 F.2d 1234, 76 LRRM 2274 (D.C. Cir. 1971), *aff'g* 76 LRRM 2273 (D. D.C. 1970).

[169] *Local 13, Longshoremen* v. *Pacific Maritime Assn., supra* note 28, where a local could not vacate award under contract held by parent international; *Harris* v. *Chemical Leaman Tank Lines, Inc., supra* note 31, where individual employees were refused the right to sue to vacate an award.

[170] Compare *Boilermakers* v. *Combustion Eng., Inc.*, 78 LRRM 2512 (D. Conn. 1971), where the NLRB was granted a stay of the arbitration proceedings where it was considering the same issue as to the extension of a contract to a newly opened plant, with *Auto Workers, Local 1010* v. *Avco Corp.*, 3 FEP Cases 936 (D. Conn. 1971), where the court refused the intervention of a state agency in a case involving state protective legislation for women.

mit the employer to enter into a contract with a binding arbitration clause, and if such statutory permission exists, then it has been held that lack of funds is no defense to the confirmation of an award providing for severance pay.[171]

V. Relationship of 301 to Other Legislation

A. National Labor Relations Act

The possibility of a change in NLRB policy as to deferral to arbitration predicted in last year's report came to pass in the Board's decision in *Collyer Insulated Wire.*[172] The majority in the *Collyer* case held that the parties should be required to settle their dispute over alleged unilateral changes in wages and working conditions on the part of the employer by reference to the grievance-arbitration provisions of their contract, where it appeared that the dispute in question was essentially over the terms and meaning of their collective bargaining agreement. The case represents an attempt to reach an accommodation between the statutory policy favoring the fullest use of collective bargaining and the arbitral process on the one hand, and the statutory policy reflected by the grant of Congress to the Board of exclusive jurisdiction to prevent unfair labor practices. The majority noted that the authority of the Board, in its discretion, to defer to the arbitration process has never been questioned by the courts, and where the dispute in its entirety arises from the contract between the parties and from their relationship under the contract, the dispute ought to be resolved in the manner in which that contract prescribes. Therefore, the NLRB held that the contract in the *Collyer* case made available a quick and fair means for the resolution of the dispute including, if appropriate, a fully effective remedy for any breach of the contract which occurred, and that the Board's obligation to advance the purposes of the NLRA is best discharged by dismissal of the complaint. However, the NLRB retained jurisdiction over the case solely for the purpose of entertaining an appropriate and timely motion for further

[171] *Providence Teachers, Local 958* v. *School Comm. of Providence,* 276 A.2d 762, 77 LRRM 2530 (R.I. Sup. Ct. 1971); but see *Operating Engineers, Local 34* v. *Buck,* 184 NW.2d 805, 76 LRRM 2807 (Minn. Sup. Ct. 1971), where the court had to consider several statutes and policies in a compulsory arbitration setting.

[172] 192 NLRB No. 150, 77 LRRM 1931 (1971). The decision resulted in four opinions with Member Brown writing an opinion concurring with the majority opinion of Members Miller and Kennedy, two new appointees to the Board. Members Jenkins and Fanning each filed dissenting opinions. It should be noted that Brown has since completed his term on the Board and the attitude of his successor toward the deferral question is unknown.

consideration upon a proper showing that either (a) the dispute has not with reasonable promptness been resolved through the grievance-arbitration procedure, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the NLRA.

The fact that only one case involving pre-award deferral to arbitration in a refusal-to-bargain situation has been decided by the Board in the more than six months since *Collyer* is mute testimony to the general usage by parties of contract grievance procedures before resort to the NLRB.[173] Only one other decision under *Collyer* has been reported and this involved discharges for union activity.[174] The NLRB refused to defer to the grievance machinery where the collective bargaining agreement did not commit the parties to binding third-party arbitration, but provided only that by an ad hoc agreement by the parties could arbitration be convened to resolve the dispute. The Board specifically did not resolve in this case when or whether *Collyer* would be applied to discharge cases under the NLRA, as distinguished from refusal-to-bargain cases where it clearly intends to apply the policy.

