APPENDIX B

ARBITRATION AND FEDERAL RIGHTS UNDER COLLECTIVE AGREEMENTS IN 1973*

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During the past year, the number of reported decisions involving the arbitral process and Section 301 of the Labor-Management Relations Act (LMRA)[1] continued at the record high level established in previous years, although the areas of concern to litigants tend to shift somewhat as the law develops. At the time of submission of this report, more than 350 reported cases were used directly in its preparation, and at least another 125 cases were considered closely for inclusion herein. This total includes a number of National Labor Relations Board (NLRB) decisions involving its deferral to arbitration policy under the *Collyer* and *Spielberg* cases.[2] The most important developments affecting arbitral law are the two decisions of the U.S. Supreme Court handed down in the early part of 1974 involving arbitration of safety disputes and deferral to arbitration in civil rights cases, which decisions are discussed separately below.

The largest number of cases continue to be individual employee actions claiming breach of contract or wrongful discharge by an employer and/or breach of the duty of fair representation by a labor organization, which cases usually end up being dismissed by the trial court. The policy of the NLRB in deferring

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[1] 29 U.S.C. 185. The Committee has attempted to cite at some point in this report every reported decision affecting arbitration during the past year except those of state trial courts and decisions arising under the Railway Labor Act (RLA), but not necessarily every point treated by a cited case is discussed herein. Since the purpose of this report is to set forth reported case developments since the last annual meeting of the Academy, a more comprehensive treatment of the areas of arbitration law noted herein with appropriate citations can be obtained by referring to some of the decisions themselves.

[2] *Collyer Insulated Wire*, 192 NLRB 152, 77 LRRM 1931 (1971); *Spielberg Mfg. Co.*, 112 NLRB 1080, 36 LRRM 1152 (1955).

to arbitration continues to be a fruitful source of litigation, as well as cases involving arbitration and the use of the injunctive remedy. There has been a steady increase in the number of arbitral decisions involving public employees, and in the past year there was a marked increase in the number of reported cases involving pension plans. These areas and other legal developments and cases involving arbitration during the past year are summarized below.

I. Supreme Court Decisions

A. Arbitration and Safety Disputes

On January 14, 1974, the Supreme Court, with one judge dissenting, issued its decision in *Gateway Coal Co.* v. *Mine Workers*,[3] holding that the presumption of arbitrability applies to safety disputes. The Court held, contrary to the court of appeals, that the collective bargaining agreement in question imposed on the parties a duty to submit the safety dispute to arbitration. The Court further found that, although the contract did not contain an express no-strike clause, the contractual commitment to submit local disagreements to final and binding arbitration gave rise to an implied obligation not to strike over such disputes, following its precedent set in the *Lucas Flour* case.[4] Accordingly, the Supreme Court upheld the injunctive relief granted by the district court requiring the union to end the strike and to submit the dispute to an impartial umpire without delay, thereby reinforcing its decision in *Boys Markets, Inc.* v. *Retail Clerks*.[5]

The Court also dealt with the applicability of Section 502 of the LMRA, which provides that the quitting of labor by employees because of abnormally dangerous working conditions is not deemed to be a strike under the Act. The Court noted that this section of the statute provides a limited exception to an express or implied no-strike obligation, that a work stoppage called solely to protect employees from immediate danger is authorized by Section 502, and that such a strike cannot be the basis for either a damage award or a *Boys Markets* injunction. However, in the instant case, the Court rejected the contention that an honest belief

[3] 414 U.S. 368, 85 LRRM 2049 (1974), *rev'g* 466 F.2d 1157, 80 LRRM 3153 (1972).
[4] *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U.S. 95, 49 LRRM 2717 (1962).
[5] *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 74 LRRM 2257 (1970).

on the part of the employees, no matter how unjustified, in the existence of "abnormally dangerous conditions for work" necessarily invokes the protection of Section 502. The Court held that: ". . . a union seeking to justify a contractually prohibited work stoppage under §502 must present 'ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition of work exists.' " (85 LRRM at 2056) The dissenting Justice relied on Section 502 as well as a contractual provision for a mine safety committee, and the extent of federal safety regulation concerning coal mines,[6] to find that Congress has preempted the field in the matter of health, safety, and environmental conditions within coal mines, thereby preventing any accommodation or adjustment of the dispute by arbitration.

Two lower federal court decisions were issued in 1973 prior to *Gateway* which also involved safety issues. The Fifth Circuit enforced an arbitration award for strike damages against a labor organization and rejected the union's defense that the strike was protected by Section 502.[7] The court found that the strike was caused by the discharge of a union shop steward who was protesting safety conditions, and held that the firing of a safety protagonist, in the absence of any allegation of particularly dangerous working conditions, is insufficient to bring the union's strike within the Section 502 exception.

A district court granted a *Boys Markets* injunction in another coal mine dispute involving an implied no-strike clause where the contract between the parties provided for final and binding arbitration of safety disputes.[8] The court held that the union had failed to comply with its contract and the outstanding law, and noted that the instant case involved a strip mine, whereas the court of appeals decision in *Gateway* that was relied upon by the union involved an underground coal mine. In addition to strengthening the presumption of arbitrability under the *Steelworkers* trilogy,[9] the *Gateway* decision, and the above-discussed

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[6] See Federal Coal Mine & Safety Act of 1969, 30 U.S.C. 813; and Occupational Safety and Health Act of 1970, 84 Stat. 1590.

