APPENDIX B

ARBITRATION AND FEDERAL RIGHTS UNDER COLLECTIVE AGREEMENTS IN 1972 *

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The reported litigation on an appellate level involving the arbitral process increased substantially during the year 1972 in both state and federal courts.[1] Three general areas account for the majority of cases reviewed by the committee during the past year. The largest volume of court litigation is caused by direct enforcement actions of collective bargaining agreements under Section 301, filed by individual employees claiming a breach of contract by an employer or a breach of duty of fair representation by a labor organization. The fact that the success ratio continues to be very low has not diminished the volume of these actions to any great extent. Second, although the number of cases seems to have leveled off somewhat, there is still a large amount of litigation involving the use of injunctions and the enforcement of the duty to arbitrate, which cases in the main spring from the Supreme Court's landmark *Boys Markets* decision.[2]

A third, steadily increasing area of litigation and reported cases

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[1] Although suits to enforce or to remedy a violation of a collective bargaining agreement as sanctioned by Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. 185, may be brought in either federal or state court, almost all such actions are brought in federal courts, the reasons for which would require an independent analysis. Thus, this report is, in general, confined to a study of decisions of the federal district courts which have initial jurisdiction of Section 301 actions, and to both federal and state court decisions on an appellate level. Because of the volume of litigation, no attempt will be made to discuss or cite reported state trial court decisions. Except where considered significant to the arbitral process in general, no extended treatment is given to Railway Labor Act cases which utilize special statutory arbitration procedures. Cases may stand for several propositions of law, but the authors have attempted to cite them in the area of their greatest significance.

[2] *Boys Markets, Inc.* v. *Retail Clerks Local 770,* 389 U.S. 325, 74 LRRM 2257 (1970). See generally Gould, "On Labor Injunctions, Unions and the Judges: The Boys Market Case," 1970 *Sup. Ct. Rev.* 215.

is the area of public employment, where collective bargaining rights are beginning to be granted and to result in collective bargaining agreements. However, due to the nascent stage of public employment relations law and the necessity for statutory authorization before public employees may be accorded collective bargaining rights, most of the reported decisions still involve the definition of such rights on a rather basic level. The full-scale development of public employment law in the areas of contract enforcement and the arbitration process must await the granting, either by legislators or by the courts, of full-scale collective bargaining rights to public employees. In addition to the above, the National Labor Relations Board's landmark decision in *Collyer Insulated Wire*[3] in 1971 has led to a substantial number of NLRB decisions outlining when and under what circumstances it will defer to the arbitral process.

All of the aforesaid areas and others will be discussed in the report below. No attempt will be made herein to set forth comprehensively the background law in regard to the various areas discussed, but the following is merely designed to highlight legal developments affecting arbitration during the past year, building on prior reports of this committee.[4]

I. Supreme Court Decisions

Several Supreme Court opinions were handed down during the past year which had a direct bearing on the arbitral process. The case that dealt with the arbitration process most directly was *Operating Engineers Local 150* v. *Flair Builders, Inc.*,[5] wherein the Court followed its previous decision in *Wiley & Sons* v. *Livingston*,[6] which held that procedural questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator. In *Flair*, the court of appeals had refused to compel the employer to arbitrate the dispute, holding that the union was guilty of laches in its enforcement of the contract. The court of appeals distinguished *Wiley* on the ground that the

[3] 192 NLRB 152, 77 LRRM 1931 (1971).

[4] See also 1972 *A.B.A. Labor Rel. Law Sec.*, at 83, "Report of the Committee on Labor Arbitration and the Law of Collective Bargaining."

[5] 406 U.S. 487, 80 LRRM 2441 (1972), *rev'g* 440 F.2d 557, 76 LRRM 2595 (7th Cir. 1971).

[6] 376 U.S. 543, 55 LRRM 2769 (1964). *Flair* was cited for the exclusivity of the contractual grievance and arbitration procedures under a broad disputes clause in *Orphan* v. *Furnco Constr. Corp.*, 446 F.2d 795, 81 LRRM 2058 (7th Cir. 1972).

procedural question there concerned "intrinsic" untimeliness relating solely to the requirements of the contract, whereas in *Flair* the question was one of "extrinsic" untimeliness based not on a violation of the contract procedures but on the failure to give timely notice under the equitable doctrine of laches.

The Supreme Court, however, held that the parties did in fact agree to arbitrate the issue of laches since the arbitration clause applied to "any difference" not settled by the parties. The Court noted that there was nothing to limit the sweep of the language of the arbitration clause or to except any dispute or class of dispute from arbitration, so the issue of laches raised by the employer should be referred to the arbitrator for decision. The Court specifically reiterated, however, that the responsibility for determining whether a union and an employer have agreed to arbitration, and the scope of the arbitration clause, remains a matter for judicial determination under *Atkinson* v. *Sinclair Refining Co.*[7]

The Court in *Flair* compared the arbitration clause therein with that involved in *Iowa Beef Packers, Inc.* v. *Thompson,*[8] decided the same term. In the latter case, the issue facing the Court was whether employees may sue for overtime compensation under the Fair Labor Standards Act (FLSA) without invoking contract grievance procedures. The Court decided that the writ of certiorari had been improvidently granted and dismissed it, since the contract contained only a narrow arbitration clause which covered only grievances "pertaining to a violation of this agreement." The Court cited in its dismissal of the writ of certiorari its decision in the *Arguelles*[9] case, decided the previous year, which held that both statutory and arbitration remedies may be available to employees under maritime law. The issue of election of remedies is again before the Court by reason of its recent granting of certiorari in *Alexander* v. *Gardner-Denver Co.*,[10]

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[7] 370 U.S. 238, 50 LRRM 2433 (1962).

[8] 405 U.S. 228, 20 WH Cases 488 (1972).

[9] *U.S. Bulk Carriers* v. *Arguelles,* 400 U.S. 351, 76 LRRM 2161 (1971). The *Thompson* case was followed in another case involving the same employer in which the Iowa Supreme Court held that the employer's "settlement" with the union, which did not follow the contract and about which the employees were not informed, did not preclude the employees' action under the FLSA for overtime compensation, and that the employees did not need to attempt contract arbitration before bringing the action. *Schimerowski* v. *Iowa Beef Packers, Inc.,* 196 NW2d 551, 20 WH Cases 709 (Iowa Sup.Ct. 1972).

[10] 466 F.2d 1209, 4 FEP Cases 1210 (10th Cir. 1972), *aff'g* 346 F.Supp. 1012, 4 FEP Cases 1205 (D.Colo. 1971), certiorari granted Feb. 20, 1973.

which held that a plaintiff-employee alleging racial discrimination under Title VII of the Civil Rights Act of 1964 against his former employer was bound by a prior arbitration award upholding his discharge. A decision on this case can be expected during the coming year, and the whole problem is discussed in more detail below.

The duty of a successor employer to bargain with a labor organization representing the predecessor's employees where the bargaining unit remains unchanged and a majority of the predecessor's employees were hired by the successor was upheld in *NLRB* v. *Burns Intl. Security Services, Inc.*[11] The Court, however, distinguishing the *Wiley* case, held that Burns was not bound to honor the substantive terms of the collective bargaining agreement that the union had negotiated with its predecessor, noting that this was not a 301 suit but a question of whether Burns had refused to bargain under the LMRA. The Court held that Burns and its predecessor were competitors, each bidding for a guard service contract, and that there was no merger or sale of assets whatsoever between the successor and its predecessor. The Court held that there was no basis for implying in either fact or law that Burns had agreed to honor the predecessor's collective bargaining agreement, including the arbitration clause. Thus, Burns was held not to have violated the LMRA by unilaterally changing wages and other conditions of employment after taking over the services performed by its predecessor, although it was ordered to recognize and bargain with the union upon request.[12]

Under the Railway Labor Act (RLA), the Supreme Court

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[11] 406 U.S. 272, 80 LRRM 2225 (1972). For a state court discussion of the *Wiley* and *Burns* cases, see *Holayter* v. *Smith*, 29 CA3rd 326, 82 LRRM 2450 (Cal.App. 1972). However, a court will readily confirm an arbitration award where the change of ownership of the employer is found to be a deceptive scheme to avoid an award or an NLRB decision. *Textile Workers* v. *Cast Optics Corp.*, 464 F.2d 577, 80 LRRM 3193 (3rd Cir. 1972). For a decision under the Railway Labor Act, see *Machinists Dist. 147* v. *Northeast Airlines, Inc.*, 473 F.2d 549, 80 LRRM 2197 (1st Cir. 1972).

[12] The *Burns* decision has been cited many times in the past year. See, for example, *NLRB* v. *Polytech, Inc.*, 469 F.2d 1226, 81 LRRM 2902 (8th Cir. 1972); *NLRB* v. *Denham*, 496 F.2d 239, 81 LRRM 2697 (9th Cir. 1972); *NLRB* v. *Geronimo Service Co.*, 467 F.2d 903, 81 LRRM 2407 (10th Cir. 1972); *NLRB* v. *Tragniew, Inc.*, 470 F.2d 669, 81 LRRM 2336 (9th Cir. 1972); *NLRB* v. *Bachrodt Chevrolet Co.*, 468 F.2d 963, 81 LRRM 2244 (7th Cir. 1972); *NLRB* v. *Wayne Convalescent Center, Inc.*, 465 F.2d 1039, 81 LRRM 2129 (6th Cir. 1972); *Emerald Maintenance, Inc.* v. *NLRB*, 464 F.2d 698, 80 LRRM 2801 (5th Cir. 1972); *Boeing Co.* v. *Machinists*, 81 LRRM 2532 (M.D.Fla. 1972); *Seeler* v. *Teamsters Local 445*, 80 LRRM 3324 (S.D.N.Y. 1972).

overruled a long-standing precedent and held in *Andrews* v. *Louisville & Nashville R. R.*[13] that an employee's claim for damages for wrongful discharge must first be submitted to the National Railroad Adjustment Board (NRAB), rather than to a court, even though the employee intends to seek employment elsewhere. The Court held that the employee's claim and the railroad's disallowance of it stemmed from differing interpretations of the collective bargaining agreement, and that the compulsory character of the administrative remedies to resolve such disputes stemmed from the RLA. The Court held that the notion that grievance and arbitration procedures for "minor disputes" under the RLA are optional and can be availed of as the employee or the carrier chooses was never good history and is no longer good law.[14] The Court compared RLA remedies to those under Section 301 of the LMRA, and held that the case for insisting on resort to the RLA remedies is, if anything, stronger in cases arising under that Act than it is in cases arising under Section 301. The Court also noted that the RLA remedies may, as under Section 301, be the only remedy available to the aggrieved party, since a party who has litigated on the merits an issue before the NRAB may be foreclosed from relitigating that issue in an independent judicial proceeding.

II. General Judicial Problems Under 301

A. Type of Actions Under Section 301

Who may bring a suit under Section 301 of the LMRA for the violation of a contract between an employer and a union, or between unions, and under what conditions such suits may be brought is the subject matter of a great deal of court litigation. It is axiomatic that there be a valid contract in existence as a jurisdictional prerequisite to a 301 suit, and the courts must frequently determine whether there is a valid contract in existence upon which 301 jurisdiction can be predicated.[15] The contract must be in writing to avoid the application of the parol

[13] 406 U.S. 320, 80 LRRM 2240 (1972), overruling *Moore* v. *Illinois Central R.R.*, 312 U.S. 630, 8 LRRM 455 (1941).

[14] The *Andrews* decision was followed in *Stephens* v. *Panhandle & Santa Fe Ry.*, 463 F.2d 421, 81 LRRM 2214 (5th Cir. 1972); *Johnson* v. *Interstate R.R.*, 345 F.Supp. 1082, 80 LRRM 3277 (W.D.Va. 1972).

[15] *Gordon* v. *Laborers*, 351 F.Supp. 824, 81 LRRM 2614 (W.D.Okla. 1972); *B & G Mfg. Co.* v. *Sheet Metal Workers*, 80 LRRM 3352 (Cal.App. 1972).

evidence rule.[16] A federal court dismissed a suit by trustees of a union welfare fund seeking to collect contributions to trust funds based upon an oral promise of the employer, holding that the employer's past contributions made on printed union forms were not binding in the future where there was no written collective bargaining agreement.[17] However, in another case an employer and an individual office-stockholder were held liable to a trust fund, even though the defendants did not sign the collective bargaining agreement, where they had validly authorized an association to negotiate the contract on their behalf.[18]

In keeping with the national policy favoring arbitration of labor disputes, the courts are quick to urge or order arbitration wherever possible to resolve law suits involving contracts subject to 301. In a suit by a union and employees against an employer and an insurance company for breach of the collective bargaining agreement by the failure to obtain the insurance benefits provided for under the contract, the court of appeals in St. Louis ordered the dispute submitted to arbitration if any party requested it, and urged that the insurance company participate in and agree to be bound by any such arbitration proceeding.[19] The court noted, however, that if all parties insisted on proceeding to trial of the issue of the breach of contract, thus waiving their rights to arbitration, the trial court must hold a trial. Federal courts will accept a prior state court adjudication as to the validity of a contract and order arbitration of a dispute under the contract,[20] and where only the validity of certain conduct or contract provisions rather than the validity of the entire contract is in dispute, courts will hold that arbitration provided for under the contract is the exclusive remedy available to the parties.[21]

A frequent type of action is an employee suit to obtain a

[16] *Local 986, Teamsters* v. *Sears, Roebuck & Co.*, 79 LRRM 2907 (C.D.Cal. 1972); *cf. Alexander Inc.* v. *Glasser*, 31 NY2d 270, 338 NYS2d 609, 81 LRRM 2916 (N.Y.Ct.App. 1972).