It is clear that in *Collyer* situations the NLRB retains exclusive jurisdiction to decide any unfair labor practice issues, and that it is merely withholding its processes in disputes that in their entirety arise from the contract between the parties, in order that the methods of resolution of disputes prescribed by the contract might be utilized. The arbitrator, therefore, is limited to deciding the contractual issues and the extent to which statutory and case law can be considered in the arbitration proceeding promises to continue to be a source of controversy among arbitrators.[175]

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[173] *Coppus Engineering Corp.*, 195 NLRB No. 113, 79 LRRM 1449 (1972). See the speech of Board Member Fanning entitled, "The Impact of *Collyer* on Arbitration," reprinted at 79 LRR 163, wherein he noted that the few cases which reach the Board in Washington do so only after the arbitration procedure has been unsuccessful.

[174] *Tulsa-Whisenhunt Funeral Homes, Inc.*, 195 NLRB No. 20, 79 LRRM 1265 (1972). The General Counsel of the NLRB has indicated in a policy statement, reported at 79 LRR 239, that as a general rule the *Collyer* policy of deferral to arbitration will be applied only to disputes involving an alleged employer refusal to bargain in violation of the NLRA and not to charges of violations of other sections of the Act.

[175] See Arbitrator Robert G. Howlett's recent decision in *Sam Garvin & Co.*, 58 LA 1 (1971), in which the "statutory issue," as distinguished from the "contractual issue," was considered at length along with supporting NLRB case law regarding refusing to bargain in a *Collyer* deferral arbitration.

Courts consistently uphold the use of the Board's discretion as to whether it will defer to arbitration or issue a complaint in an unfair labor practice proceeding.[176] In cases involving issues related to the representation of employees, deferral to arbitration is virtually nonexistent in view of the Board's prerogatives under the statute and its special expertise. Thus, the NLRB's refusal to defer to arbitration was upheld in a case where an arbitrator had ruled that the union represented a majority at a particular plant contrary to an NLRB ruling that the union never represented an uncoerced majority.[177] In another case the Second Circuit upheld the NLRB's refusal to bargain, finding against an employer who defended on the ground that an arbitrator had ruled that unrepresented cashiers of a restaurant should be added to an existing unit of waitresses, rather than becoming part of a separate bargaining unit, as the NLRB found.[178] The court agreed with the NLRB that the position of the cashiers had not been adequately presented to the arbitrator. The NLRB itself disagreed with the award of an arbitrator who clarified a bargaining unit by finding two individuals to be employees rather than independent contractors, the Board holding that the award was repugnant to the policies and purposes of the statute.[179]

In addition to the *Plasterers* case treated above, during the past year the NLRB decided that the reorganization of the National Joint Board for the Settlement of Jurisdictional Disputes after a collective bargaining agreement had been signed relieved the parties from recognizing the new joint board, so the NLRB proceeded to a determination of the dispute under its Section 10(k) proceedings.[180] A district court held in a contempt proceeding for violation of an injunction that it was no defense that the union acted pursuant to an arbitration award issued subse-

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[176] *United Aircraft Co.* v. *NLRB,* 440 F.2d 85, 76 LRRM 2761 (2d Cir. 1971) (discipline case); *NLRB* v. *Wisconsin Aluminum Foundry Co.,* 440 F.2d 393, 76 LRRM 2576 (7th Cir. 1971) (discrimination case); but see *United Aircraft Corp.* v. *Canel Lodge 700, Machinists, supra* note 155.

[177] *NLRB* v. *Hunter Outdoor Products, Inc.,* 440 F.2d 876, 76 LRRM 2969 (1st Cir. 1971). See also *Lanco Coal Co.* v. *Southern Labor Union, supra* note 129.

[178] *NLRB* v. *Horn & Hardart Co.,* 439 F.2d 674, 76 LRRM 2443 (2d Cir. 1971).

[179] *Peerless Publications, Inc.,* 190 NLRB No. 130, 77 LRRM 1262 (1971).