[7] *Pence Constr. Corp.* v. *Local 450, Operating Engineers,* 484 F.2d 398, 84 LRRM 2392 (5th Cir. 1973).

[8] *Peabody Coal Mine* v. *Local 7869, Mine Workers,* 350 F.Supp. 615, 83 LRRM 2868 (W.D.Ark. 1973).

[9] *Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593, 46 LRRM 2423 (1960).

lower court decisions, would indicate that the Section 502 exception will be rare justification for a strike by a union in the face of an express or implied no-strike clause.

B. Arbitration and Title VII Actions

In a decision that promises to have a somewhat broader impact than *Gateway,* the Supreme Court in *Alexander* v. *Gardner-Denver Co.*[10] unanimously adopted the position that the prior submission of an employee's claim to arbitration under a collective bargaining agreement does not preclude a later suit under Title VII of the Civil Rights Act of 1964, thereby clarifying the equal division of the Court in *Dewey* v. *Reynolds Metals Co.*[11] The Court reversed a holding of the Tenth Circuit and adopted the position of several other circuits, holding that:

> ". . . Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. In sum, Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement." (7 FEP at 85-86)

The Court held that legislative enactments in the area of employment discrimination have long evinced a general intent to accord parallel or overlapping remedies, that no inconsistency results from permitting both collective bargaining rights and Title VII rights to be enforced in their respectively appropriate forums, and that the relationship between the two forums is complementary.

Both the Supreme Court and the lower courts that have held with it that there is no election of remedies in such cases are careful to point out that an employee may not be unjustly enriched through duplicative recoveries. The Supreme Court noted that judicial relief can be structured to avoid such windfall gains and that if the relief obtained by the employee in arbitration were fully equivalent to that obtainable under Title VII, there would be no further relief for a court to grant and no need for the employee to institute suit in the first place. In the *Oubichon*[12]

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[10] 415 U.S. 36, 7 FEP Cases 81 (1974).

[11] 402 U.S. 689, 3 FEP Cases 508 (1971), *aff'g* by an equally divided court 429 F.2d 324, 2 FEP Cases 687, 869 (6th Cir. 1970).

[12] *Oubichon* v. *North American Rockwell Corp.,* 482 F.2d 569, 6 FEP Cases 171 (9th Cir. 1973).

case decided by the Ninth Circuit during the past year, which also rejected any bar to a Title VII action on the theory of election of remedies, the court pointed out that the acceptance of the arbitral remedy is *prima facie* evidence that the employee has received full compensation.

The Court in *Gardner-Denver* was careful to point out that while a union may waive certain statutory rights related to collective bargaining activity, such as the right of its members to distribute literature in an employer's plant as illustrated in its subsequent decision in *NLRB* v. *Magnavox Co.*,[13] the rights under Title VII stand on a different ground and concern not majoritarian processes, but an individual's right to equal employment opportunities. The Court held that Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices, and under these circumstances an employee's rights under Title VII are not susceptible to prospective waiver. On the other hand, the Court held that the contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination by means of Title VII.

The Supreme Court expressly disagreed with the argument of the employer that its ruling would undermine substantially an employer's incentive to arbitrate collective bargaining disputes. The Court noted that the primary incentive for an employer to enter into an arbitration agreement is the union's reciprocal promise not to strike, and that it was not unreasonable to assume that most employers would regard the benefits derived from a no-strike pledge as outweighing whatever costs might result from according employees an arbitral remedy against discrimination in addition to the judicial remedy under Title VII. The Court also noted that the grievance-arbitration machinery of a collective bargaining agreement remains a relatively inexpensive and expeditious means for resolving a wide range of disputes, including claims of discriminatory employment practices. Thus, an employer has an incentive to make available the conciliatory and therapeutic process of arbitration which may satisfy the employee, thus saving the employer the expense and aggravation associated with a more cumbersome law suit. For similar reasons, the em-

[13] 415 U.S. 322, 85 LRRM 2475 (1974).

ployee also has a strong incentive to arbitrate grievances, and such arbitration may often eliminate those misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum.

The Court in *Gardner-Denver* refused to adopt a rule that federal courts should defer to arbitral decisions in Title VII discrimination cases, analogous to the *Spielberg* rule of the NLRB deferring to arbitral decisions on statutory issues in certain cases. The Court rejected the assumption that arbitral processes are commensurate with judicial processes and that Congress impliedly intended federal courts to defer to arbitral decisions on Title VII issues. The Court stressed the special role of the arbitrator in effectuating the intent of the parties set forth in the collective bargaining agreement, rather than effectuating the requirements of enacted legislation, and noted that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. The Court held that the fact-finding processes of arbitration are usually not equivalent to judicial fact-finding; that adopting a deferral rule would tend to make arbitration a procedurally complex, expensive, and time-consuming process; and that judicial enforcement of such a role would almost require courts to make *de novo* determinations of the employee's claims. The Court also expressed concern that a deferral rule might adversely affect the arbitration system as well as the enforcement scheme of Title VII, since some employees may elect to bypass arbitration and institute law suits because of the fears that the arbitral forum would not protect their rights adequately, thereby reducing the possibility of voluntary compliance or settlement of Title VII claims in the collective bargaining procedures, and resulting in more rather than less litigation.