[17] *Caporale* v. *Di-Com Corp.*, 345 F.Supp. 153, 80 LRRM 3089 (N.D.Ill. 1972).

[18] *Garment Workers, ILGWU, Local 415* v. *Miami Casuals, Inc.*, 456 F.2d 799, 79 LRRM 2732 (5th Cir. 1972) (amount of employer's liability referred to arbitration).

[19] *Steelworkers* v. *Mesker Bros. Ind.*, 457 F.2d 91, 79 LRRM 2714 (8th Cir. 1972); compare *Associated General Contractors of Ill.* v. *Teamsters*, 345 F.Supp. 1296, 80 LRRM 3419 (S.D.Ill. 1972), where there was no interpretive arbitration under the contract.

[20] *Commarato* v. *Art Steel Co.*, 79 LRRM 2775 (S.D.N.Y. 1972).

[21] *L. A. Newspaper Guild* v. *Hearst Corp.*, 82 LRRM 2656 (C.D.Cal. 1973); *Printing Ind. of St. Louis* v. *Bindery Local 55*, 345 F.Supp. 339, 81 LRRM 2915 (E.D.Mo. 1972).

pension, and under most plans the aggrieved employee has no right to arbitration.[22] The Georgia Supreme Court recently granted a discharged employee, whose discharge was upheld in an arbitration proceeding, an early retirement pension, noting that it could reach the merits of the case since the arbitration clause under the collective bargaining agreement was not applicable to the pension contract.[23] Employee suits involving such pension plans frequently involve the qualifying regulations of such plans or their modification, and the trustees in such cases are often a necessary party.[24]

Section 301 lends itself to a wide variety of suits on contracts, including damage suits for breach of a contract,[25] and specific performance of a collective bargaining agreement against a successor employer.[26] Other actions reported during the past year include the enforcement of an exclusive nondiscriminatory hiring hall in a right-to-work state,[27] and union actions for the enforcement of a dues checkoff provision or the recovery of union dues from an employer.[28] In a union's damage action for breach of a subcontracting clause of a collective bargaining agreement, the court held that evidence of bargaining history was inadmissible to explain the meaning of an unambiguous contract clause that was clear on its face.[29]

The most common damage action, other than employee actions, are employer actions for damages caused by a labor organization's breach of a no-strike clause.[30] However, where such a claim

[22] See, for example, *Teston* v. *Carey*, 464 F.2d 765, 80 LRRM 2382 (D.C.Cir. 1972); *Kiser* v. *Carey*, 353 F.Supp. 736, 82 LRRM 2577 (D.D.C. 1973); *Patterson* v. *Mine Workers Welfare Fund*, 346 F.Supp. 11, 81 LRRM 2509 (E.D.Tenn. 1971); *Brune* v. *Morse*, 339 F.Supp. 159, 80 LRRM 2820 (E.D.Mo. 1972); *Visovsky* v. *Boyle*, 80 LRRM 2537 (D.D.C. 1962); *Rezsutek* v. *Carey*, 80 LRRM 2134 (D.D.C. 1972).

[23] *Atlantic Steel Co.* v. *Kitchens*, 187 SE2d 824, 79 LRRM 2620 (Ga.Sup.Ct. 1972).

[24] See *Jackson* v. *Trans World Airlines, Inc.*, 457 F.2d 202, 80 LRRM 2362 (2d Cir. 1972); *Hayes* v. *Morse*, 347 F. Supp. 1081, 81 LRRM 2894 (E.D.Mo. 1972); *Barninger* v. *Maritime Union*, 349 F.Supp. 803, 81 LRRM 2605 (S.D.N.Y. 1972) (fair-representation action).

[25] *Iodice* v. *Callabrese*, 345 F.Supp. 248, 80 LRRM 2680 (S.D.N.Y. 1972).

[26] *Holayter* v. *Smith*, *supra* note 11.

[27] *Laborers Local 107* v. *Kunco, Inc.*, 472 F.2d 456, 82 LRRM 2542 (8th Cir. 1973), *rev'g* 344 F.2d 626, 80 LRRM 3099 (W.D.Ark. 1972).

[28] *Machinists Monroe Lodge 770* v. *Litton Business Systems, Inc.*, ... F.2d ....., 80 LRRM 2379 (4th Cir 1972); *Electrical Workers Local 123* v. *Westinghouse Electric Corp.*, 345 F.Supp. 274, 80 LRRM 3151 (W.D.Pa. 1972).

[29] *Local 783, Industrial Workers* v. *General Electric Co.*, 471 F.2d 751, 82 LRRM 2416 (6th Cir. 1973).

[30] See, for example, *Adley Express Co.* v. *Local 107, Teamsters*, 349 F.Supp. 436, 81 LRRM 2627 (E.D.Pa. 1972).

is subject to arbitration under the contract of the parties, such procedure must be utilized despite an employer's claim that the union's strike amounted to a repudiation of the arbitration clause.[31] Damages were granted to an employer where the no-strike clause was implied and the defendant district union was not a named party to the contract, which had been signed by the international union, the court holding that 301 does not require the parties to the action to be the parties to the contract alleged to have been breached.[32] Thus, a corporate subsidiary may collect damages under a contract signed by its parent caused by a union's honoring of a picket line established by another labor organization, where the subsidiary had complied with all material terms of the contract and the union had accepted the benefits thereunder, since such conduct was held to constitute adoption and ratification by the parties of the contract.[33] Where the employer has multiple plants, however, the damages involved are limited to the plant where the contract applies, since 301 is limited to enforcement of contractual obligations and no tort theory of damages is applicable.[34]

Courts also have jurisdiction under Section 301 to enforce agreements between labor organizations, which agreements are often to enforce the jurisdictional claims of the particular organizations, sometimes referred to as no-raiding agreements. In one case a federal district court took jurisdiction of an action to enforce a no-raiding agreement and at the same time enjoined an NLRB election, holding that the NLRB policy of deferring to such agreements only in cases where both unions are affiliates of the AFL-CIO is of questionable statutory validity.[35] Another district court held that where the NLRB had made a determination of a work-assignment dispute in a Section 10(k) hearing under the LMRA, the NLRB determination takes precedence over a prior contrary determination by the National Joint Board

[31] *General Dynamics Corp.* v. *Local 5, Marine Workers,* 469 F.2d 848, 81 LRRM 2746 (1st Cir. 1972).

[32] *Peggs Run Coal Co.* v. *Dist. 5, UMW,* 338 F.Supp. 1275, 79 LRRM 2777 (W.D.Pa. 1972); in regard to the status of the plaintiff as a labor organization, see *Southeast Louisiana Trades Council* v. *Scheyd, Brennan, Inc.,* 334 F.Supp. 720, 79 LRRM 2763 (E.D.La. 1971).

[33] *Kelley-Nelson Constr. Co.* v. *Laborers Local 107,* 80 LRRM 2334 (W.D.Ark. 1972).

[34] *Wilson Certified Foods, Inc.* v. *Meat Cutters,* 82 LRRM 2140 (N.D.Ill. 1972), which also discusses the question of venue as does the case of *Franchino* v. *Valenti,* 347 F.Supp. 1020, 81 LRRM 2251 (E.D.N.Y. 1972).

[35] *Local 1547, IBEW* v. *Local 959, Teamsters,* 356 F.Supp. 636, 82 LRRM 2307 (D.Alaska 1973).

for the Settlement of Jurisdictional Disputes in the Building and Construction Industry and precludes a 301 suit for damages by the union which lost the work by reason of the 10 (k) determination.[36] The Sixth Circuit held that courts have no jurisdiction under Section 301 of suits by local unions to enjoin the merger of several international unions in a case where all of the employers involved are subject to the Railway Labor Act rather than to LMRA.[37]

While suits by employees to enforce provisions of union constitutions and bylaws, other than suits falling within the fair-representation area, are infrequent, there were two cases decided in 1972 by lower federal courts refusing to take jurisdiction of such suits. In one case, a Pennsylvania district court held that it had no jurisdiction of an individual's action under a union constitution and bylaws with respect to his expulsion from the union, since the matter was arguably prohibited by Section 8 (b) (2) of the LMRA administered by the NLRB.[38] The court also held that fair representation could not be involved since the union would have no such duty when the plaintiff was no longer a member and the statute of limitations precluded consideration of any events occurring prior to his expulsion. An Ohio district court also held that it lacked jurisdiction of a suit by members of a local union who claimed that the international damaged them by violating its constitution, holding that the purpose of 301 is to give federal courts jurisdiction of actions for violation of contracts between an employer and a union or between unions, but not actions by individual employees to enforce personal rights.[39]

There are numerous cases where courts have found that the rights sought to be vindicated by the plaintiffs do not come within the provisions of Section 301. It is axiomatic that a labor dispute of itself is not sufficient to vest the courts with jurisdiction if there is no breach of any contract shown.[40] Courts will not

[36] *Iron Workers Local 395* v. *Carpenters,* 347 F.Supp. 1377, 82 LRRM 2363 (N.D. Ind. 1972).

[37] *Locomotive Firemen* v. *United Transportation Union,* 471 F.2d 8, 82 LRRM 2423 (6th Cir. 1972).

[38] *Rew* v. *Masters, Mates & Pilots,* 81 LRRM 2476 (E.D.Pa. 1972).

[39] *Akerman* v. *UAW,* 82 LRRM 2541 (N.D.Ohio 1973); but see a successful action under a union constitution by RLA employees in *LaTurner* v. *Burlington Northern, Inc.,* 81 LRRM 2408, 80 LRRM 2588 (E.D.Wash. 1972).

[40] *Fiorelli* v. *Kellewer,* 339 F.Supp. 796, 80 LRRM 2343 (E.D.Pa. 1972) (pension dispute between local union pension fund and district council pension fund); *City of Galveston* v. *Masters, Mates & Pilots,* 338 F.Supp. 907, 79 LRRM 2619 (S.D.Tex. 1972) (injunction against picketing in violation of state law).

enforce, under 301, private oral contracts between an employer and its employees, but will require that they pursue the grievance procedures under a collective bargaining agreement as their sole remedy.[41] Similarly, persons not covered by the contract in question, such as supervisory or casual employees, may not maintain an action on the contract.[42] Also, courts have no jurisdiction of an action by an employer against individual union members.[43] The Third Circuit held that it had no jurisdiction of an action by employees who allege that a collective bargaining agreement discriminates against them, where no violation of the contract is also alleged.[44] The First Circuit held that it had no jurisdiction, under 301, of an action by employees to have a collective bargaining agreement declared null and void on the ground that the union no longer was supported by the employees.[45] The court held that the NLRB had primary jurisdiction of the problem and that Section 301 authorizes suits for violation of contracts but not to challenge the validity of the contract itself.

As noted above in the discussion of the Supreme Court's *Flair* decision, basic contract questions regarding the existence of a contract or the scope of the arbitration clause are questions for the courts to determine, not for an arbitrator. Such a case is presented when the question is whether a contract has been terminated by the parties.[46] Alleged illegality of a contract clause, however, will not prevent a court from referring it to arbitration if the clause in question is not clearly unlawful and an arbitrator might find it to be valid.[47] Courts have also distinguished suits seeking to enforce a contract or for violation of a collective bargaining agreement from actions where employees are seeking redress of an alleged violation of law by the collective

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[41] *Klepacky* v. *Kraftco Corp.*, 80 LRRM 3144 (D.Conn. 1972); in regard to individual contracts under the RLA, see *Trans World Airlines* v. *Beaty*, 80 LRRM 2353, 80 LRRM 2354 (S.D.N.Y. 1972).

[42] *Steelworkers* v. *General Fireproofing Co.*, 464 F.2d 726, 80 LRRM 3113 (6th Cir. 1972) (also discussed the fact that the court had no jurisdiction over an oral agreement with the supervisor); *Love* v. *Republic Natl. Life Ins. Co.*, 80 LRRM 2495 (N.D.Ala. 1971) (casual employee).

[43] *Bethlehem Mines Corp.* v. *Mineworkers*, 344 F.Supp. 1161, 80 LRRM 3069 (W.D.Pa. 1972). On this problem, see generally "Comment," 86 *Harv. L. Rev.* 447 (1972).

[44] *Leskiw* v. *Local 1470, IBEW*, 464 F.2d 721, 80 LRRM 3118 (3rd Cir. 1972).

[45] *Hernandez* v. *Natl. Packing Co.*, 455 F.2d 1252, 79 LRRM 2707 (1st Cir. 1972).

[46] *Pullman, Inc.* v. *Boilermakers Local 347*, 354 F.Supp. 496, 82 LRRM 2638 (E.D.Pa. 1972).

[47] *Paramount Bag Mfg. Co.* v. *ILGWU Local 98*, 353 F.Supp. 1131, 82 LRRM 2583 (E.D.N.Y. 1973) (hot-cargo clause basis for dispute).

bargaining agreement itself or the assertion of rights independent of the agreement. Thus, the alleged violation of a state right-to-work law in a state court is not an action under Section 301 and removable to a federal court, whereas a federal court can decide whether a right-to-work law applies to a particular contract, thereby voiding an agency-shop clause.[48]

Another action that has been held not to be cognizable under Section 301 is a suit by a union to enforce a grievance settlement agreement before the dispute reached final arbitration.[49] The same was true for a suit by employees against a union, seeking to hold it responsible for the enforcement of the Federal Mine Safety Code, even though the collective bargaining agreement did impose an obligation on the employer to adhere to the provisions of that code.[50] An employee, however, who brought an action under an owner-driver lease agreement against the employer does not have to exhaust the grievance-arbitration procedures under a separate collective bargaining agreement between the employer and its drivers.[51]

B. Survival of Contractual Rights

The expiration or termination of a contract, and the closure of a business or the transfer of ownership, present unique problems under Section 301. Despite the Supreme Court ruling in the *Burns* case discussed above, a successor employer may still be bound by the collective bargaining agreement of its predecessor.[52] The Eighth Circuit held that it was for an arbitrator and not the court to determine if a collective bargaining agreement was terminated when the Federal Communications Commission awarded a frequency to its interim operator where the contract language was ambiguous.[53] A union may also be a suc-

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[48] Compare *West* v. *Operating Engineers Local 624*, 82 LRRM 2278 (S.D.Miss. 1972), with *Mobil Oil Corp.* v. *Oilworkers Local 8-801*, 81 LRRM 2051 (E.D.Tex. 1972).