[180] *Bricklayers, Local 1 (Lembke Constr. Co.),* 194 NLRB No. 98, 79 LRRM 1025 (1971); and *Sheet Metal Workers, Local 312 (Morris & Sons Co.),* 194 NLRB 100, 79 LRRM 1015 (1971) (Member Fanning dissenting), overruling *Asbestos Workers, Local 28 (Paul Jensen, Inc.),* 186 NLRB No. 20, 75 LRRM 1310 (1970); but see *Local 644, Carpenters* v. *Walsh Constr. Co., supra* note 147.

quent to the injunction.[181] In another contempt proceeding under the 80-day cooling-off procedures under the LMRA, the parties were ordered to obey arbitration awards relating to the dispute.[182]

A number of NLRB cases involved issues surrounding the use of grievance and arbitration machinery. The Eighth Circuit upheld a finding by the Board of a refusal to bargain by an employer's unilateral withdrawal of the arbitration step of a grievance procedure, where a letter of the employer regarding continuance of the procedure under an expired contract constituted a valid interim agreement.[183] Another court found, contrary to the NLRB, no refusal to bargain by an employer's attempt in bargaining to limit the arbitration of grievances in regard to new piecework rates,[184] or by an employer's failure to process grievances regarding the reinstatement of strikers under a new collective bargaining agreement.[185] On the other hand, an employer cannot defend the discharge of strikers under the no-strike clause where the strike was to protest unlawful employer practices by claiming that the strikers failed to use the grievance procedure under the contract.[186] In an unusual situation involving the processing of a grievance which turned out to be to the grievant's detriment and resulted in his discharge, the Board found no violation on the part of the union in the absence of evidence that it intended to retaliate against the employee, nor did it find a violation by the employer, holding that the contract gave the employer no choice but to take the discharge action.[187]

The Ninth Circuit found no refusal to bargain by an employer's failure to participate in two separate grievance proceedings and to abide by arbitration awards against it.[188] The court noted that the availability of a remedy under Section 301 argued for

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[181] *Henderson* v. *Local 23, Longshoremen,* 77 LRRM 3138 (W.D. Wash. 1971).
[182] *U.S.* v. *Longshoremen,* 334 F.Supp. 329, 78 LRRM 2840 (N.D. Calif. 1971).
[183] *Taft Broadcasting Co.* v. *NLRB,* 441 F.2d 1382, 77 LRRM 2257 (8th Cir. 1971).
[184] *Moore of Bedford, Inc.* v. *NLRB,* 451 F.2d 406, 78 LRRM 2769 (4th Cir. 1971).
[185] *NLRB* v. *Community Motor Bus Co.,* 439 F.2d 965, 76 LRRM 2844 (4th Cir. 1971).
[186] *Jones & McKnight, Inc.* v. *NLRB,* 445 F.2d 97, 77 LRRM 2705 (7th Cir. 1971).
[187] *Currin-Greene Shoe Mfg. Co.,* 190 NLRB No. 120, 77 LRRM 1389 (1971). See also *Steelworkers and its Local 4803 (Grasis Fabricating Co.),* 194 NLRB No. 119, 79 LRRM 1191 (1971) (no violation found by union's refusal to take grievance to arbitration).
[188] *NLRB* v. *Los Angeles-Yuma Freight Lines,* 446 F.2d 210, 77 LRRM 3076 (9th Cir. 1971).

restraint by the NLRB. The District of Columbia Circuit, on the other hand, upheld an NLRB finding that a union improperly refused to follow contract procedures for the adjustment of a dispute regarding the employer's choice of a foreman, but in strong language indicated that the parties should have used the contract grievance procedure to resolve what it termed to be a "trivial dispute." [189] No violation of the NLRA was found by the strike of a local union where the employer's contract with the international union gave locals the right to bargain over local wage rates.[190] A union local was found by the NLRB to be in violation of the NLRA for fining a member who testified adversely to the union in an arbitration proceeding.[191] Refusal of the NLRB to issue a complaint is not res judicata of an employee action against an employer and a union for wrongful discharge and breach of the duty of fair representation.[192]