In summary, the Supreme Court held that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective bargaining agreement and his cause of action under Title VII. Thus, the federal courts must consider an employee's claim under Title VII *de novo,* and the arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate. The Court refused to adopt any standards as to what weight should be ac-

corded the arbitral decision, but left it to the court's discretion under the facts and circumstances of each case. The Court, however, did set forth some relevant factors to be considered, such as an adequate nondiscrimination clause in the contract, procedural fairness in the arbitral forum, adequacy of the record on the discrimination issue, and the special competence of the arbitrator. The Court noted that an arbitrator's determination gives full consideration to an employee's Title VII rights, but at the same time stressed the duty of the courts to assure full availability to a judicial forum in Title VII actions.

In addition to the *Oubichon* case decided by the Ninth Circuit during the past year prior to the *Gardner-Denver* decision, the Seventh Circuit held in *Rose* v. *Bridgeport Brass Co.*[14] that an employee's Title VII sex discrimination suit was in part barred by a prior arbitration award where the issues raised in the law suit were identical to those previously ruled upon by the arbitrator. Quite clearly, *Rose* and similar cases [15] do not meet the criteria set forth in *Gardner-Denver.* Where it is clear that the district court merely considered the findings of the arbitrator as facts to be considered along with other evidence presented in the Title VII suit, such a holding would appear to satisfy the *Gardner-Denver* ruling.[16] In *Rose,* the Seventh Circuit adopted a deferral rule that expressed hostility to the relitigation of issues adjudicated by an arbitrator. *Gardner-Denver,* of course, rejected outright any general deferral stance.

In another case, the Court of Appeals for the District of Columbia held in *Macklin* v. *Spector Freight Systems, Inc.*[17] that the election-of-remedies doctrine was not applicable to a Title VII racial discrimination case, especially where the issue had not been raised in the prior adverse grievance proceedings, where relief was doubtful because the collective bargaining agreement did not contain an antidiscrimination provision, and where the quality of the union's representation was in issue. *Gardner-Denver* moved beyond *Macklin* and all previous appellate authority through its rejection of any deferral or election-of-remedies rule.

In other Title VII cases, a Pennsylvania district court held that a sex discrimination case was not barred by the election-of-reme-

[14] 487 F.2d 804, 6 FEP Cases 837 (7th Cir. 1973).
[15] *Monroe* v. *Kroger Co.,* 6 FEP Cases 827 (N.D.Ohio 1972).
[16] See *Workmen* v. *Ravenna Arsenal, Inc.,* 6 FEP Cases 149 (N.D.Ohio 1973).
[17] 487 F.2d 979, 5 FEP Cases 994 (D.C.Cir. 1973).

dies doctrine because grievances had been previously submitted to arbitration, and further held that the union was not an indispensable party to such an action against the employer where the language of the contract was not involved in the Title VII action and the union would not be affected by the decree requiring the employer to end the sexual discrimination.[18] It has also been held by the Third Circuit that the settlement of a grievance at the third step of the grievance procedure is no bar to a subsequent investigation of a discrimination claim by the Equal Employment Opportunity Commission (EEOC).[19]

II. Employee Actions Under 301

A. Civil Rights Actions and 301

In addition to the cases involving deferral to grievance procedures in civil rights actions under Title VII, the courts during the past year have tackled various other problem areas touching on the interplay between Title VII and the arbitral process. Questions arise as to the vitality of existing contract rights in the face of a Title VII court decree or an affirmative action program designed to eliminate discriminatory employment conditions. In two cases reported during the past year, a union was denied arbitration of grievances involving an employer's modification of transfer or seniority rights where the employer took such action pursuant to a court decree in a Title VII case or in an attempt to implement an affirmative action program.[20] In such cases, however, the courts are careful to stress that the arbitration clause of the collective bargaining agreement retains its vitality except where resort to the arbitral process may prevent an employer from complying with Title VII and other civil rights regulations.

A union is sometimes joined with an employer in Title VII and fair-representation actions that challenge the hiring practices of the employer. Two district courts have held that where the

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[18] *Ostapowicz* v. *Johnson Bronze Co.*, 369 F.Supp. 522, 7 FEP Cases 147 (W.D.Pa. 1973).

[19] *U.S. Steel Corp.* v. *U.S.*, 487 F.2d 1396, 6 FEP Cases 1122 (3rd Cir. 1973), *aff'g* 6 FEP Cases 977 (W.D.Pa); see also *Univ. of Colorado* v. *Colorado Civil Rights Comm.*, 6 FEP Cases 988 (Colo.Dist.Ct. 1973); but compare *EEOC* v. *McLean Trucking Co.*, 7 FEP Cases 299, 301, 302 (W.D.Tenn. 1974) where EEOC action was held to be estopped where employee claim had been arbitrated.