[49] *Operating Engineers Local 564* v. *Dow Chemical Co.*, 348 F.Supp. 1149, 81 LRRM 2279 (S.D.Tex. 1972).

[50] *Bryant* v. *Mine Workers*, 467 F.2d 1, 81 LRRM 2401 (6th Cir. 1972).

[51] *Antoine* v. *Boutell Driveway Co.*, 351 F.Supp. 1271, 82 LRRM 2045 (D.Del. 1972); as to exhaustion of contract remedies, see *Moore* v. *North American Rockwell Corp.*, 80 LRRM 2172 (E.D.Mich. 1972).

[52] *Textile Workers* v. *Cast Optics Corp.*, *supra* note 11; *Local 59, Sheet Metal Workers* v. *Workman, Inc.*, 343 F.Supp. 480, 80 LRRM 2498 (D.Del. 1972); *Steelworkers* v. *U.S. Gypsum Co.*, 339 F.Supp. 302, 79 LRRM 2833 (N.D.Ala. 1972).

[53] *Local 4, IBEW* v. *Radio Thirteen-Eighty, Inc.*, 469 F.2d 610, 81 LRRM 2829 (8th Cir. 1972) (denial of attorney fees to union within lower court's discretion).

cessor to a pension plan established by a union that has been decertified as the collective bargaining agent, and the decertified union in such case has no right to arbitration in regard to termination of the plan.[54]

Certain contractual obligations continue after the expiration or termination of a contract, and one court has compelled an employer to honor a grievance settled prior to the termination of a collective bargaining agreement.[55] Where a grievance arose before the expiration of a contract, courts may enjoin a union strike and order the employer to arbitrate the dispute after the contract has expired.[56] The expiration of a master contract will not relieve an employer from his obligation to continue to make health, welfare, and pension payments under a fringe benefit agreement which has not yet expired.[57] A court may order arbitration of a dispute on the basis of a memorandum of settlement between the parties providing for a day-to-day extension of the collective bargaining agreement, even though the federal Pay Board had not yet approved the settlement.[58]

The Ninth Circuit held that an employer must arbitrate claims raised by a union in regard to the closure of its plant, and that the closure does not affect the jurisdiction of the arbitrator over the dispute but merely his power to fashion an award.[59] The same court held, however, that the employer who purchased the plant and whose employees were represented by another union could not be compelled to arbitrate. Where contract provisions cover the closure of a business and termination of employees, such as a clause requiring the employer not to sell without a clause binding its successor to the collective bargaining agreement, a court may use its injunctive power to require arbitration and other remedial action pending arbitration.[60] However, where the collective bargaining agreement expired before the

[54] *Brewery Workers Local 163* v. *Stegmaier Brewing Co.*, 338 F.Supp. 1137, 79 LRRM 2765 (M.D.Pa. 1972).

[55] *Mine Workers Local 1486* v. *Peggs Run Coal Co.*, 434 F.Supp. 68, 80 LRRM 2736 (W.D.Pa. 1972); but *cf.* note 49 *supra*.

[56] *Kauai Electric Co.* v. *Local 1260, IBEW*, 79 LRRM 2838 (D.Hawaii 1971); but *cf. Teamsters Local 996* v. *Honolulu Rapid Transit Co.*, 343 F.Supp. 419, 80 LRRM 2758 (D.Hawaii 1972).

[57] *Local 9, Operating Engineers* v. *Siegrist Constr. Co.*, 458 F.2d 1313, 80 LRRM 2483 (10th Cir. 1972).

[58] *Safeway Stores, Inc.* v. *Teamsters Local 639*, 82 LRRM 2473 (D.D.C. 1972).

[59] *Machinists* v. *Howmet Corp.*, 466 F.2d 1249, 81 LRRM 2289 (9th Cir. 1972).

[60] *Meat Cutters Local 590* v. *Natl. Tea Co.*, 346 F.Supp. 875, 81 LRRM 2027 (W.D.Pa. 1972).

employer went out of business, a union may have no right to arbitrate such matters as severance pay for the employees.[61]

Closure of a business causes a great deal of litigation by employees and unions in regard to the survival or extinguishment of pension rights, and in such cases the provisions of the particular plan are of paramount importance.[62] The Sixth Circuit permitted employees to bring a class action under a collective bargaining agreement for damages by reason of the closure of a plant involving pensions and other benefits, and the court held that a letter by the employer in regard to bidding rights in the event of a transfer of operations could be considered part of the collective bargaining agreement.[63]

C. Multiparty Arbitration

Courts continue to favor the use of multiparty arbitration as the best means to resolve contract disputes involving more than two parties. The case situation that had the most litigation during the past year involved the Scottex Corporation, which had a plant in New York and a new plant in Texas. The district court in New York refused to enforce an arbitration award and ordered tripartite arbitration, where the New York union had obtained an award requiring the employer to close its Texas plant and a second union in Texas had obtained a separate and incompatible award forbidding the closing of the Texas plant.[64] It is not surprising that in such circumstances the NLRB refused to follow its policy of deferring to arbitration in regard to the allegation of unlawful assistance to the union at the new Texas plant.[65]

The courts have indicated that any such request for tripartite

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[61] *Milk Drivers Local 246* v. *Thompson's Dairy, Inc.*, 80 LRRM 3403 (D.D.C. 1972).

[62] See, for example, *Knoll* v. *Phoenix Steel Corp.*, 465 F.2d 1128, 81 LRRM 2143 (3rd Cir. 1972) (employees sought termination of pension plan and lump-sum distribution); *Dill* v. *Wood Shovel & Tool Co.*, 80 LRRM 2445 (S.D.Ohio 1972) (employees held to have no vested rights under pension plan when plant closed); *UAW Local 174* v. *Anaconda American Brass Co.*, 340 F.Supp. 651, 80 LRRM 2052, 2798 (E.D.Mich. 1972).

[63] *Schneider* v. *Electric Auto-Light Co.*, 456 F.2d 366, 79 LRRM 2825 (6th Cir. 1972).

[64] *Textile Workers* v. *Scottex Corp.*, 344 F.Supp. 243, 80 LRRM 2899 (S.D. N.Y. 1972).

[65] *Scottex Corp.*, 200 NLRB No. 75, 82 LRRM 1287 (1972); for the NLRB case involving the denial of a request for a 10(j) injunction with respect to unfair labor practices at the Texas plant, see *Youngblood* v. *Scottex Corp.*, 80 LRRM 2619 (N.D.Tex. 1972).

arbitration should be made before an award is rendered on a contract, rather than waiting until it is too late to raise the issue in a suit for enforcement of an arbitration award.[66] However, in the *Scottex* case, where two unions have obtained conflicting arbitration awards in regard to the same work, a court may refuse to enforce either award and order tripartite arbitration.[67] Courts have also held that tripartite arbitration is possible to determine which employees are entitled to subcontracted work, but the failure to have submitted to joint arbitration will not be grounds for an employer to vacate an award granting subcontracted work to its employees rather than to employees of a subcontractor.[68] A franchiser has been compelled to participate in an arbitration proceeding under a contract between a union and the franchisee, where the contract contemplates such participation by the franchiser who took over the business.[69]

D. Conduct of Arbitration and Miscellaneous Problems

After the issuance of an arbitration award, losing parties frequently raise issues regarding the mechanics of the arbitration process or the conduct of the arbitrator. It is obvious that an arbitrator cannot decide issues not submitted to him or beyond his authority to decide.[70] Also, a court may send a case back to an arbitrator where his award is not sufficiently clear.[71] An arbitra-

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[66] *Local 416, Sheet Metal Workers* v. *ABC Contrs., Inc.,* 335 F.Supp. 636, 79 LRRM 2918 (W.D.Wis. 1970); see also *Operating Engineers Local 450* v. *Mid-Valley, Inc.,* 347 F.Supp. 1104, 81 LRRM 2325 (S.D.Tex. 1972) (court denied punitive damages since the contract did not provide for such, and denied attorney fees since the employer was justified in its refusal to comply with the award); *Local 416, Sheet Metal Workers* v. *Helgesteel Corp.,* 335 F.Supp. 812, 80 LRRM 2113 (E.D.Wis. 1971).

[67] *Edmos Corp.* v. *Textile Workers,* 80 LRRM 3225 (S.D.N.Y. 1972); under the RLA, see *United Transportation Union* v. *Burlington Northern, Inc.,* 470 F.2d 813, 82 LRRM 2089 (8th Cir. 1972).

[68] See *Emery Air Freight Corp.* v. *Teamsters Local 295,* 81 LRRM 2393 (E.D.N.Y. 1972).

[69] *Detroit Joint Board, Hotel Employees* v. *Howard Johnson Co.,* 81 LRRM 2329 (E.D.Mich. 1972).

[70] *Steelworkers* v. *U.S. Gypsum Co., supra* note 52; *British Overseas Airway Corp.* v. *Machinists,* 80 LRRM 3468 (N.Y.App.Div. 1972); *Legislative Conf. of City Univ. of N.Y.* v. *N.Y. Bd. of Ed.,* 330 NYS2d 668, 80 LRRM 2340, (N.Y.App.Div. 1972); *Bremen School Dist.* v. *Dist. 228, Joint Faculty Assn.,* 280 NE2d 509, 79 LRRM 2679 (Ill.App. 1972); *cf. Printing Industry of Washington, D.C.* v. *Typographical Union No. 101,* 353 F.Supp. 1348, 82 LRRM 2537 (D.D.C. 1973).

[71] Compare *Machinists Lodge 917* v. *Air Products & Chemicals, Inc.,* 341 F.Supp. 874, 80 LRRM 3204 (E.D.Pa. 1972), with *Printing Pressmen No. 135* v. *Cell-Foil Products, Inc.,* 459 F.2d 754, 80 LRRM 2309 (6th Cir. 1972).

tor has been granted standing by a court to seek a declaratory judgment as to the validity of his award under a statutory provision.[72]

The selection of arbitrators is subject to mutual agreement between the parties, but if the parties cannot agree, the court will perform that function for them.[73] It is not required that a grievant have counsel at an arbitration hearing,[74] and the fact that the committee deliberating on a grievance took only a short time does not mean that the decision is not fair and informed.[75] A technical violation of voting procedures in regard to panel decisions will not be sufficient to vitiate an arbitration award.[76]

The procedural standards by which an arbitrator weighs evidence are matters exclusively for his determination, so an arbitrator did not err when he imposed upon the union in a strike discipline case the burden of proving the legality of the strike.[77] In a fair-representation suit by employees, the Fourth Circuit granted summary judgment to the union, finding that the grievance had been processed in a forceful and conscientious manner, that the union did not need to consult a lawyer, and that the introduction of hearsay testimony in the arbitration hearing was not objectionable.[78] The court stated in its opinion that: "An arbitration hearing is not a court of law and need not be conducted like one. Neither lawyers nor strict adherence to judicial rules of evidence are necessary complements of industrial peace and stability—the ultimate goals of arbitration."

An arbitrator has authority to retain jurisdiction of a case and order a second hearing to consider such things as damages.[79]

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[72] *In re Arbitration of Typo-Publishers Outside Tape Fund,* 344 F.Supp. 194, 80 LRRM 2973 (S.D.N.Y. 1972).

[73] *Bethlehem Mines Corp.* v. *Mineworkers, supra* note 43; see also *Machinists Lodge 67* v. *Trailways Service, Inc.,* 80 LRRM 2163 (D.D.C. 1972).

[74] *Sharpe* v. *Carolina Freight Carriers Corp.,* 337 F.Supp. 529, 79 LRRM 2709 (E.D.Pa. 1972).

[75] *Townsend* v. *McNeill,* 81 LRRM 2215 (N.D.Ill. 1972).

[76] *Local 416, Sheet Metal Workers* v. *Helgesteel Corp., supra* note 66.

[77] *Local 761, IUE* v. *General Electric Co.,* 80 LRRM 2530 (W.D.Ky. 1972).

[78] *Walden* v. *Teamsters Local 71,* 468 F.2d 196, 81 LRRM 2608 (4th Cir. 1972).

[79] *Belo Corp.* v. *Dallas Typographical Union No. 173,* 82 LRRM 2574 (N.D.Tex. 1972); *Dist. 50, UMW, Local 15253* v. *James Julian, Inc.,* 341 F.Supp. 503, 80 LRRM 2260 (M.D.Pa. 1972); but a court has no authority to appoint a second or appellate arbitrator where the issues are already decided by an arbitrator, *Adams* v. *Gusweiler,* 30 Ohio St.2d 326, 80 LRRM 3179 (Ohio Sup.Ct. 1972).