A number of cases were presented where NLRB procedures were raised as a defense in actions to compel arbitration. The Ninth Circuit compelled arbitration of a dispute as to whether a contract covers a new plant of the employer, where the NLRB already found the employer in violation of the NLRA for its failure to apply the contract to the new plant.[193] The court held that there was no preemption by the NLRA in a 301 action, and that the possibility of conflict with the NLRB was no barrier to resort to the arbitration tribunal, noting that the NLRB may choose to follow the arbitration award. The court pointed out that to grant the employer's request to defer to the Board would undermine the federal policy favoring arbitration. However, a district court in another case permitted the NLRB to intervene in a union's action to compel arbitration, and the action was dismissed, where there would be a direct and necessary conflict with an NLRB ruling that the employer's second plant was a separate unit rather than included in the union's contract at the

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[189] *Dallas Mailers, Local 143* v. *NLRB*, 445 F.2d 730, 733, 76 LRRM 2247, 77 LRRM 2796 (D.C. Cir. 1971).

[190] *General Electric Co.* v. *NLRB*, 443 F.2d 602, 77 LRRM 2259 (5th Cir. 1971); see also *General Electric Co.* v. *Local 191, IUE*, 443 F.2d 608, 77 LRRM 2264 (5th Cir. 1971), *on remand* of 398 U.S. 436, 74 LRRM 2420 (1970).

[191] *Teamsters, Local 788 (San Juan Islands Cannery)*, 190 NLRB No. 5, 77 LRRM 1458 (1971).

[192] *Ruzicka* v. *General Motors Corp., supra* note 47; but *cf. Carpenters, Local 971 Vacation Trust* v. *Sargent Fixture Co., supra* note 70.

[193] *Lodge 1327, Machinists* v. *Fraser & Johnston Co.*, 454 F.2d 88, 79 LRRM 2118 (9th Cir. 1971); but see *NLRB* v. *Hunter Outdoor Products, Inc., supra* note 177.

first plant.[194] In another case, a union was held to be entitled to arbitration of a discharge of seven employees, the court holding that the dismissal of a charge by the NLRB was not res judicata and also that the change in the number of shareholders of the employer did not dissolve the company's liability or affect automatic renewal of the contract.[195]

In an unusual case involving a violation of the NLRA by reason of a union's refusal to process a wrongful discharge grievance under a collective bargaining agreement, the Second Circuit refused to enforce an NLRB order requiring the union to pay back pay to the aggrieved employee.[196] The court held under the *Vaca* case damages must be apportioned in wrongful discharge actions and the wrongfulness of the discharge itself had not been found by any tribunal, so the court ordered that the grievance be sent to arbitration.

B. Arbitration and Civil Rights Legislation

The split decision of the Supreme Court in the *Dewey* case noted above may have created some doubt about the state of the law on election of remedies. However, the weight of authority is very much against *Dewey*. Two subsequent decisions of that same circuit attest to the ambivalence about *Dewey* in the Sixth Circuit itself. In the *Spann* [197] case the court held that an employee who had been reinstated by an arbitrator without back pay may not maintain an action under Title VII of the Civil Rights Act of 1964 against his employer for the back pay denied by the arbitrator. The court held that "where all issues are presented to bona fide arbitration and no other refuge is sought until that arbitration is totally complete, *Dewey* precludes judicial cognizance of the complaint." The court emphasized the union's efforts at protecting the employee's rights and its success in the arbitration proceedings even though union intervention against the black grievant had prompted his discharge, and restated its limited power of judicial review of arbitrators' decisions that are deemed to be final under the terms of the collective bargaining agreement.

[194] *Teamsters, Local 542* v. *Ace Enterprises*, 332 F.Supp. 36, 77 LRRM 3009 (S.D. Calif. 1971).
[195] *Local 4, IBEW* v. *Radio Thirteen-Eighty, Inc.*, 334 F.Supp. 242, 78 LRRM 2668 (E.D. Mo. 1971).
[196] *NLRB* v. *Local 485, IUE*, 454 F.2d 17, 79 LRRM 2278 (2d Cir. 1972).
[197] *Spann* v. *Joanna Western Mills Co.*, 446 F.2d 120, 3 FEP Cases 831 (6th Cir. 1971). Title VII is located at 42 U.S.C. 2000e.