[20] *Muchison* v. *ITT Rayonier, Inc.*, 6 FEP Cases 596 (S.D.Ga. 1973); *Savannah Printing Union Local 604* v. *Union Camp Corp.*, 350 F.Supp 632, 82 LRRM 2721 (S.D.Ga. 1972).

employer exclusively does all the hiring of employees and there is no evidence of union control or participation in the alleged unlawful hiring practices, then there is no violation by the union of its duty of fair representation or of Title VII, even though the union may have acquiesced in the employer's hiring practices.[21] However, the better view is that a union has a duty of fair representation and Title VII obligation to applicants as well as incumbent employees where the employer's discriminatory conduct is a matter about which the union is aware.[22] The fact that an unlawful and discriminatory practice or policy is the product of collective bargaining and that there is no evidence of unfair representation by the union involved does not preclude a finding of a Title VII violation of the continued present effects of the employer's pre-Title VII racially discriminatory policies.[23] It has been held that to find that a union breached its duty of fair representation under 301, as distinguished from a Title VII action, a plaintiff must prove more than its mere acquiescence in the unlawful seniority system and show that the union acted in bad faith or with hostile discrimination.[24] However, as evidenced by the recent *Detroit Edison* case,[25] where such hostile discrimination is established through such evidence as a refusal to process grievances of Negro employees, discriminatory seniority provisions in the collective bargaining agreement, and exclusion of Negroes from union office, and the failure to protest an employer's racially discriminatory hiring and promotion practices, a remedy may be ordered against the union as well as the employer in a Title VII suit, even on the basis of acquiescence, and extensive damages recovered. In one recent case in the Sixth Circuit, however, which challenged the sex discrimination of an employer and union caused by following a statute of Ohio limiting the amount of weight female employees may lift, the good-faith reliance of the union on the state statute when it allegedly failed to properly assist the female employees with grievances led the court to conclude that no money damages would be awarded.[26]

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[21] *Hairston* v. *McLean Trucking Co.*, 6 FEP Cases 779 (M.D.N.C. 1973); *Meadows* v. *Ford Motor Co.*, 6 FEP Cases 795 (W.D.Ky 1973).

[22] *Stamps* v. *Detroit Edison Co.*, 365 F.Supp. 87, 6 FEP Cases 612 at 629, 635 (E.D.Mich. 1973).

[23] *Peters* v. *Missouri Pacific RR.*, 483 F.2d 490, 6 FEP Cases 163 (5th Cir. 1973).

[24] *Sabala* v. *Western Gillette, Inc.*, 362 F.Supp. 1142, 6 FEP Cases 120 (S.D.Tex. 1973).

[25] *Supra* note 22.

[26] *Wernet* v. *Meat Cutters Local 17*, 484 F.2d 403, 6 FEP Cases 602 (6th Cir. 1973).

Because of the reasoning in *Gardner-Denver* and the view that parties accused of discrimination cannot be entrusted with the resolution of charges against them, the requirement that a plaintiff exhaust the contractual or internal union remedies does not apply to Title VII cases as it does to Section 301 actions, especially where the plaintiff alleges collusion between the employer and the union to deprive him of equal employment opportunities.[27] In cases where fair-representation and Title VII issues are raised in the same proceedings, the failure of the plaintiff to pursue his contractual remedies has been relied upon by district courts to weigh against the plaintiff's claim.[28] However, as noted above, this would appear to be inconsistent with *Gardner-Denver.* The same is true for holdings to the effect that a plaintiff's refusal to cooperate in the processing of a grievance, or his disregard or ignorance of available remedies, may lead to summary dismissal of his law suit for failure to exhaust contractual or internal union remedies.[29] However, one court has held that exhaustion of remedies is not necessary where proper access to the grievance procedure was allegedly denied the plaintiff, and a union's belated willingness to take a grievance to arbitration will not render a Title VII action moot.[30] The exhaustion requirement has also been held to apply to civil service grievance procedures under the new amendments permitting employees of the Federal Government to bring action under Title VII.[31]

B. Fair-Representation Actions Under 301

Aggrieved employees who are disenchanted with their union's efforts on their behalf to obtain redress of grievances continue to file a surprisingly high number of actions alleging breach by a union of its duty of fair representation and/or breach of contract by the employer involved. Despite the high number of such ac-

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[27] *Marlowe* v. *General Motors Corp.*, 489 F.2d 1057, 6 FEP Cases 1083 (6th Cir. 1973).

[28] *Woods* v. *North American Rockwell Corp.*, 480 F.2d 644, 6 FEP Cases 22 (10th Cir. 1973); *Rodriguez* v. *East Texas Motor Freight*, 6 FEP Cases 45 (W.D.Tex. 1973); *Herrera* v. *Yellow Freight Systems, Inc.*, 6 FEP Cases (W.D.Tex. 1973); *Resendis* v. *Lee Way Motor Freight, Inc.*, 6 FEP Cases 38 (W.D.Tex 1973); *Fluker* v. *Papermakers Locals 265 and 940*, 6 FEP Cases 92 (S.D.Ala. 1972).

[29] *Jenkins* v. *General Motors Corp.*, 364 F.Supp. 302, 6 FEP Cases 763 (D.Del. 1973); *Patmon* v. *Van Doren Co.*, 6 FEP Cases 821 (N.D.Ohio 1973); *Davis* v. *Local 242, Laborers*, 84 LRRM 2544 (W.D.Wash. 1973).

[30] *Massey* v. *Illinois Range Co.*, 358 F.Supp. 1271, 5 FEP Cases 1200 (N.D.Ill. 1973).