However, an arbitrator need not reopen an arbitration hearing after it is closed at the request of the party wishing to present additional testimony, where the party had full opportunity to present the evidence, sought no continuance, failed to make an offer of proof, and knew or should have known that the evidence was relevant.[80] Where a party refuses to comply with an arbitration award without justification, the other party may be entitled to an attorney fee incurred in securing compliance with the arbitration award.[81] In addition to awarding attorney fees, where the fees for an arbitrator are not fixed by an agreement of the parties, the court may do so in an action enforcing an award.[82]

III. Enforcement of Right to Arbitration

A. Injunctions and the Arbitration Process

The landmark Supreme Court decision in the *Boys Markets* case, permitting the use of injunctive relief under the Norris-LaGuardia Act where the parties have agreed to arbitration under a collective bargaining agreement, continues to be a fruitful source of litigation and an important source of the development of the law under Section 301. With some degree of regularity, cases arise under the *Lucas Flour* [83] case, under which the union's no-strike obligation may be implied from a contract provision compelling arbitration. Thus, the Seventh Circuit permanently enjoined a strike over the discharge of an employee where the contract required mandatory arbitration of local disputes, even though the no-strike clause had been expressly abrogated in each successive contract of the parties since 1947.[84] The court, however, limited the injunction to the dispute before it in view of the policy of Norris-LaGuardia. An employer's suit against a union for damages for breach of a no-strike clause may be stayed, at the union's request, pending arbitration if there is any chance that the arbitration clause may cover the dispute, even though the

[80] *Shopping Cart, Inc.* v. *Food Employees Local 196,* 350 F.Supp. 1221, 82 LRRM 2107 (E.D.Pa. 1972).

[81] See *Retail Clerks Local 201* v. *Lane County Grocery Employers,* 81 LRRM 2671 (D.Ore. 1972), and cases cited in note 79 *supra.*

[82] *Linbeck Constr. Corp.* v. *Carpenters,* 79 LRRM 2737 (S.D.Tex. 1972).

[83] *Teamsters* v. *Lucas Flour Co.,* 369 U.S. 95, 49 LRRM 2717 (1962); see, during the past year, *Hormel & Co.* v. *Meat Cutters Local P-31,* 349 F.Supp. 785, 81 LRRM 2500 (N.D.Iowa 1972); *Bethlehem Mines Corp.* v. *Mineworkers,* 340 F.Supp. 829, 80 LRRM 2116 (W.D.Pa. 1972).

[84] *Old Ben Coal Corp.* v. *Local 1487, UMW,* 457 F.2d 162, 79 LRRM 2845 (7th Cir. 1972).

employer was not specifically given a right to grieve under the contract.[85]

An injunction may be granted only where the trial court makes appropriate findings that the underlying dispute is arbitrable under the contract.[86] Thus, the Fifth Circuit denied an injunction against the refusal of a union's members to cross the picket line of another union, finding that the dispute was not over an arbitrable grievance subject to arbitration under the contract, since the strike itself was the alleged arbitrable dispute.[87] Also, an injunction was denied where the work stoppage was caused by a disagreement between members of the union and the leaders of the union, but there was no grievance by the union members against the employer.[88]

While it is clear that both parties must be contractually bound to arbitrate, which is a question for the court, it is not necessary that both parties be capable of initiating the arbitration procedures.[89] The use of the word "may" in an arbitration clause does not detract from the mandatory nature of arbitration, but merely permits the parties to use discretion in deciding whether or not to arbitrate a dispute.[90] Once it is found that mandatory arbitration is available, it makes no difference whether the underlying dispute is based upon an oral commitment or agreement between the parties.[91]

The party seeking the injunction must comply strictly with its

[85] *Super Market Service Corp.* v. *Local 229, Teamsters,* 340 F.Supp. 1143, 80 LRRM 2088 (M.D.Pa. 1972). *Cf. Drake Bakeries* v. *Bakery Workers,* 370 U.S 254, 50 LRRM 2440 (1962).

[86] *McCord, Condron & McDonald, Inc.* v. *Carpenters Local 1822,* 464 F.2d 1036, 80 LRRM 3374 (5th Cir. 1972); *Parade Publications, Inc.* v. *Philadelphia Mailers Union No. 14,* 459 F.2d 369, 80 LRRM 2264 (3rd Cir. 1972); *cf. Delaware Contractors Assn.* v. *Operating Engineers Local 542,* 351 F.Supp. 568, 82 LRRM 2078 (D.Del. 1972).

[87] *Amstar Corp.* v. *Meat Cutters,* 468 F.2d 1372, 81 LRRM 2644 (5th Cir. 1972).

[88] *Barnes & Tucker Co.* v. *UWM Dist. 2,* 338 F.Supp. 924, 80 LRRM 2316 (W.D.Pa. 1972).

[89] *Avco Corp.* v. *Local 787, UAW,* 459 F.2d 968, 80 LRRM 2290 (3rd Cir. 1972); see also *Martin Hageland, Inc.* v. *District Court,* 460 F.2d 789, 80 LRRM 2539 (9th Cir. 1972); *Pullman, Inc.* v. *Boilermakers Local 347, supra* note 46; *Brick & Clay Workers* v. *Dist. 50, Allied & Technical Workers,* 345 F.Supp. 495, 80 LRRM 2871 (E.D.Mo. 1972) (action by union against another union for injunction based on a no-raiding agreement which did not provide for arbitration); *cf. Kauai Electric Co.* v. *Local 1260, IBEW, supra* note 56.

[90] *Anheuser-Busch, Inc.* v. *Teamsters Local 133,* 346 F.Supp. 702, 81 LRRM 2673 (E.D.Mo. 1972).

[91] *Anheuser-Busch, Inc.* v. *Brewers and Maltsters Local 6, Teamsters,* 346 F.Supp. 239, 80 LRRM 2915 (E.D.Mo. 1972); *Amstar Corp.* v. *Sugar Workers Local 9,* 345 F.Supp. 331, 80 LRRM 2987 (E.D.N.Y. 1972).

contractual obligations and show irreparable damage before it is entitled to relief.[92] Where an employer had earlier refused to arbitrate a dispute, the court subsequently issued an injunction against the union's strike and ordered immediate arbitration on condition that the employer pay to the union an attorney fee for the cost of preparation and attendance at the earlier scheduled arbitration in which the employer refused to participate.[93] A party may be held in contempt of a temporary restraining order or preliminary injunction if it does not file objections or appeal immediately.[94] Once an enforceable award has issued, the injunction will be dissolved.[95]

The question sometimes arises whether the employees are actually on strike. One court found that the refusal of employees to work overtime amounted to a strike and granted an injunction pending arbitration of the dispute concerning overtime work.[96] The same court, however, refused to issue an injunction where the employees laid off by a partial discontinuance of operations were picketing, but where other employees were working and the dispute had been submitted to arbitration, finding that the union was not engaged in a strike.[97]

A number of cases have arisen in regard to the use of injunctive procedures where the strike involves employees' safety. The Third Circuit, in the *Gateway* and *U. S. Steel* cases, has explicitly found that safety disputes are sui generis under Section 502 of the LMRA and has refused to issue an injunction pending arbitration of such disputes, thus making them an exception to the *Boys Markets* rationale.[98] The Eighth Circuit, however, granted an

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[92] *Transamerican Trailer Transport, Inc.* v. *Seafarers,* 80 LRRM 2965 (D.P.R. 1971); *Siu de Puerto Rico* v. *Virgin Islands Port Authority,* 334 F.Supp. 510, 79 LRRM 2701 (D.V.I. 1971); *cf. Evans* v. *Dana Corp.,* 81 LRRM 2518 (N.D.Ohio 1972) (employee suit).

[93] *Nezelek, Inc.* v. *Teamsters Local 294,* 342 F.Supp. 507, 80 LRRM 3459 (N.D.N.Y. 1972).

[94] *Bethlehem Mines Corp.* v. *Mineworkers Dist. 2,* 476 F.2d 860, 82 LRRM 2601 (3rd Cir. 1972); *C & H Sugar Co.* v. *Sugar Workers No. 1,* 82 LRRM 2660 (N.D.Cal. 1973).

[95] *Pilot Freight Carriers, Inc.* v. *Teamsters,* 353 F.Supp. 869, 81 LRRM 2207 (M.D.N.C. 1972).

[96] *Elevator Mfgrs. Assn. of N.Y.* v. *Local 1, Elevator Constructors,* 342 F.Supp. 372, 80 LRRM 2165 (S.D.N.Y. 1972).

[97] *MacFadden-Bartell Corp.* v. *Local 1034, Teamsters,* 345 F.Supp. 1286, 80 LRRM 3234 (S.D.N.Y. 1972).

[98] *U.S. Steel Corp.* v. *Mine Workers Local 1248,* 469 F.2d 729, 81 LRRM 2646 (3rd Cir. 1972); *Gateway Coal Co.* v. *Dist. 4, Mine Workers,* 466 F.2d 1157, 80 LRRM 3153 (3rd Cir. 1972).

injunction ordering the reinstatement of certain employees and requiring the submission of the safety dispute to arbitration, noting that the contract in question specifically required that safety disputes be submitted to arbitration.[99] The Supreme Court has granted review of the *Gateway* case, so a decision should be rendered in the next year as to whether *Boys Markets* will be limited to economic disputes not involving safety.[100]

A union may sometimes be granted an injunction against certain employer activity pending arbitration of the employer's right to take the action forming the basis of the dispute.[101] The union, however, may have to post a bond against any damage to the employer by reason of the court's maintenance of the status quo.[102] More often, however, a union is denied an injunction against employer action pending arbitration, because it cannot show irreparable injury which will not be remedied in the arbitrator's decision, or because the contract appears to favor the employer's position.[103]

B. Other Suits Compelling or Staying Arbitration

The national policy favoring arbitration leaves very few situations where arbitration is denied by the courts. The court, however, will not compel arbitration where the arbitration clause is of limited scope and does not cover the dispute in question,[104] or

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[99] *Hanna Mining Co.* v. *Steelworkers,* 464 F.2d 565, 80 LRRM 3268 (8th Cir. 1972).

[100] Certiorari granted Feb. 26, 1973.

[101] *UAW Local 757* v. *Budd Co.,* 345 F.Supp. 42, 81 LRRM 2414 (E.D.Pa. 1972); *Southwestern Bell Tel. Co.* v. *Local 6222, Communications Workers,* 343 F.Supp. 1165, 80 LRRM 2513 (S.D.Tex. 1972).

[102] *Printing Pressmen No. 9* v. *Pittsburgh Press Co.,* 470 F.2d 422, 81 LRRM 2438, 2439 (3rd Cir. 1972); for the use of injunctions under the RLA, see, for example, *REA Express, Inc.* v. *Railway Clerks,* 459 F.2d 226, 80 LRRM 2206 (5th Cir. 1972); *UTU* v. *Burlington Northern, Inc.,* 344 F.Supp. 659, 80 LRRM 2225 (D.Minn. 1972); *Elgin, Joliet & Eastern Ry.* v. *UTU,* 342 F.Supp. 793, 796, 80 LRRM 2348, 2621 (N.D.Ill. 1972).

[103] *Detroit Typographical Union No. 18* v. *Detroit Newspaper Publishers Assn.,* 471 F.2d 872, 82 LRRM 2332 (6th Cir. 1972), *rev'g* 81 LRRM 2797 (E.D.Mich.); *American Can Co.* v. *Local 7420, Steelworkers,* 350 F.Supp. 810, 81 LRRM 2706 (E.D.Pa. 1972); *Meat Cutters Local 590* v. *Natl. Tea Co., supra* note 60; Utility *Workers Local 174* v. *South Pittsburgh Water Co.,* 345 F.Supp. 52, 81 LRRM 2392 (W.D.Pa. 1972); *Transport Workers* v. *Penn Central Co.,* 80 LRRM 2939 (W.D.Pa. 1971).

[104] *Operating Engineers Local 279* v. *Richardson Carbon Co.,* 471 F.2d 1175, 82 LRRM 2403 (5th Cir. 1973); *Ringler* v. *Yarnell,* 287 A.2d 803, 79 LRRM 2924 (Pa.Comm.Ct. 1972); *Steelworkers* v. *General Fireproofing Co, supra* note 42; *cf. Pararale* v. *Air Wisconsin, Inc.,* 79 LRRM 2658 (N.D.Ill. 1972).

where the grievance in question is the same as a prior award.[105] The exclusion of a dispute from arbitration, however, must be specific, and a vague and ambiguous exclusion clause with a broad arbitration clause will cause the court to require the dispute to be submitted to arbitration.[106]

Courts have denied arbitration of grievances attempting to apply a contract to another plant of the employer where a different union is the recognized bargaining agent of the employees.[107] Unless there is a clear conflict between the arbitral process and the NLRB proceedings in cases where the jurisdiction of the NLRB is raised as a defense, courts will still compel the parties to arbitrate their dispute.[108] However, in view of the necessity of a valid and binding contract, a court may stay a request for arbitration pending an NLRB determination regarding the validity of the contract.[109] The courts will require a party to abide by the method of arbitration agreed to under the contract and will refuse to substitute some other method, such as a disinterested arbitrator in the place of a joint committee.[110] Of course, it is well settled that all procedural questions, such as the timeliness of a grievance or compliance with the grievance procedure, are for the arbitrator rather than the courts to determine.[111]

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[105] *Drake Motor Lines,* v. *Truck Drivers Local 107,* 343 F.Supp. 1130, 80 LRRM 3003 (E.D.Pa. 1972) (employer granted permanent injunction of arbitration of grievance; but see cases cited in note 111 *infra*).

[106] *Local 369, IBEW* v. *Armor Elevator Co.,* 82 LRRM 2463 (W.D.Ky. 1973); *Plumbers Local 52* v. *Daniel of Ala.,* 80 LRRM 2980 (M.D.Ala. 1972); *Brick & Clay Workers Local 486* v. *Lee Clay Products Co.,* 488 S.W.2d 331, 82 LRRM 2074 (Ky.App. 1972); see, in regard to arbitration and pension plans, *UAW Local 107* v. *White Motor Co.,* 81 LRRM 2222 (D.Minn. 1972); *Retail Clerks Local 1460* v. *Newberry Wabash, Inc.,* 79 LRRM 2847 (N.D.Ind. 1971); *cf. Brewery Workers Local 163* v. *Stegmaier Brewing Co., supra* note 54.