In *Newman* v. *Avco Corp.*,[198] the Sixth Circuit reversed a summary judgment of a Title VII action against an employer and a union by a discharged employee whose grievance alleging racial discrimination had been rejected by an arbitrator. The court held that the *Dewey* case was based upon an estoppel theory rather than upon a doctrine of election of remedies, and that estoppel did not apply to the present case where the discharged employee did not voluntarily submit his grievance to arbitration but only because under the collective bargaining contract failure to do so would have rendered the discharge final. The court also noted that the employee was attacking the fairness and impartiality of the arbitration proceeding, since he alleged a longstanding conspiracy by the employer and the union, who set up the grievance procedure and chose the arbitrator, to maintain a system of racial discrimination. The court also expressed doubt that the arbitrator had the right to finally decide plaintiff's claims of racial discrimination in the absence of any clause in the contract prohibiting racial discrimination. The distinguishing feature of the *Spann* case was the fact that Spann sought and accepted a largely favorable arbitration award and then sued in another forum for the back pay denied by the arbitrator. This decision produces the ludicrous result of encouraging workers not to accept favorable arbitration awards and thus mitigating damages.[199]

In other district court decisions on the same problem, a Title VII action by a discharged employee who filed his Title VII case after an adverse arbitration decision and a finding by the Equal Employment Opportunity Commission of no basis to support the plaintiff's charges was dismissed.[200] This decision used the election-of-remedies rather than estoppel rationale, although the case was decided prior to the Sixth Circuit's *Newman* decision. The *Spann* result has been reached by other district courts where the plaintiff attempted to present the same issue to the court as had been heard and decided by the arbitrator and where there was a full hearing of the claim of discrimination.[201]

[198] 451 F.2d 742, 3 FEP Cases 1137 (6th Cir. 1971), *rev'g* 313 F.Supp. 1069, 2 FEP Cases 517, 811 (M.D. Tenn. 1970).

[199] For further discussion of this issue, see Gould, "Judicial Review of Employment Discrimination Arbitrations," in "Judicial Review: As Arbitrators See It," Part II, *supra* pages 114-150.

[200] *Taylor* v. *Springmeier Shipping Co.*, 4 FEP Cases 322 (W.D. Tenn. 1971).

[201] *Rios* v. *Reynolds Metals Co.*, 332 F.Supp. 1209, 4 FEP Cases 130 (S.D. Tex. 1971), a case involving national origin discrimination, comparing *Dewey* and the

Other district courts have held that actions under various civil rights acts are not barred by prior arbitration decisions or settlements in the grievance procedure, especially where the charge is that the collective bargaining agreement itself violates the civil rights of the plaintiff and that the contract was used to maintain a discriminatory system.[202] Affirmative action plans in regard to minority-group employment may present conflicts with existing provisions of collective bargaining agreements, as in one case involving the Illinois "Ogilvie Plan." [203] The Illinois district court held that the provisions of the collective bargaining agreement must give way to federal regulations, but emphasized that the parties may still use the grievance procedure under their contracts.

Procedurally it has been held that a Section 301 suit may be pleaded with a civil rights action, and that exhaustion of remedies need not be pleaded in fair-representation cases since the union could not be expected to represent the aggrieved employees vigorously.[204] A fatal defect in a Title VII action that is pleaded with a 301 action does not affect the latter, since Title VII requirements do not apply to a breach-of-contract action.[205] A federal court may abstain from deciding an employee suit brought under civil rights statutes until an arbitration decision favorable to the employee is finally decided in state court proceedings.[206] Under the Railway Labor Act, it has been held that Title VII offers a remedy in addition to that provided by the National Railroad Adjustment Board.[207]

Hutchings case of the Fifth Circuit, *supra* note 4; see also *Rose* v. *Bridgeport Brass Co.*, 4 FEP Cases 267 (S.D. Ind. 1972), a sex discrimination case dismissed on the basis of plaintiff's failure to sustain her burden of proof.