[31] *Penn* v. *Schlesinger*, 400 F.2d 700, 6 FEP Cases 1109 (5th Cir. 1973).

tions, most are disposed of by the trial court on motions to dismiss or for summary judgment in view of the difficulty of pleading and establishing the necessary arbitrary and bad-faith conduct by the union necessary to sustain such a cause of action under the Supreme Court's decision in *Vaca* v. *Sipes*.[32] Thus, the individual plaintiff in a 301 action faces an initial hurdle of setting forth a factual pleading that will survive a motion to dismiss by the employer and/or union.[33] For example, a court does not have jurisdiction under Section 301 of an employee action against a union based upon the alleged failure of the union to bargain with the employer over the shutdown of a plant, since this allegation is not a breach of contract but a breach of the statutory duty to bargain under the jurisdiction of the NLRB.[34] In 301 actions by employees against an employer, for example, for restoration of certain employment benefits, where the matter in issue has been settled in the grievance procedure, no breach of contract by the employer can be established in the absence of an allegation of a breach of the duty of fair representation by the union.[35]

The courts are even more careful to require that employees in fair-representation and breach-of-contract actions avail themselves of available grievance procedures and exhaust such procedures before bringing action.[36] Thus, an employee cannot complain of unfair representation where he fails to avail himself fully of the grievance processes or refuses to cooperate fully with the union in the presentation and preparation of his grievance.[37] In a wrongful discharge action against an employer, the employee need not plead exhaustion of contractural remedies or that the union breached its duty of fair representation in handling the grievance, but these are held to be matters of affirmative defense

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[32] 386 U.S. 171, 64 LRRM 2369 (1967).

[33] See, for example, *Sagona* v. *Plumbers Local 60*, 480 F.2d 652, 84 LRRM 2367 (5th Cir. 1973); *Estes* v. *Hankins Container Co.*, 85 LRRM 2045 (S.D.Ohio 1973); *Shafer* v. *General Motors Corp.*, 84 LRRM 2549 (S.D.Ohio 1973); *Booth* v. *Teamsters Local 270*, 83 LRRM 3011 (M.D.La. 1972).

[34] *Balc* v. *Steelworkers Local 13263*, 84 LRRM 2558 (W.D.Pa. 1973).

[35] *Alfieri* v. *General Motors Corp.*, 489 F.2d 731, 85 LRRM 2242 (2d Cir. 1973); see also *infra*, note 67.

[36] See *Harp* v. *Kroger Co.*, 489 F.2d 1104, 85 LRRM 2382 (6th Cir. 1974); *Hubicki* v. *ACF Industries, Inc.*, 484 F.2d 519, 84 LRRM 2072 (3d Cir. 1973); *Currie* v. *Bixby*, 340 N.Y.S.2d 73, 83 LRRM 2075 (N.Y.App. Div. 1973).

[37] *Szcsesny* v. *Montgomery Ward & Co.*, ... F.2d ...., 83 LRRM 2041 (7th Cir. 1973); *Ross* v. *Hayes Intl. Corp.*, 84 LRRM 2922 (N.D.Ala. 1973); *Moses* v. *Chrysler Corp.*, 84 LRRM 2720 (E.D.Mich. 1973); *Rapp* v. *M & G Convoy, Inc.*, 83 LRRM 2531 (E.D.Mich. 1973).

to be pleaded by the employer.[38] In appropriate circumstances, a fair-representation action may also be dismissed by reason of plaintiff's failure to avail himself of intra-union remedies that are reasonably calculated to grant the relief desired.[39]

A prior arbitration award adverse to the plaintiff will generally bar a fair-representation, wrongful-discharge type of action absent a properly pleaded issue of bad faith by the union in handling the grievance.[40] The courts will not relitigate the same issues that were before the arbitrator in a fair-representation action.[41] An employee has no absolute right to have his grievance pressed to arbitration, and the failure of the union to request arbitration of a grievance is insufficient of itself to establish bad faith or discriminatory conduct on its part.[42] Thus, no fair-representation action by reason of the union's failure to take a grievance to arbitration or its withdrawal of a grievance can be maintained where it honestly and in good faith made such a decision.[43]

In regard to the processing of grievances, it is held that negligence, poor judgment, or perfunctory and restrained representation by union officials in the presentation of grievances are not sufficient to establish the bad faith or hostile discrimination necessary to maintain a fair-representation action.[44] Further, it has been held that it is not evidence of bad faith to show that the union representative failed to investigate personally and secure witnesses in regard to the incident leading to the employee's grievance where grievants normally collect the supporting evidence for the arbitration tribunal.[45] Neither is there any obliga-

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[38] *Miller* v. *Illinois-California Express, Inc.*, 358 F.Supp 1378, 84 LRRM 2219 (N.D.Ill. 1972); see also, for exhaustion of administrative remedies under the RLA, *Westermayer* v. *Pullman Co.*, 84 LRRM 2852 (N.D.Ill. 1973).

[39] Compare *See* v. *Local 417, UAW*, ... F.2d ...., 83 LRRM 2512 (6th Cir. 1973); *Reid* v. *Local 1093, UAW*, 479 F.2d 517, 83 LRRM 2406 (10th Cir. 1973); *Seay* v. *McDonnell Douglas Corp.*, 85 LRRM 2007 (C.D.Calif. 1973); with *Yeager* v. *Schmidt & Sons, Inc.*, 355 F.Supp. 332, 82 LRRM 2783 (E.D.Pa. 1973).

[40] *White* v. *Chemical Leaman Tank Lines, Inc.*, 490 F.2d 1267, 85 LRRM 2401 (4th Cir. 1974); *Hines* v. *Local 337, Teamsters*, 84 LRRM 2649 (N.D.Ohio 1973).