[107] *Stove Workers Local 123-B* v. *Gaffers & Sattler, Inc.,* 470 F.2d 860, 82 LRRM 2223 (9th Cir. 1972); *Lithographers Local 7-P* v. *Parade Publications, Inc.,* 352 F.Supp. 634, 82 LRRM 2111 (E.D.Pa, 1972); *cf. Machinists* v. *Howmet Corp., supra* note 59; *Teamsters Local 996* v. *Honolulu Rapid Transit Co., supra* note 56.

[108] *Dist. 50, UMW, Local 12934* v. *Dow Corning Corp.,* 459 F.2d 221, 80 LRRM 2218 (6th Cir. 1972); *Local 1434 IBEW* v. *E. I. DuPont Co.,* 350 F.Supp. 462, 81 LRRM 2678 (E.D.Va. 1972); *Borden, Inc.* v. *Local 50 Bakery Workers,* 328 NYS2d 939, 79 LRRM 2611 (N.Y.App.Div. 1972).

[109] *Colonie Hill, Ltd.* v. *Local 164 Bartenders,* 343 F.Supp. 986, 80 LRRM 2745 (E.D.N.Y. 1972).

[110] *Printing Pressmen No. 57* v. *Florida Publishing Co.,* 468 F.2d 824, 81 LRRM 2561 (5th Cir. 1972); see also *Machinists Lodge 71* v. *McIntosh Motors Inc.,* 335 F.Supp 987, 80 LRRM 2084 (W.D.Mo. 1971).

[111] *Signal Delivery Service, Inc.* v. *Truck Drivers Local 107,* 345 F.Supp. 697, 80 LRRM 3222 (E.D.Pa. 1972); *American Sterilizer Co. v. Local 832, UAW,* 341 F.Supp. 522, 80 LRRM 2319 (W.D.Pa. 1972); see also *Airway Equipment Rental*

In one case a court granted summary judgment to the union in an employer's suit to vacate an arbitration award, and at the same time ordered arbitration of the union's counterclaim for damages caused by the employer's refusal to comply with the award.[112] Another court denied an employer the stay of arbitration of a wage increase dispute that allegedly violated the federal Phase I economic controls, holding that the arbitrator must still make a ruling and decide the basic facts subject to any necessary administrative approvals, and that he could order the employer's cooperation in making the proper submission to the Pay Board for an exception.[113] Another court compelled arbitration even though the grieving employee attempted to withdraw his grievance, indicating that it was for the arbitrator to determine the issue.[114]

IV. Enforcement and Review of Awards

Consistent with the national policy designed to promote final and binding arbitration of labor disputes, courts are severely limited as to the extent to which they can review an arbitrator's award and will enforce his award without review on the merits as long as the award draws its essence from the collective bargaining agreement.[115] An award is not reviewable for an alleged error of law or fact unless it can be shown that the arbitrator exceeded his power by giving a completely irrational construction to the disputed contract provisions.[116] The party seeking enforcement is frequently awarded a summary judgment, although it may not receive attorney fees unless the failure to abide by the award is completely without merit.[117] Courts are liberal in finding that an issue is arbitrable under a collective bargaining agreement,

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Co. v. *Lodge 447, Dist. 50 Machinists,* 80 LRRM 2671 (E.D.N.Y. 1972); *Suffern Distrib., Inc.* v. *Local 153, Office & Professional Employees,* 331 NYS2d 876, 80 LRRM 3467 (N.Y.App.Div. 1972).

[112] *New England Tel. Co.* v. *Telephone Workers,* 81 LRRM 2861 (D.Mass. 1972).

[113] *Universal Oven Co.* v. *Dist. 15, Machinists,* 81 LRRM 2167 (E.D.N.Y. 1972).

[114] *Lodge 831, Machinists* v. *Cedar Rapids Eng. Co.,* 79 LRRM 2929 (N.D.Iowa 1971).

[115] *Donley* v. *Motor Freight Express, Inc.,* 81 LRRM 2398 (W.D.Pa. 1972); *Reece* v. *Westmoreland Coal Co.,* 340 F.Supp. 695, 80 LRRM 2032 (W.D.Va. 1972); *Rogers* v. *Fed. of Teachers,* 79 LRRM 2926 (S.D.N.Y. 1972); *Greene* v. *Mari & Sons Flooring Co.,* 289 NE2d 860, 81 LRRM 2846 (Mass.Jud.Ct. 1972); under the RLA, see *Catalano* v. *BRAC,* 348 F.Supp. 369, 81 LRRM 2350 (S.D.N.Y. 1972); *Mendes* v. *REA Express, Inc.,* 81 LRRM 2209 (S.D.N.Y. 1972); *Stephens* v. *Panhandle & Santa Fe Ry.,* 81 LRRM 2212 (N.D.Tex. 1971).

[116] *W. M. Girvan, Inc.* v. *Robiloto,* 338 NYS2d 950, 82 LRRM 2617 (N.Y.App.Div. 1972).

[117] *Machinists Airline Dist. 146* v. *Dallas Airmotive, Inc.,* ..... F.2d ....., 80 LRRM 2672 (5th Cir. 1972).

such as finding an implied term of a contract to allow holiday pay during a strike,[118] or to pay wage increases under the wage-price freeze.[119] Even if a court disagrees with the arbitrator's construction of the contract, it will enforce the award if there is any ambiguity between the contract sections in question.[120]

Arbitrators are allowed wide latitude in fashioning remedies, and the courts will strictly follow the award granted by the arbitrator.[121] An award may be enforced through the use of an injunction,[122] and technical irregularities in the issuance of the award are not grounds for vacating the award unless substantial prejudice can be shown by the irregularity.[123] A party seeking to vacate an award must have appropriate authority to do so.[124] No enforcement will be granted where the award has already been complied with, but the question of compliance may be subject to arbitration rather than an enforcement proceeding of the original award.[125] An award may preclude a separate action on the same grievance under other statutes, such as the Welfare and Pension Plans Disclosure Act, on the ground that the plaintiff had elected his remedies and is bound thereby.[126]

Summary enforcement of an arbitration award will be denied where the defendant can raise a substantial factual question arising from its refusal to comply with the award.[127] A court is not bound by an arbitrator's ruling denying arbitration on procedural grounds, such as the failure of the union to appoint an arbitrator in a timely manner, but may declare the grievance arbitrable,

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[118] *Scottex Corp.* v. *Knitgoods Workers Local 155, ILGWU,* 80 LRRM 2879 (S.D.N.Y. 1972).

[119] *Local 1115, Nursing Home Union* v. *Hialeah Convalescent Home, Inc.,* 348 F.Supp. 404, 81 LRRM 2312 (S.D.Fla. 1972).

[120] *Airline Pilots Assn.* v. *Capital Intl. Airways, Inc.,* 458 F.2d 1349, 80 LRRM 2529 (6th Cir. 1972).

[121] *Machinists Lodge 790* v. *Champion Carriers, Inc.,* ..... F.2d ....., 82 LRRM 2160 (10th Cir. 1972); *Newark Wire Cloth Co.* v. *Steelworkers,* 339 F.Supp. 1207, 80 LRRM 2094 (D.N.J. 1972).

[122] *Bricklayers Union No. 7* v. *Lueder Constr. Co.,* 346 F.Supp. 558, 81 LRRM 2624 (D.Neb. 1972).

[123] *Local 701, Teamsters* v. *Needham's Motor Service, Inc.,* 82 LRRM 2412 (D.N.J. 1972); *Carpenters Local 642* v. *DeMello,* 80 LRRM 2469 (Cal.App. 1972).

[124] *Railway, Airline & Steamship Clerks* v. *REA Express, Inc.,* 344 F.Supp. 1370, 80 LRRM 2877 (S.D.N.Y. 1972).

[125] *Detroit Joint Bd., ACWA* v. *White Tower Laundry & Cleaners,* 353 F.Supp. 168, 82 LRRM 2682 (E.D.Mich. 1973); *Textile Workers* v. *Courtaulds, Inc.,* 80 LRRM 2823 (S.D.Ala. 1972).

[126] *Liberman* v. *Cook,* 434 F.Supp. 558, 80 LRRM 2731 (W.D.Pa. 1972).

[127] *Machinists Dist. 8* v. *Clark Co.,* 471 F.2d 694, 81 LRRM 2763 (7th Cir. 1972).

vacate the award, and order arbitration on the merits.[128] An NLRB ruling that another labor organization represents the employees in question may preclude enforcement of an award, as well as a finding that the arbitrator exceeded his authority under the contract or his award is indefinite and inadequate.[129] Where an award is ambiguous, the courts will refuse to enforce it and remand the proceeding to the arbitrator for clarification.[130]

V. Arbitration and the NLRB

A. Deferral to Arbitration

As expected, the landmark decision of the NLRB in the *Collyer* case in late 1971 with respect to pre-award deferral to arbitration of disputes involving the interpretation of collective bargaining agreements, and the much earlier 1955 decision of the Board in *Spielberg Mfg. Co.*[131] regarding post-award deferral, has led to a large number of NLRB decisions clarifying its law in regard to deferral. In the *Collyer* line of cases, a Board majority composed of Chairman Miller and Members Kennedy and Penello favor the policy of pre-award deferral, while a Board minority composed of Members Jenkins and Fanning are generally against such deferral. No such clear-cut split in the Board is evident in the *Spielberg* policy of post-award deferral. In either event, the large number of deferral cases decided by the NLRB during the past year would indicate that its policies in regard to referral have been the cause of a substantial number of cases reaching arbitration which previously would not have done so.

While most *Collyer* cases involve the alleged unilateral action by an employer in violation of its bargaining obligation under

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[128] *In re Newspaper Guild Local 69,* 352 F.Supp. 1383, 82 LRRM 2657 (C.D.Cal. 1973).

[129] *Electrical Contractors of Greater Boston* v. *Local 103, IBEW,* 458 F.2d 590, 79 LRRM 3060 (1st Cir. 1972); *Cynthetex Corp.* v. *UAW Local 1553,* 80 LRRM 2631 (W.D.Ky. 1972); *Local 7-210, Oil Workers* v. *Union Tank Car Co.,* 337 F.Supp. 83, 80 LRRM 2102 (N.D.Ill. 1971); see also *UTU* v. *Chicago, Milwaukee, St. Paul & Pacific Ry.,* 80 LRRM 2542 (W.D.Wash. 1972).

[130] *IBEW Local 369* v. *Olin Corp.,* 471 F.2d. 468, 82 LRRM 2338 (6th Cir. 1972); *UAW Local 791* v. *American Air Filter Co.,* 81 LRRM 2429 (W.D.Ky. 1972); *Operating Engineers Local 30* v. *White Plains Hosp. Assn.,* 335 NYS2d 943, 81 LRRM 2720 (N.Y.App.Div. 1972).

[131] 112 NLRB 1080, 36 LRRM 1152 (1955); *Collyer* is cited at note 3 *supra;* some cases involve both the *Collyer* and *Spielberg* doctrines, such as *Associated Press,* 199 NLRB No. 168, 81 LRRM 1535 (1972); *Atlantic-Richfield Co.,* 199 NLRB No. 135, 81 LRRM 1412 (1972).

the NLRA,[132] the Board has clearly held that the *Collyer* doctrine will be applied to cases involving alleged discrimination based upon union or protected concerted activity.[133] In contrast, however, most *Spielberg* cases involving post-award deferral appear to involve issues of discrimination.[134] Despite the large number of deferral cases, there are still situations where the Board is reluctant to defer to arbitration, namely, in jurisdictional disputes or representation problems.[135] There are also cases where the Board refuses to decide the unfair labor practice issue on the ground that the case involves a good-faith belief by both parties in their interpretation of a collective bargaining agreement, and it does not wish to be placed in the postion of interpreting the contract.[136]

As long as the subject matter of the dispute is arguably covered by the arbitration clause of the contract, the NLRB will leave to the arbitrator the decision as to whether or not a dispute is arbitrable.[137] The fact that a grievance has not been filed or that the union has abandoned or dropped the grievance will not prevent the Board from deferring to arbitration.[138] The Board will not assume that a discharged employee will be inadequately represented by the union unless it appears that the employer and

[132] See, for example, *Radioear Corp.*, 199 NLRB No. 137, 81 LRRM 1402 (1972) (involved zipper clause of contract); *Western Electric, Inc.*, 199 NLRB Nos. 45 and 49, 81 LRRM 1613 and 1615 (1972); *Firch Baking Co.*, 199 NLRB No. 62, 81 LRRM 1616 (1972); *Barwise Sheet Metal Co.*, 199 NLRB No. 64, 81 LRRM 1639 (1972); *Eastman Broadcasting Co.*, 199 NLRB No. 58, 81 LRRM 1257 (1972); *Peerless Pressed Metal Corp.*, 198 NLRB No. 5, 80 LRRM 1708 (1972); *Bethlehem Steel Corp.*, 197 NLRB No. 121, 80 LRRM 1417 (1972); *Great Coastal Express, Inc.*, 196 NLRB No. 129, 80 LRRM 1097 (1972); *Coppus Eng. Corp.*, 195 NLRB No. 113, 79 LRRM 1449 (1972).