[202] *Lazard* v. *Boeing Co.*, 3 FEP Cases 643 (E.D. La. 1971); *Mack* v. *General Electric Co.*, 329 F.Supp. 72, 3 FEP Cases 733 (E.D. Pa. 1971); *Page* v. *Curtiss-Wright Corp.*, 332 F.Supp. 1060, 3 FEP Cases 1187 (D. N.J. 1971).

[203] *Southern Illinois Builders Assn.* v. *Ogilvie*, 3 FEP Cases 571 (S.D. Ill. 1971); see also *U.S.* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 3 FEP Cases 589 (2d Cir. 1971); and *U.S.* v. *Virginia Electric & Power Co.*, 327 F.Supp. 1034, 3 FEP Cases 529 (E.D. Va. 1971), an injunctive action under Title VII against a system of unlawful job and departmental seniority under a collective bargaining agreement.

[204] See the *Glus, Meaders,* and *Pompey* cases cited in note 47, *supra;* see also *Ricciotti* v. *Warwick School Committee,* 319 F.Supp. 1006, 76 LRRM 2720 (D. R.I. 1970).

[205] *Osborne* v. *McCall Printing Co., supra* note 65.

[206] *Steele* v. *Haley, supra* note 16.

[207] *Reyes* v. *Missouri-Kansas-Texas RR,* 53 F.R.D. 293, 3 FEP Cases 121 (D. Kan. 1971); see also *Banks* v. *Seaboard Coast Line RR, supra* note 44.

C. Other Statutes

As noted in the *Arguelles* case discussed above, the existence of other statutory rights may enhance or supplement rights given under a collective bargaining agreement for the resolution of disputes and grievances. Thus, the Interstate Commerce Commission has elaborate provisions and procedures for protecting the rights of employees in the merger or discontinuance of railroads, including the use of arbitration proceedings, and the courts give usual deference to the rulings of such independent administrative agencies.[208] The Civil Aeronautics Board has set up protections for employees involved in the merger of airlines, and a CAB policy requiring unions and surviving airlines to submit disputes concerning the integration of seniority lists to arbitration was upheld.[209] The court held that the CAB has power to compel a union to abide by an arbitrator's decision where the CAB has ordered that the determination of the arbitral tribunal shall be final and binding upon all parties.

VI. Conclusion

One immediate impression of the year's activity in regard to the relationship of the courts and the arbitral process is the widespread use of the *Boys Markets* decision, which appears to have had a larger impact on the volume of court litigation than was originally anticipated. While no scientific data were found regarding the *Boys Markets* impact on the negotiated contract grievance procedures themselves, parties are clearly making frequent use of the new-found injunctive remedy to aid in the resolution of disputes arising under collective bargaining agreements. The use of the *Boys Markets* rationale by employers, and even by labor organizations in an increasing number of situations to preserve the status quo where employer action is threatened, would dictate that the parties carefully review their existing grievance procedures to see that they come within the requirements of the *Boys Markets* decision. Similarly, the broader policy of the NLRB in regard to pre-award deferral to arbitration enunciated in the *Collyer* decision should enhance the role of arbitration, perhaps qualitatively and certainly quantitatively, but again the type of grievance procedure set forth in the contract

[208] See *Ferrick* v. *B & O RR*, 447 F.2d 89, 78 LRRM 2565 (3rd Cir. 1971); see also *Nemitz* v. *Norfolk & Western Ry., supra* note 6; *Reardon* v. *Penn-Central Trans. Co., supra* note 18.

[209] *American Airlines, Inc.* v. *CAB*, 445 F.2d 891, 77 LRRM 3089 (2d Cir. 1971).

will be critical to a determination as to whether there will be deferral in the first instance. Because the Board was deeply divided in the *Collyer* issue, its future remains unclear.

Employee suits under 301 attacking both employer and union action under a collective bargaining agreement show a steady increase and present the greatest volume of litigation presented to the courts, although the success ratio of such action is extremely low. Another increasing area of litigation, and perhaps more fruitful as far as success to plaintiffs is concerned, are actions under various civil rights statutes. These actions promise to continue to increase as legislation protecting minority rights becomes more prevalent and more refined,[210] and as various civil rights groups continue their initiatives in enforcing such legislation. It is fair to conclude that arbitrators will have to become more sensitive to individual rights of grievants and minority-group employees than they have been, so as to see that their complaints are properly and fully aired in the arbitration process with the necessary procedural and substantive safeguards. Such sensitivity could conceivably be of significant benefit to the courts in reducing their case load and at the same time enhance the collective bargaining process in the upholding of individual and minority rights. However, the probability is that the arbitration process is in need of change and reform if it is to play a significant role in this area.