[41] *Whitmore* v. *Eastern Greyhound Lines*, 83 LRRM 2978 (E.D.Mich. 1973); *Turpin* v. *Love*, 84 LRRM 2346 (Tenn.Ct.App. 1973).

[42] *Harle* v. *Western Airlines*, 84 LRRM 2196 (C.D.Calif. 1973); *Pawlowski* v. *Local 337, Teamsters*, 83 LRRM 3112 (E.D.Mich. 1973); *Cecil* v. *Local 1336, UAW*, 83 LRRM 2286 (W.D.Ky. 1973).

[43] *Winfrey* v. *General Motors Corp.*, 85 LRRM 2370, 7 FEP Cases 212 (N.D.Ga. 1973); *Arnold* v. *Hayes Intl. Corp.*, 84 LRRM 2993 (N.D.Ala. 1973).

[44] *Provenzino* v. *Merchants Forwarding*, 84 LRRM 2212 (E.D.Mich. 1973); *Gorshak* v. *Ex-Cell-O Corp.*, 83 LRRM 2505 (E.D.Mich. 1973).

[45] *Berry* v. *Intermountain Express Co.*, 85 LRRM 2408 (D.N.M. 1974).

tion on the part of the union to actively urge a strike vote by the membership where there is no provision for arbitration.[46] No breach of fair representation is established by the fact that the union varied the contractual grievance procedure and received an adverse decision,[47] or by the union's refusal to allow the employee's attorney to participate in the preparation of his case for administrative hearings, or by the delay in processing the case through the grievance procedure.[48]

A good-faith disposition by the union of a claim in the grievance procedure may bar a subsequent action for breach of contract by the employees.[49] Absent fraud or conspiracy on the part of the employer or union to deprive employees of contractual rights, a settlement agreement between an employer and a union of a contract dispute will bar an employee suit for breach of contract by the employer and/or breach of the duty of fair representation by the labor organization.[50] It is not determinative of a breach of duty of fair representation if an employee's consent was not obtained to the union's abandonment of his grievance and the agreeing to a settlement with the employer, since the employer and the union are entitled to make good-faith interpretations of the collective bargaining agreement.[51]

Problems involving seniority rights, especially in the merger of operations, continue to form the basis of many 301 actions by employees. As long as the employer and the union acted reasonably and in good faith in making their agreement, the group of employees that is dissatisfied with their seniority placement in relation to other employees will have no cause of action.[52] Since seniority decisions are bound to be unfavorable to some members of the collective bargaining unit, the union has no obligation to ad-

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[46] *Breish* v. *Local 771, UAW,* 84 LRRM 2596 (E.D.Mich. 1973).

[47] *Elrod* v. *Teamsters,* .... F.2d ...., 85 LRRM 2189 (9th Cir. 1973).

[48] *Brown* v. *Northwestern Pacific RR,* 85 LRRM 2072 (N.D.Calif. 1973); *Garborcauskas* v. *Penn Central Transp. Co.,* 84 LRRM 2949 (D.Conn. 1973); *Davies* v. *American Airlines, Inc.,* 85 LRRM 2403 (N.D.Ill. 1973).

[49] *Cady* v. *Twin Rivers Towing Co.,* 486 F.2d 1335, 84 LRRM 2732 (3d Cir. 1973).

[50] *Otero* v. *IUE,* 474 F.2d 3, 82 LRRM 2843 (9th Cir. 1973); *Corcoran* v. *Allied Supermarkets, Inc.,* 379 F.Supp. 1041, 83 LRRM 2622 (E.D.Mo. 1973); *Cona* v. *Jim Walter Corp.,* 83 LRRM 2541 (E.D.Mich. 1973).

[51] *Sanderson* v. *Ford Motor Co.,* 483 F.2d 102, 83 LRRM 2859 (5th Cir. 1973).

[52] *Kesinger* v. *Universal Airlines, Inc.,* 474 F.2d 1127, 82 LRRM 2725 (6th Cir. 1973); *Thomas* v. *Ford Motor Co.,* 85 LRRM 2394 (E.D.Mich. 1973); *Lipasek* v. *Byers Transp. Co.,* 84 LRRM 2337 (W.D.Mo. 1973); *Witherspoon* v. *Locomotive Engineers,* 194 S.E.2d 399, LRRM 2707 (S.C.Sup.Ct. 1973).

vance as a negotiating position the maximum possible advantage for each individual or group involved, and it may in good faith follow a policy of not interceding on behalf of either side in such disputes.[53] Employees also have been denied injunctions restraining an employer's cessation of operations and transfer of employees to another location.[54]

Despite the overwhelming majority of employee 301 actions that are reported as being adverse to the plaintiff, there are still occasional victories in such actions. During the past year, substantial jury verdicts were received in fair-representation actions against a labor organization in a case where a union caused an employer to discharge an employee because he was nonunion,[55] and in a state action where the union was found to have violated its duty of fair representation by ignoring and making no effort to settle the employee's grievance and by processing it in a perfunctory manner.[56] An employee action will survive a motion to dismiss even though the union now expresses a willingness to pursue plaintiff's grievance where it is alleged that the union representative was motivated by personal hostility in dropping the employee's grievance.[57] An action will not be dismissed against an employer where there is an allegation of collusion with the union in regard to dropping the employee's grievance.[58]

Certain employee actions arise where the courts must consider whether they have jurisdiction of the action of the parties under Section 301. It is elementary that the plaintiff in a 301 action must allege a breach of some provision of a collective bargaining agreement and that the employer involved must be subject to 301 of the LMRA.[59] It is also clear that the labor organization named in the suit must have a duty of fair representation toward

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[53] *Pirone* v. *Penn Central Co.*, 370 F.Supp. 172, 85 LRRM 2411 (S.D.N.Y. 1974); *McCall* v. *Air Line Pilots Assn.*, 84 LRRM 2738 (D.D.C. 1973); *Gleason* v. *T.I.M.E.-D.C., Inc.*, 84 LRRM 2107 (D.Colo. 1972).