[133] See, for example, *Champlin Petroleum Co.*, 201 NLRB No. 9, 82 LRRM 1388 (1973); *Gary-Hobart Water Corp.*, 200 NLRB No. 98, 81 LRRM 1564 (1972); *L.E.M., Inc.*, 198 NLRB No. 99, 81 LRRM 1069 (1972); *Appalachian Power Co.*, 198 NLRB No. 7, 80 LRRM 1731 (1972); *cf. San-Tul Hotel Co.*, 198 NLRB No. 86, 81 LRRM 1287 (1972).

[134] See, for example, *Campbell Sixty-Six Express, Inc.*, 200 NLRB No. 157, 82 LRRM 1136 (1972); *Natl. Tea Co.*, 198 NLRB No. 62, 80 LRRM 1736 (1972); see also, under the RLA, *Mendes* v. *Railway Clerks*, ... F.2d ....., 82 LRRM 2384 (2d Cir. 1973).

[135] *Machinists Dist. 20 (Ladish Co.)*, 200 NLRB No. 165, 82 LRRM 1081 (1972); *Combustion Eng. Inc.*, 195 NLRB No. 161, 79 LRRM 1577 (1972); *cf. Northwest Publications, Inc.*, 197 NLRB No. 32, 80 LRRM 1296 (1972).

[136] *Diamond Natl. Corp.*, 197 NLRB No. 80, 80 LRRM 1397 (1972); *cf. Borden Inc.*, 196 NLRB No. 172, 80 LRRM 1249 (1972).

[137] *Southwestern Bell Tel. Co.*, 198 NLRB No. 6, 80 LRRM 1711 (1972); *Norfolk Beer Dist. Assn.*, 196 NLRB No. 165, 80 LRRM 1235 (1972).

[138] *Patman, Inc.*, 197 NLRB No. 150, 80 LRRM 1481 (1972); *Titus-Will Ford Sales, Inc.*, 197 NLRB No. 4, 80 LRRM 1289 (1972); *Wrought Washer Mfg. Co.*, 197 NLRB No. 14, 80 LRRM 1289 (1972).

the union were condoning the alleged discrimination, or where the interests of the union and the employee are in substantial conflict and there is reasonable ground for believing that the employee's interests may not be adequately protected in the arbitration process.[139] The fact that the employer has engaged in unwarranted foot-dragging in complying with the grievance-arbitration procedure will not prevent deferral.[140] Where the subject matter is not grievable and the arbitrator has no authority to remedy the problem, such as employer threats, or where the conduct in question entails the complete rejection by the employer of the self-organizational rights of employees and the principles of collective bargaining, then the Board will refuse to defer to arbitration.[141] The Board also defers to arbitration in cases under both *Collyer* and *Spielberg* involving alleged unfair labor practices by labor organizations in both bargaining and discrimination cases.[142] However, in one union case where the NLRB found a bargaining violation, the Second Circuit rejected the union's argument that the Board's order should not be enforced on the ground that the dispute should have been settled by resort to the grievance-arbitration procedures of the contract.[143]

In the case of *Malrite of Wisconsin, Inc.*,[144] the Board majority, with Members Fanning and Jenkins dissenting, deferred to an outstanding arbitration award which met the *Spielberg* conditions, even though the employer would not comply with the award. The Board majority held that it was not the tribunal to enforce the award and that its policy of deference to arbitration encompasses the entire arbitral process, including the enforcement of awards. In another split decision of the Board involving

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[139] Compare *Natl. Radio Co.*, 198 NLRB No. 1, 80 LRRM 1718 (1972), with *Fleet Carrier Corp.*, 201 NLRB No. 29, 82 LRRM 1178 (1973); *Pauley Paving Co.*, 200 NLRB No. 24, 82 LRRM 1005 (1972); and *Aristo Foods, Inc.*, 198 NLRB No. 2, 80 LRRM 1743 (1972).

[140] *Medical Manors, Inc.*, 199 NLRB No. 139, 81 LRRM 1341 (1972).

[141] *Ryerson & Sons, Inc.*, 199 NLRB No. 44, 81 LRRM 1261 (1972); *Chase Mfg. Co.*, 200 NLRB No. 128, 82 LRRM 1026 (1972).

[142] *Newspaper Guild of Brockton (Enterprise Pub. Co.)*, 201 NLRB No. 118, 82 LRRM 1337 (1973); *Baltimore Typographical Union No. 12 (A. S. Abell Co.)*, 201 NLRB No. 5, 82 LRRM 1127 (1973); *Houston Mailers Union No. 36 (Houston Chronicle)*, 199 NLRB No. 69, 81 LRRM 1310 (1972); *Teamsters Local 70 (Natl. Biscuit Co.)*, 198 NLRB No. 4, 80 LRRM 1727 (1972); *Electrical Workers Local 130, IUE (Westinghouse Electric Corp.)*, 200 NLRB No. 115, 82 LRRM 1209 (1972) (*Spielberg* case with no dissent).

[143] *NLRB* v. *Communications Workers Local 1170*, 474 F.2d 788, 82 LRRM 2101 (2d Cir. 1972).

[144] 198 NLRB No. 3, 80 LRRM 1593 (1973).

an existing arbitration award, the majority held that they would look to the evidence and contentions presented to the arbitrator, in addition to the award itself, to determine whether the unfair labor practice issue had been disposed of by the arbitrator.[145] The majority found that the unfair labor practice issue had been decided by the arbitrator, and the award was given conclusive effect. In another case the Board deferred to a joint committee arbitration award upholding the discharge of a union steward, finding that the issue of union activity had been considered by the committee, even though it was not mentioned in their decision.[146] In the same case the Board held that the time given by the committee to consideration of the grievance was adequate, that the committee did not have to have a transcript of the testimony or serve a written decision, and that there was no evidence that the friction that existed between the grievant and the union business agent affected the grievant's representation at the committee hearing.

The Board will not defer to an arbitration award where the unfair labor practice was not litigated or decided by the arbitration tribunal or where there is no indication in the arbitrator's opinion that the unfair labor practice issue was considered.[147] The burden of proving whether the arbitration tribunal was presented with the unfair labor practice issue and considered it rests on the party asserting that the NLRB should not assert jurisdication.[148] The Board will not defer to an award where the arbitrator has ignored a long line of NLRB and court precedents, or where the decision is inconsistent with the policies of the LMRA.[149]

B. Other NLRB Cases

Besides the successorship cases discussed above in connection

[145] *Gulf States Asphalt Co.*, 200 NLRB No. 100, 82 LRRM 1008 (1972).

[146] *Superior Motor Trans. Co.*, 200 NLRB No. 139, 82 LRRM 1083 (1972).

[147] *Fleet Dist. Services, Inc.*, 200 NLRB No. 35, 81 LRRM 1385 (1972); *Trygon Electronics, Inc.*, 199 NLRB No. 61, 81 LRRM 1365 (1972); *Montgomery Ward & Co.*, 195 NLRB No. 136, 79 LRRM 1505 (1972); *Air Reduction Co.*, 195 NLRB No. 120, 79 LRRM 1467 (1972).

[148] *Yourga Trucking, Inc.*, 197 NLRB No. 130, 80 LRRM 1498 (1972).

[149] *Ryder Technical Institute*, 199 NLRB No. 85, 81 LRRM 1296 (1972); *Jacobs Transfer, Inc.*, 201 NLRB No. 34, 82 LRRM 1360 (1973) (the decision also noted that the discharged employee did not voluntarily submit the dispute to the grievance procedure or agree to be bound by the joint committee hearing the grievance, but asked for a neutral panel, and that the committee did not consider whether the LMRA was violated).

with the Supreme Court's decision in the *Burns* case, the courts and the NLRB have considered during the past year a number of other problems touching on the arbitral process. The Seventh Circuit enforced an NLRB order finding that a union violated the NLRA by striking to force an employer association to agree to submit jurisdictional disputes to a tripartite panel in which management did not participate.[150] A union was enjoined by a federal court, at the request of the NLRB, from filing grievances or enforcing arbitration awards where its representative status over the employees in question was in doubt.[151] The Third Circuit held that a federal district court had no jurisdiction over a suit by a union to invalidate a contract between an employer and a rival union where the NLRB had determined that the contract of the rival union applied to the employees in question.[152] It also held that a union violates the NLRA by refusing to process grievances of employees because they filed proceedings with the NLRB.[153]

The activity of a steward in soliciting grievances and participating in grievance hearings is protected under the NLRA,[154] and an employer may not refuse to meet and confer in good faith with the union with respect to grievances.[155] The Board has also held that a union violates the NLRA if it refuses to process grievances because the grievants are not members of the union.[156] An employee is protected in the right to attempt to negotiate changes in a current collective bargaining agreement, even though the union is bypassed in such an attempt.[157]

VI. Rights of Individual Employees Under 301

A. Fair-Representation Suits

Employees covered by collective bargaining agreements and arbitration procedures continue to seek direct relief from the

[150] *Associated General Contractors* v. *NLRB,* 465 F.2d 327, 80 LRRM 3157 (7th Cir. 1972).

[151] *Boire* v. *Teamsters Locals 79, etc.,* 81 LRRM 2888 (M.D.Fla. 1972).

[152] *Local 1, Confed. Indep. Unions* v. *Rockwell-Standard Co.,* 465 F.2d 1137, 81 LRRM 2117 (3rd Cir. 1972).

[153] *NLRB* v. *Teamsters Local 703,* ..... F.2d ....., 81 LRRM 2488 (7th Cir. 1972).

[154] *NLRB* v. *Lenkurt Electric Co.,* 459 F.2d 635, 80 LRRM 2222 (9th Cir. 1972); *Northwest Drayage Co.,* 201 NLRB No. 99, 82 LRRM 1310 (1973).

[155] *U.S. Gypsum Co.,* 200 NLRB No. 46, 82 LRRM 1240 (1972).

[156] *Steelworkers Local 937 (Magna Copper Co.),* 200 NLRB No. 8, 81 LRRM 1445 (1972).

[157] *Singer Co.,* 198 NLRB No. 122, 81 LRRM 1163 (1972).

courts for their grievances in the form of breach-of-contract actions against employers, usually for wrongful discharge, or an action for breach of the duty of fair representation against a labor organization. An overwhelming majority of these cases end up being dismissed by the courts, many by entry of summary judgment against the employee-plaintiff, either on the theory that there is a final and binding arbitration award under a contract or that the plaintiff has failed to exhaust his contractual and other available remedies.[158] The employee can overcome a motion for summary judgment or to dismiss only if the pleadings raise a question of fact and the other elements for a successful suit are present.[159] The employee may bring his action in either federal or state court, but state law will apply to such matters as the statute of limitations.[160] Injunctive relief in such suits is rarely granted.[161]

Employee suits are usually brought against both the employer and the labor organization representing the employees, but may be brought against either the employer or the union individually as long as the defendant is a party to the contract.[162] It has been held that where an employee may be precluded from processing a breach-of-contract action for wrongful discharge against an employer because of an adverse arbitration award and the absence of any allegation of an employer-union conspiracy, the employee may still proceed against the union on an allegation that it

[158] *Moore* v. *McLean Trucking Co.*, ... F.2d ....., 82 LRRM 2523 (4th Cir. 1973); *Hammond* v. *Papermakers Local 985*, 462 F.2d 174, 80 LRRM 2894 (6th Cir. 1972); *Alonso* v. *Kaiser Aluminum Corp.*, ... F.2d ....., 81 LRRM 2057 (4th Cir. 1972); *Hayes* v. *Local 391, Teamsters*, 460 F.2d 531, 80 LRRM 2422 (4th Cir. 1972); *Yantis* v. *Modern Motor Express*, 82 LRRM 2286 (S.D.Ohio 1972); *Phillips* v. *Columbia Gas, Inc.*, 347 F.Supp. 533, 81 LRRM 2821 (S.D.W.Va. 1972); *Davis* v. *Rogers Display Studios*, 80 LRRM 3264 (N.D.Ohio 1972); *Quinn* v. *Dixie Highway Express*, 79 LRRM 2894 (N.D.Ala. 1972); *O'Dell* v. *Intl. Paper Co.*, 262 So.2d 101, 80 LRRM 3012 (La. App. 1972); for an NLRB fair-representation case, see *Bleier* v. *NLRB*, 457 F.2d 871, 79 LRRM 2990 (3rd Cir. 1972); under the RLA, see *Baxter* v. *REA Express*, 455 F.2d 693, 79 LRRM 2752 (6th Cir. 1972); *Bundy* v. *Penn Central Co.*, 455 F.2d 277, 79 LRRM 2698 (6th Cir. 1972); *Sensabaugh* v. *Railway Express Agency, Inc.*, 348 F.Supp. 1398, 82 LRRM 2096 (W.D.Va. 1972); *Linzy* v. *Railway Carmen*, 79 LRRM 2792 (N.D.Ill. 1971).

[159] *Day* v. *Local 36, UAW*, ... F.2d ....., 80 LRRM 3333 (6th Cir. 1972); *Jost* v. *Machinists Lodge 1146*, 80 LRRM 3272 (D.Neb. 1972); *Rowan* v. *Howard Sober, Inc.*, 81 LRRM 2513 (E.D.Mich. 1972).

[160] *Kennedy* v. *Wheeling-Pittsburgh Steel Corp.*, ... F.2d ....., 81 LRRM 2349 (4th Cir. 1972); *Local 199, Laborers* v. *Plant*, 297 A.2d 37, 81 LRRM 2221 (Del. Sup.Ct. 1972).

[161] See *Sanders* v. *Airline Pilots Assn.*, 473 F.2d 244, 82 LRRM 2023 (2d Cir. 1972).