No dramatic increase of cases in the public employment sector has yet surfaced, but a review of the reported decisions of last year indicates that significant cases are beginning to be reported from jurisdictions other than such states as New York and Michigan, which were early leaders in the passage of statutes giving public employees the right to bargain collectively. As states begin to pass enabling legislation and collective bargaining develops, the number of such cases should increase. The slow development of arbitration decisions in the public sector appears to be caused not only by the lack of legislation or the restrictions in existing legislation, but also by the lack of sophistication on the part of parties in regard to collective bargaining, a lack that may be overcome with the passage of time.

The national labor policy of encouraging private arbitration

[210] See, for example, the proposed text of the Equal Employment Opportunity Act of 1972, Conference Report, set forth at 79 LRR 211.

because of its potential for expeditious disposition of labor disputes without resort to the courts has given rise to increasing expressions of impatience on the part of courts where the litigious or restrictive attitudes of the parties have imposed on the courts' case loads.[211] The Second Circuit Court of Appeals was especially critical of recurring suits to compel arbitration under the collective bargaining agreement between General Electric and the IUE, the court commenting on the "distressing history of litigation between these parties," caused by a restrictive and involved arbitration clause which in a previous case was noted to "resemble a trust indenture." [212] The court said in its opinion that

> ". . . the availability of the courts is essential to labor peace and the strike-free operation of industry. But by continually and regularly falling back on the courts, these parties have largely abdicated their responsibilities to seek peaceful voluntary resolution of their own problems and have thus abused the judicial process. We hesitate to consider the consequences if more employers and unions adopted the stringent contractual arbitration language involved here and then foisted on the federal courts, in these days of congested calendars, the responsibility for directing when and when not to arbitrate each time a dispute concerning one of thousands of employees survived the grievance machinery.
>
> "We suspect that the employer and the union may consider Section 301 litigation a necessary dose of medicine every time they fail to agree on arbitrability. [Footnote omitted.] In the hope of thwarting any such thoughtless involvement of the federal courts, we want to make clear that we reaffirm the principles of the *1968 Case* and that we shall apply those principles to all substantive provisions of the contract."

The court then engaged in a long discussion of the various grievances involved and closed with the following comment:

> "Before closing with the traditional word of disposition, we again voice the hope that the parties will abandon that strategy which requires federal courts to play the role of *parens patriae* in their labor disputes. That such a course results in a disposition of grievances at a snail's pace is obvious from the history of the case before us which dates back to May 1968 when the complaint was filed in

[211] See *Mogge* v. *Dist. 8, Machinists, supra* note 107; *Local 757, Teamsters* v. *Borden, Inc., supra* note 114; see also *Dallas Mailers Union, Local 143* v. *NLRB, supra note* 189, which was an NLRB case involving the discipline by the union of a foreman where the court, in very strong language, indicated that the dispute should have been settled long ago by voluntary procedures of the parties.

[212] *IUE* v. *General Electric Co., supra note* 142; the 1968 case referred to by the court is reported at 407 F.2d 253, 70 LRRM 2082 (2d Cir. 1968), *cert. denied,* 395 U.S. 904, 71 LRRM 2254 (1969).

the district court. The courts' resources are not unexpendable, and we must insist that the parties recognize their responsibilities to settle grievances of individual employees with dispatch. Delay is a concomitant of drawing in the federal courts."

These quotations indicate the reliance of the courts on the use of arbitration to settle labor disputes and their general desire to remain in the background in the resolution of such disputes as much as possible. In order that the national policy be implemented, it is necessary for the parties to avoid restrictive and burdensome requirements in the implementation and use of grievance and arbitration machinery. The above-noted case law may serve as a guide to parties, and arbitrators as well, in areas where problems might be anticipated.

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