[54] *Sappington* v. *Associated Transport, Inc.*, 493 F.2d 1353, 84 LRRM 2909 (4th Cir. 1973).

[55] *Richardson* v. *Communications Workers*, 486 F.2d 801, 84 LRRM 2617 (8th Cir. 1973) (jury award of $92,000).

[56] *Lome* v. *Local 705, Hotel Employees*, 205 N.W.2d 167, 82 LRRM 3041 (Mich. Sup.Ct. 1973) (jury award of almost $8,000); see Sachs, "Review of Labor Law," 20 *Wayne L. Rev.* 515, 517 (1974).

[57] *Ruzicka* v. *General Motors Corp.*, 85 LRRM 2419 (E.D.Mich. 1973).

[58] *Imel* v. *Zohn Mfg. Co.*, 481 F.2d 181, 83 LRRM 2797 (10th Cir. 1973).

[59] *Reingold* v. *Kaiser Foundation Hospital*, 82 LRRM 3215 (C.D.Calif. 1973) (hospitals not subject to 301); *Bell* v. *Chesapeake & Ohio Ry.*, 58 FRD 566, 84 LRRM 2358 (S.D.W.Va. 1973) (railroads not covered by 301).

the plaintiff,[60] and only the union, not individual union officials, are liable to an employee.[61] A court has taken jurisdiction under 301 of a suit by union members against a union to require the union to honor its contract with an employer regarding no reprisals for honoring a strike picket line by another labor organization.[62] Also, a court has taken jurisdiction under 301 of a suit by a group of supervisors who were seeking damages against their supervisory union caused when they were reinstated without back pay.[63]

Procedural problems in fair-representation actions continually arise, especially on motions for summary judgment or to dismiss the plaintiff's cause of action. For example, cases frequently involve the question of exhaustion of remedies or the application of the appropriate statute of limitations to the plaintiff's cause of action.[64] It is generally held that a jury trial is not absolutely required in actions based on the breach by a union of its duty of fair representation since this is an equitable claim; however, it has been held that a plaintiff may be entitled to a jury trial on his legal claim against the employer for breach of contract and damages.[65] In any event, where the court grants a jury trial, whether discretionary or required, there must be sufficient evidence in the record from which a jury could properly find the breach of duty of fair representation by the labor organization and/or breach of contract by the employer.[66] It has also been held that the court is not in error when it puts aside a breach-of-contract question on the part of the employer until after a decision has been made on the alleged breach of duty of fair representation by the union, which it is generally held must precede any

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[60] *Hughes* v. *Shoreline Beverage Distributing Co.*, 85 LRRM 2071 (S.D.Calif 1973).

[61] *Hughes* v. *Shoreline Beverage Distributing Co.*, 84 LRRM 2770 (S.D.Calif. 1973); *Acheson* v. *Bottlers Local 896*, 83 LRRM 2845 (N.D.Calif. 1973).

[62] *Buzzard* v. *Lodge 1040, Machinists*, 480 F.2d 35, 82 LRRM 3130 (9th Cir. 1973).

[63] *Dente* v. *Masters, Mates & Pilots, Local 90*, 492 F.2d 10, 84 LRRM 2982 (9th Cir. 1973).

[64] *Cato* v. *Longshoremen's Assn.*, 485 F.2d 583, 84 LRRM 3014 (5th Cir. 1973) (concealment of union officers of decision not to file suit against the employer means employees not barred by statute of limitations); *Mikelson* v. *Wisconsin Bridge & Iron Co.*, 359 F.Supp. 444, 84 LRRM 2450 (W.D.Wis. 1973); *Tuma* v. *American Can Co.*, 367 F.Supp. 1178, 84 LRRM 2374 (D.N.J. 1973).

[65] *Harrison* v. *Chrysler Corp.*, 60 FRD 9, 85 LRRM 2141 (S.D.Ind. 1973).

[66] *Johnson* v. *Local 89, General Drivers*, 488 F.2d 250, 84 LRRM 2961 (6th Cir. 1973).

finding of a breach of contract.[67] Courts also are reluctant to allow class actions in fair-representation suits and will hold that an arbitration award is presumptively valid and determines the rights of the parties involved in the arbitral process.[68]

III. Enforcement of Right to Arbitration

A. Suits Compelling or Staying Arbitration

The question whether a grievance is arbitrable under the grievance-arbitration procedures of a collective bargaining agreement is a determination to be made by the arbitrator unless it is clear and unambiguous that the contract excludes the matter from arbitration.[69] Thus, where the collective bargaining agreement clearly does not provide for arbitration of a particular dispute, or where the union has failed to comply with the contractual grievance procedure, then the court may examine the contract and refuse to order arbitration.[70] However, where there are underlying factual or legal issues, even where the arbitration provision is restrictive or ambiguous, the courts will tend to favor arbitration of disputes arising between the parties.[71]

Defenses to the request for arbitration, such as the procedural failures in processing the grievance, laches, or the difficulty of securing witnesses to testify, are matters to be decided by the arbitrator and not by the court.[72] A court may stay a 301 action for violation of a contract and grant the defendant's motion to submit the procedural and substantive issues to arbitration.[73] The question whether a grievance was settled between the shop chairman and management also may be referred to an arbitrator for

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[67] *Steinman* v. *Spector Freight Systems, Inc.*, 430 F.2d 437, 83 LRRM 2285 (2d Cir. 1973); see also *Corso* v. *Local 153, UAW*, 123 N.J.Super. 121, 301 A.2d 773, 82 LRRM 3070 (1973); see *supra* note 35.