[162] *Hensley* v. *United Transports, Inc.*, 346 F.Supp. 1108, 81 LRRM 2070 (N.D.Tex. 1972) (court held it had no jurisdiction over union attorneys who were not parties to the contract).

breached its duty of fair representation owed the employee.[163] In one case where an employee brought a breach-of-contract action against an employer only for overtime pay, the Seventh Circuit noted that the plaintiff must still prove a breach of duty of fair representation on the part of the union, even if it is not a party, before the court could reach the merits of the breach-of-contract suit. The court noted that this was necessary in order to preserve the vitality of the grievance-arbitration machinery as the exclusive means for the redress of employee grievances, and it also noted that a union has a right to screen employee grievances.[164]

In one employee suit against an employer for violation of seniority rights, a court permitted the union to be joined as a necessary party, in order to protect its contract interests and the interests of other members of the bargaining unit, and to determine whether contract remedies had been exhausted.[165] One unusual breach-of-contract-and-fair-representation suit was filed by a waiters' local against its own international union and various employers because of an agreement made by the international that bartenders, who were also members of the international union, would share in certain gratuities at hotel banquets.[166] The court dismissed the action, citing the leading case of *Humphrey* v. *Moore*,[167] holding that a breach of the duty of fair representation cannot be found where a union's decision in a matter involving conflicting interests of different groups of employees is not fraudulent or arbitrary. A similar problem is found in seniority disputes, especially in the transportation industry represented by the Teamsters Union, where employers merge or are purchased by another company represented by the same labor organization and a question arises as to whether the seniority rosters of the two companies should be dovetailed or the employees of the acquired company be placed at the bottom of the new

[163] *Margetta* v. *Pam Pam Corp.*, 354 F.Supp. 158, 82 LRRM 2598 (N.D.Cal. 1973), discussing the leading Supreme Court decision in *Vaca* v. *Sipes*, 386 U.S. 171, 64 LRRM 2369 (1967).

[164] *Orphan* v. *Furnco Constr. Co.*, *supra* note 6; see as to the screening and processing of grievances, *Turner* v. *Air Transport Disp. Assn.*, 468 F.2d 297, 81 LRRM 2471 (5th Cir. 1972); *Coca-Cola Bottling Co.*, 199 NLRB No. 9, 81 LRRM 1138 (1972); *Wentcel, Inc.*, 198 NLRB No. 104, 81 LRRM 1045 (1972).

[165] *Kinnunen* v. *American Motors Corp.*, 56 F.R.D. 102, 81 LRRM 2220 (E.D.Wis. 1972).

[166] *Hotel & Restaurant Employees Local 781* v. *Hotel Assn. of Washington, D.C.*, 82 LRRM 2646 (D.D.C. 1973).

[167] 375 U.S. 335, 55 LRRM 2031 (1964).

seniority roster.[168] In such cases, fairness is not the standard applied by the courts where there is an award by an arbitration tribunal arrived at in good faith by the employer and the union, and even though the Interstate Commerce Commission may decide the issue to the contrary.[169]

A union does not breach its duty of fair representation by its refusal to proceed to arbitration of a grievance, but its only burden is to act fairly and in good faith.[170] A union does not violate its duty of fair representation by agreeing not to file grievances for probationary employees,[171] and it has no duty to protest a discharge until requested to do so.[172] It is not sufficient to show that the union used poor judgment and was poorly prepared in the processing and presenting of a grievance.[173] However, the fact that a union cannot give fair and vigorous representation because it agrees with an employer's interpretation of the contract may provide a basis for allowing employees to sue for overtime compensation despite contrary findings in the grievance procedure.[174]

In addition to the requirement that employees exhaust contractual and union remedies before resorting to court action, their action may be preempted by jurisdiction of the NLRB under the recent Supreme Court decision in *Motor Coach Employees* v. *Lockridge*.[175] The requirement that internal union remedies be

[168] *Morris* v. *Werner-Continental, Inc.*, 466 F.2d 1185, 81 LRRM 2294 (6th Cir. 1972); *Brady* v. *Consolidated Freightways Corp.*, 82 LRRM 2245 (S.D.Ohio 1972); *Smith* v. *Yellow Freight System, Inc.*, 79 LRRM 3079 (N.D.Ohio 1972); *Evans* v. *UTU*, 80 LRRM 2016 (N.D.Ala. 1970). The NLRB has held that a contract clause providing for dovetailing of seniority in merger cases is not discrimination based on union membership, *Teamsters Local 17 (Colorado Transfer)*, 198 NLRB No. 42, 80 LRRM 1682 (1972).

[169] See *Price* v. *Teamsters*, 457 F.2d 605, 79 LRRM 2865 (3rd Cir. 1972); *McDermott* v. *Teamsters Joint Council 53*, 347 F.Supp. 473, 82 LRRM 2322 (E.D.Pa. 1972); *Albert* v. *Chemical Leaman Tank Lines, Inc.*, 344 F.Supp. 1141, 80 LRRM 2919 (S.D.W.Va. 1972); see also *Pierone* v. *Penn Central Co.*, 54 F.R.D. 542, 79 LRRM 2859 (S.D.N.Y. 1972).

[170] *Lewis* v. *Magna American Corp.*, 472 F.2d 560, 82 LRRM 2559 (6th Cir. 1972); *Sarnelli* v. *Meat Cutters Local 33*, 457 F.2d 879, 79 LRRM 3088 (1st Cir. 1972); *Moore* v. *Sunbeam Corp.*, 459 F.2d 811, 4 FEP Cases 454 and 1218, 79 LRRM 2803 (7th Cir. 1972); *Cady* v. *Twin Rivers Towing Co.*, 339 F.Supp. 885, 80 LRRM 2026 (W.D.Pa. 1972); *Gratien* v. *Bethlehem Steel Corp.*, 79 LRRM 2870 (W.D.N.Y. 1972); *Bigley* v. *Natl. Lead Co.*, 457 F.2d 605, 79 LRRM 2865 (N.D.Ohio 1971).

[171] *Conrad* v. *Delta Airlines, Inc.*, 80 LRRM 3172 (N.D.Ill. 1972).

[172] *Hubicki* v. *Steelworkers*, 344 F.Supp. 1247, 80 LRRM 3084 (M.D.Pa. 1972).

[173] *Farmer* v. *Railroad Trainmen*, 258 So.2d 503, 79 LRRM 2785 (Fla.App. 1972).

[174] *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142, 20 WH Cases 630 (5th Cir. 1972).

[175] 403 U.S. 274, 77 LRRM 2501 (1971); see *Beriault* v. *Local 40, Longshoremen*, 340 F.Supp. 155, 80 LRRM 2058 (D.Ore. 1972); *Allen* v. *Teamsters Local 528*, 81

exhausted as well as contract remedies is clear and often leads to the dismissal of fair-representation suits, especially where the plaintiff-employee is represented by the United Automobile Workers, which has an elaborate intra-union remedy procedure.[176] However, it is clear that such remedies must be real and not illusory, and the union must not be found guilty of bad faith.[177]

Despite the obstacles facing individual employee actions, a small number of them do reach a jury and result in a verdict favorable to the plaintiff. In two cases a local was found to have improperly refused to process a grievance, the court noting in one that a union must have some reason for refusing to process a grievance.[178] In one case a jury found that an oral contract existed and that it had been breached by reason of certain discharges thereunder, but refused to send the validity of the discharges to arbitration once the contract was found, in view of the extensive and protracted litigation.[179] A plaintiff in such cases may be entitled to attorney fees.[180]

B. Arbitration and Civil Rights Litigation

There continues to be a split among the courts in civil rights cases under Title VII of the Civil Rights Act of 1964 as to whether a judicial remedy is available to an employee who first submits his claim to arbitration under an antidiscrimination clause in a collective bargaining agreement between his employer and his union and receives an adverse arbitral determination of the grievance. As noted above, the Supreme Court's agreement to review the *Alexander* case should result in some clarification of the somewhat confusing state of the law as to the election of

LRRM 2791 (N.D.Ga. 1972); *Rudolph* v. *Wagner Electric Corp.*, 80 LRRM 2937 (E.D.Mo. 1972); *cf. Rabazza* v. *Seafarers*, 337 F.Supp. 41, 79 LRRM 2629 (D.P.R. 1972).

[176] *Esquivel* v. *Air Conditioning Products Co.*, 82 LRRM 2001 (E.D.Mich. 1972); *See* v. *Local 417, UAW*, 81 LRRM 2517 (E.D.Mich. 1972); *Reid* v. *UAW Local 1093*, 80 LRRM 2886 (N.D.Okla. 1972); *Randolph* v. *General Motors Corp.*, 80 LRRM 2563 (D.Colo. 1972)

[177] See *Petersen* v. *Rath Packing Co.*, 461 F.2d 312, 80 LRRM 2833 (8th Cir. 1972); *Yeager* v. *Schmidt & Sons, Inc.*, 434 F.Supp. 927, 80 LRRM 2668 (E.D.Pa. 1972).

[178] *Griffin* v. *UAW*, 469 F.2d 181, 81 LRRM 2485 (4th Cir. 1972); see also *Patrick* v. *Operating Engineers*, 456 F.2d 672, 79 LRRM 2889 (8th Cir. 1972).

[179] *Smith* v. *Pittsburgh Gauge & Supply Co.*, 464 F.2d 870, 80 LRRM 3208 (3rd Cir. 1972).

[180] *Local 4067, Steelworkers* v. *United Steelworkers*, 338 F.Supp. 1155, 1164, 79 LRRM 3087 (W.D.Pa. 1972); see, regarding the timing of an appeal, *Richardson* v. *Communications Workers*, 469 F.2d 333, 81 LRRM 2801 (8th Cir. 1972).

remedies and estoppel in civil rights arbitration cases caused by the Court's equal division in affirming the *Dewey* case in 1971.[181] Thus, the reported decisions are not entirely clear on the question of whether a plaintiff is estopped from collaterally challenging an adverse arbitration award in a civil rights action. However, the evolving weight of authority appears to be quite hostile to the *Dewey* rationale and conclusion.

By way of background, in *Hutchings* v. *U. S. Industries, Inc.*,[182] the Fifth Circuit held that the doctrines of election of remedies and res judicata did not bar a subsequent suit under Title VII where the rights and remedies at issue in an arbitration proceeding differed from the rights and remedies at issue in Title VII. The election-of-remedies or estoppel approach, however, was adopted by the Sixth Circuit in the *Dewey* case, which was substantially modified by its *Spann* and *Newman* decisions[183] discussed in last year's report.

The gap between the two views in regard to election of remedies in civil rights cases appeared to have narrowed even further by reason of the recent decision of the Fifth Circuit in *Rios* v. *Reynolds Metals Co.*[184] In the *Rios* case the Fifth Circuit held that a federal district court has discretion to defer to an arbitra-

[181] *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 332, 2 FEP Cases 687 (6th Cir. 1970); *aff'd* by an equally divided court, 402 U.S. 689, 3 FEP Cases 508 (1971); see note 10 *supra*.

[182] 428 F.2d 303, 2 FEP Cases 725 (5th Cir. 1970); for recent cases following the *Hutchings* ruling, see *Davis* v. *Ameripol, Inc.*, 56 F.R.D. 284, 5 FEP Cases 91 (E.D.Tex. 1972); *Salinas* v. *Murphy Ind., Inc.*, 338 F.Supp. 1381, 4 FEP Cases 757 (S.D.Tex. 1972); *Board of Education, Syracuse School Dist.* v. *State Div. of Human Rights*, 328 NYS2d 732, 4 FEP Cases 627 (N.Y.App. 1972). For some of the backg[illegible]d see Gould, "Labor Arbitration of Grievances Involving Racial Discrimination," 118 *U. of Pa. L. Rev.* 40 (1969); Gould, "Judicial Review of Employment Discrimination Arbitrations," in *Labor Arbitration at the Quarter-Century Mark*, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1973), 114-150; McKelvey, "Sex and the Single Arbitrator," in *Arbitration and the Public Interest*, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1971), 1-29; Meltzer, "Ruminations About Ideology, Law, and Labor Arbitration," in *The Arbitrator, the NLRB, and the Courts*, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1967), 1.

[183] *Spann* v. *Joanna Western Mills Co.*, 446 F.2d 120, 3 FEP Cases 831 (6th Cir. 1971); *Newman* v. *Avco Corp.*, 451 F.2d 743, 3 FEP Cases 1137 (6th Cir. 1971). For further cases reported during the past year, see *Thomas* v. *Carey Mfg. Co.*, 455 F.2d 911, 4 FEP Cases 468 (6th Cir. 1972); *Heard* v. *Mueller Co.*, 464 F.2d 190, 4 FEP Cases 1119 (6th Cir. 1972); *aff'g* 4 FEP Cases 1118 (D.A. Tenn. 1971); *Macklin* v. *Spector Freight Systems, Inc.*, 4 FEP Cases 663 (D.D.C. 1971); *Turner* v. *Firestone Tire & Rubber Co.*, 4 FEP Cases 638 and 639 (W.D.Tenn. 1971); *Corey* v. *Avco Corp.*, 4 FEP Cases 1028 (Conn. Sup.Ct. 1972).

[184] 467 F.2d 54, 5 FEP Cases 1 (5th Cir. 1972).

tion award in a Title VII action, similar to the procedure adopted by the NLRB in deferring to arbitration awards, when certain standards are met. The court stated that a federal district court, in the exercise of its power as the final arbiter under Title VII, may defer to an arbitration award under the following limitations:[185]

> "First, there may be no deference to the decision of the arbitrator unless the contractual right coincides with rights under Title VII. Second, it must be plain that the arbitrator's decision is in no way violative of the private rights guaranteed by Title VII, nor of the public policy which inheres in Title VII. In addition, before deferring, the district court must be satisfied that (1) the factual issues before it are identical to those decided by the arbitrator; (2) the arbitrator had power under the collective agreement to decide the ultimate issue of discrimination; (3) the evidence presented at the arbitral hearing dealt adequately with all factual issues; (4) the arbitrator actually decided the factual issues presented to the court; (5) the arbitration proceeding was fair and regular and free of procedural infirmities. The burden of proof in establishing these conditions of limitation will be upon the respondent as distinguished from the claimant.
>
> "In essence, this procedure will amount to a review of the arbitration proceeding in cases involving Title VII rights. It is not as broad as the procedure followed in general grievance-arbitration cases where the court looks only to the question whether under the terms of the collective bargaining agreement the arbitrator had power to decide the issues he decided."

In a footnote, the Fifth Circuit noted that its holding may be somewhat in line with the Sixth Circuit cases as they have evolved through the *Newman* decision.[186] The court summarized the Sixth Circuit's approach as requiring relitigation of a claim in court unless certain conditions are met: "Thus, the arbitration proceeding must have been fair and impartial. The issue presented to the court under Title VII must be the same as the issue decided by the arbitrator under the collective bargaining agreement. The arbitrator must have had the power, under the collective bargaining agreement, to decide the issue he decided."

Whether the Tenth Circuit and the district court in the *Alexander* case complied with the aforesaid conditions is not clear. The opinion noted that the issue of racially motivated

[185] *Id.* at 4.
[186] *Supra* note 183.

discriminatory employment practices was presented to the arbitrator and rejected, although the lower court noted that the arbitrator's findings did not discuss the plaintiff's assertion to the court of racial discrimination, but the plaintiff admitted in a deposition that this charge was before the arbitrator. Both the district court and the court of appeals opinions in the *Alexander* case made much of the fact that the Equal Employment Opportunity Commission had found that the plaintiff's facts did not amount to a Title VII violation and had dismissed his charge.

The significance of *Rios* is that the arbitration of employment discrimination disputes will require substantial reforms in order to pass muster under that decision's standards. For one thing, arbitrators will have to start doing what most of them swore never to do—to rely upon Title VII and other public law in writing their opinions and awards.

It is thus clear that the trial court must reach the merits of the Title VII action where the discrimination issue has not been considered by the arbitrator.[187] An Ohio district court held that a sex discrimination action against an employer and a union may be maintained, even though the plaintiff did not file a grievance and did not exhaust contract remedies, citing the *Hutchings* case.[188] The court distinguished the *Dewey* case on the ground that the plaintiff did not elect to proceed to binding arbitration of the sex discrimination issue.

Civil rights actions are frequently combined with 301 actions involving breach of contract and breach of the duty of fair representation by a labor organization.[189] In one case it was held that an employee could not raise the issue of the employer's racial discrimination under the contract in a fair-representation suit against the union, where the issue was not raised nor any such claim made by the employee under the contract in the grievance and arbitration proceeding that preceded the court action.[190] In Title VII-301 actions, the processing of a grievance by the plaintiff tolls the limitation period under the Civil Rights Act of 1964, so

[187] See *Franks* v. *Bowman Transp. Co.*, 5 FEP Cases 421 (N.D.Ga. 1972); *Jamison* v. *Olga Coal Co.*, 335 F.Supp. 454, 4 FEP Cases 532 (S.D.W.Va. 1971).

[188] *Palmer* v. *Natl. Cash Register Co.*, 346 F.Supp. 1043, 4 FEP Cases 1155 (S.D. Ohio 1972).

[189] See, for example, *Jenkins* v. *General Motors Corp.*, 5 FEP Cases 551 (D.Del. 1973); *McFadden* v. *Baltimore Steamship Trade Assn.*, 5 FEP Cases 300 (D.Md. 1973).

[190] *Whitehead* v. *UAW*, 4 FEP Cases 954 (E.D.Mich. 1972).

that the issuance of an arbitration decision may be critical in regard to the timeliness of the filing of a charge with the Equal Employment Opportunity Commission.[191]

In regard to remedies under Title VII, one court, in a pattern or practice discrimination case against a labor organization, ordered that a joint apprenticeship committee with a complaint procedure be set up for applicants, with the right of an appeal to arbitration under American Arbitration Association procedures.[192] In the *Union Camp* and *Central Motor Lines* cases [193] decided during the past year, the courts have tackled grievance-arbitration problems caused by court orders or administrative rulings resulting in revised seniority systems to eliminate racial discrimination. In the *Union Camp* case, the court refused to compel arbitration of grievances arising from the employer's unilateral and voluntary implementation of an affirmative action program to eliminate the effects of past racial job assignment patterns pursuant to a directive of the Office of Federal Contract Compliance. The court held that the arbitration clause retains its vitality save in those instances where resort to the arbitral process may prevent the employer from complying with Title VII and from implementing its affirmative action program. In the *Central Motor Lines* case, a union was found not to have violated the court's previous order by the filing and processing of grievances challenging the revised seniority roster. The court pointed out, however, that the joint committee hearing the grievances should not have deadlocked, since the grievances were frivolous in that they asked the employer to violate the court's order and Title VII.

VII. Public Sector Developments

The increasing amount of litigation involving public employment and the right to collective bargaining indicates that arbitration will play an increasing role in the public sector in the years to come. At the present time most of the litigation involves defining and developing basic rights granted by enabling legislation of the states which have enacted it and which, slowly but

[191] *Phillips* v. *Columbia Gas, Inc.*, 5 FEP Cases 240 (S.D.W.Va. 1972); see regarding proper union parties in such actions, *Sagers* v. *Yellow Freight System, Inc.*, 4 FEP Cases 1297 (N.D.Ga. 1972).

[192] *Sims* v. *Sheet Metal Workers Local 65*, 5 FEP Cases 557 (N.D.Ohio 1972).

[193] *Savannah Printing Union Local 604* v. *Union Camp Corp.*, 5 FEP Cases 670 (S.D.Ga. 1972); *U.S.* v. *Central Motor Lines, Inc.*, 5 FEP Cases 88 (W.D.N.C. 1972).

surely, is coming into existence. While public employees may have a constitutional right to organize and petition for redress of grievances,[194] absent a statute to the contrary, a public employer has no enforceable duty to recognize a representative of its employees and to bargain collectively with them in regard to wages, hours, or working conditions.[195] A recent Florida Supreme Court case indicates that the courts may take a more positive role in guaranteeing collective bargaining rights for public employees if the legislatures do not do so.[196] The Florida court was faced with a petition to force the legislature to enact guidelines for collective bargaining for public employees as guaranteed in the state constitution. The court held that judicial implementation of the constitutional provision was premature, but it warned that it would take action if the legislature did not fulfill its responsibilities under the Florida constitution.

Where enabling legislation is in existence, it is frequently limited to certain types of public employment, especially such sensitive positions as police and fire employees and teachers.[197] Once enabling legislation is in existence, litigation is usually necessary before basic questions of interpretation of the statute, such as who is covered by the legislation and what is the scope of bargaining granted thereunder, are defined.[198] Further, procedural questions under such legislation must be resolved by the courts.[199] One of the more troublesome problems in the public area is balancing new state legislation governing public employment against prior provisions of state or local statutes, charters, or

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[194] See *Fitzgerald* v. *DiGraza*, 354 F.Supp. 90, 82 LRRM 2379 (E.D.Mo. 1972); *cf. Berenguer* v. *Dunlavey*, 352 F.Supp. 444, 82 LRRM 2368 (D.Del. 1972).

[195] *Cook County Police Assn.* v. *City of Harvey*, 289 NE2d 226, 81 LRRM 2669 (Ill.App. 1972); *Alaniz* v. *City of San Antonio*, 80 LRRM 2983 (W.D.Tex. 1971).

[196] *Dade County Teachers Assn.* v. *Florida Legislature*, 269 So.2d 684, 81 LRRM 2899 (Fla.Sup.Ct. 1972).

[197] See *Sidney Ed. Assn.* v. *Sidney School Dist.*, 189 Neb. 540, 82 LRRM 2589 (Neb. Sup.Ct. 1973); *Town of Scituate* v. *Scituate Teachers' Assn.*, 296 A.2d 466, 82 LRRM 2007 (R.I.Sup.Ct. 1972); *Dearborn Fire Fighters Assn. Local 412* v. *City of Dearborn*, 42 Mich.App. 51, 201 NW2d 650, 81 LRRM 2826 (1972); *Austin* v. *Howard*, 332 NYS2d 434, 80 LRRM 3007 (N.Y.App.Div. 1972); *Allegheny County* v. *Venneri*, 289 A.2d 523, 80 LRRM 2438 (Pa.Comm.Ct. 1972).

[198] See *Union Free School Dist.* v. *Associated Teachers of Huntington*, 30 NY2d 122, 282 NE2d 109, 79 LRRM 2881 (N.Y.Ct.App. 1972); *Roza Irrigation Dist* v. *State of Washington*, 80 Wn.2d 633, 497 P.2d 166, 80 LRRM 2924 (Wash.Sup.Ct. 1972); *Paton* v. *Poirer*, 286 A.2d 243, 79 LRRM 2781 (R.I.Sup.Ct. 1972).

[199] See *Bassett* v. *Braddock*, 262 So.2d 425, 80 LRRM 2955 (Fla.Sup.Ct. 1972); *Veith* v. *School Dist. of Fort Atkinson*, 196 NW2d 714, 80 LRRM 2176 (Wis.Sup.Ct. 1972).

policies which may conflict with the new rights granted public employees.[200]

It has been held under legislation granting collective bargaining rights to public employees that the submission of grievances to binding arbitration is a mandatory subject of bargaining. Thus, the Connecticut Supreme Court held that if a public employer has power to make a contract, it also has the power to agree on the method of enforcement of that contract and in doing so it is not delegating its statutory authority regarding matters of policy.[201] Once authority to enter into a collective bargaining agreement providing for compulsory arbitration of disputes has been given by the legislature, then arbitration can be compelled and awards enforced as in the private sector.[202] With the wide range of possible conflicting legislation and the discretion vested in public bodies by statute, questions as to what matters are the subject matter of grievances and are arbitrable under a collective bargaining agreement promise to be a fruitful source of litigation.[203] Also, the settlement of grievances may be restricted under state law, for example, by limitations on paying out public funds which may be construed as a gift in the settlement of a grievance.[204]

VIII. Conclusion

The most important pending development of the law affecting arbitration will be the Supreme Court decision in the *Alexander* case with respect to election of remedies in civil rights cases, which should be decided in the next term of the Court. Hopefully, this will resolve any remaining conflict that exists between the positions of the circuit courts of appeal regarding the election of

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[200] See *Detroit Police Officers Assn.* v. *City of Detroit*, 41 Mich.App. 723, 200 NW2d 722, 81 LRRM 2529 (Mich.Ct.App. 1972); *Los Angeles Fire Fighters Local 1044* v. *City of Monrovia*, 24 Cal.App.3rd 289, 80 LRRM 2648 (Cal.Ct.App. 1972).

[201] *West Hartford Educ Assn.* v. *DeCourcy*, 460 F.2d 531, 80 LRRM 2422 (Conn. Sup.Ct. 1972); see also *Gary Teachers Union Local 4* v. *City of Gary*, 284 NE2d 108, 80 LRRM 3090 (Ind.App. 1972); *cf. Armstrong School Dist.* v. *Armstrong Educ. Assn.*, 291 A.2d 125, 80 LRRM 2616 (Pa.Comm.Ct. 1972).

[202] *East Chicago Teachers Union Local 511* v. *East Chicago Board*, 81 LRRM 2586 (Ind.App. 1972); *Town of North Kingston* v. *North Kingston Teachers Assn.*, 297 A.2d 342, 82 LRRM 2010 (R.I.Sup.Ct. 1972); *cf. Worrilow* v. *Lebanon Lodge No. 42, F.O.P.*, 288 A.2d 835, 80 LRRM 2120 (Pa.Comm.Ct. 1972).

[203] See *Central School Dist. No. 1* v. *Three Village Teachers Assn.*, 336 NYS2d 656, 81 LRRM 2974 (N.Y.App.Div. 1972); *Rockford Bd. of Ed.* v. *Rockford Ed. Assn.*, 3 Ill.App.3rd 1090, 80 LRRM 2592 (Ill.App.Ct. 1972).

[204] *Antonopoulou* v. *Beame*, 332 NYS2d 464, 80 LRRM 2652 (N.Y.App.Div. 1972).

remedies and estoppel of employees who have participated in an arbitration proceeding which resulted in an award adverse to their interests and who are plaintiffs in court actions alleging discriminatory conduct under Title VII of the Civil Rights Act of 1964. Also of importance will be the resolution of the question of whether safety grievances are an exception to the recent relaxation on the granting of injunctions in labor disputes where arbitration is available to the parties, which the Supreme Court faces in the *Gateway Coal* case that is pending review.

It also appears certain that arbitrators in the coming years will become much more involved in the development of public employment relations law, since state legislatures are inexorably, though slowly, moving toward the granting of collective bargaining rights to public employees similar to the rights that exist in the private sector. The major question in the public employment sector is whether the failure or reluctance of state legislatures to act in this area will, by default, force the Federal Government to enact legislation granting certain rights regarding collective bargaining in public employment and to set up the necessary procedures to implement the same, which is being advocated by certain interest groups.

In summary, the steady increase in litigation involving arbitration indicates that there will continue to be expanding opportunities for arbitrators, and that there does not appear to be any diminishment in sight of the caseload being handled by the arbitral process. The complexity of the developing law, on the other hand, and the existence of numerous administrative and executive policies, such as exist in the civil rights area, require increasing vigilance and acumen on the part of arbitrators to see that their decisions and remedies under a collective bargaining agreement are in accord with the most enlightened policies being promulgated through legislation and court decisions.

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