[68] *Sheridan* v. *Liquor Salesmen's Union, Local 2*, 60 FRD 48, 84 LRRM 2351 (S.D.N.Y. 1973).

[69] See, for example, *Local 647, UAW* v. *General Electric Co.*, 474 F.2d 1172, 82 LRRM 2945 (6th Cir. 1973); *Carpenters' District Council of Milwaukee* v. *J. F. Cook Co.*, 84 LRRM 3002 (E.D.Wis. 1973).

[70] *Oil Workers* v. *Oil City Brass Workers, Inc.*, 479 F.2d 1048, 83 LRRM 2961 (5th Cir. 1973); *Cook* v. *Gristede Bros.*, 84 LRRM 2173 (S.D.N.Y. 1973).

[71] *Neuhoff Bros. Packers, Inc.* v. *Meat Cutters Local 540*, 84 LRRM 2535 (N.D.Tex 1973); *Amstar Corp. v. Sugar Workers Local 165()*, 83 LRRM 2772 (E.D.Pa. 1973); *Service Employees Local 18* v. *American Bldg. Maintenance Co.*, 29 Calif.App.3d 356, 82 LRRM 2785 (1972).

[72] *Woodworkers Local 5-378* v. *Vancouver Plywood Co.*, 480 F.2d 922, 84 LRRM 2128 (5th Cir. 1973), *aff'g* 84 LRRM 2080 (W.D.La.); *Air Line Pilots Assn.* v. *United Airlines, Inc.*, 83 LRRM 2070 (E.D.N.Y. 1973).

[73] *Local 542, Operating Engineers* v. *Penn State Constr., Inc.*, 356 F.Supp. 512, 82 LRRM 3087 (M.D.Pa. 1973).

determination.[74] However, where the employer and the union have settled a grievance, the employees may not compel arbitration of the dispute, especially where they knew and approved of the settlement.[75]

The appropriate parties to the arbitration proceeding are sometimes in dispute. For example, in a suit by a union to compel arbitration of a dispute as to whether a subcontractor has complied with the provisions of the union's collective bargaining agreement with the contractor, a court found no merit in the contractor's contention that the subcontractor is an indispensable party to the proceeding.[76] Also, in a dispute over the layoff of employees, a court ordered an employer to arbitrate the dispute while the insurance carrier involved was dismissed from the action, since the carrier was not a party to the collective bargaining agreement and the interpretation of the insurance contract was not subject to arbitration.[77]

A number of interesting cases have arisen enforcing the duty to arbitrate. For example, arbitration has been ordered on a union's counterclaim to an employer's declaratory judgment action that certain grievances were not arbitrable.[78] Even where the contract was clear that the employer was the sole judge of an employee's capabilities, the Fifth Circuit entered a limited order requiring the employer to arbitrate whether it acted arbitrarily or in bad faith as to certain discharges.[79] The question of whether an employer is entitled to arbitration of wage and seniority issues unresolved by the parties in a midcontract wage reopener was also ordered to arbitration, as against the union's contention that the arbitration clause was limited only to "employee grievances." [80]

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[74] *Graphic Arts Union Local 255* v. *Courier-Journal Lithographing Co.*, 84 LRRM 2594 (W.D.Ky. 1973).

[75] *Bernal* v. *Southern Pacific Transp. Co.*, 83 LRRM 2698 (C.D.Calif. 1973).

[76] *Operating Engineers Local 103* v. *Irmscher & Sons, Inc.*, 84 LRRM 2711 (N.D.Ind. 1973).

[77] *Steelworkers* v. *General Steel Industries, Inc.*, 363 F.Supp. 840, 84 LRRM 2209 (E.D.Mo. 1973).

[78] *Lynch & Co.* v. *Brewery Workers*, 477 F.2d 595, 83 LRRM 2983 (6th Cir. 1973), *aff'g* 83 LRRM 2933 (N.D.Tex. 1972).

[79] *Plumbers Local 52* v. *Daniel of Alabama*, 479 F.2d 342, 83 LRRM 2522 (5th Cir. 1973).

[80] *Laundry Workers Local 93* v. *Bormon Investment Co.*, 491 F.2d 1029, 84 LRRM 2084 (8th Cir. 1973), *aff'd* by an equally divided court sitting en banc, 491 F.2d 1029, 85 LRRM 2280 (1974); but see *Teamsters Local 955* v. *Bermingham-Prosser Paper Co.*, 364 F.Supp. 426, 84 LRRM 2326 (W.D.Mo. 1973) (union denied arbitration as to whether it can strike during wage reopener period where the no-strike clause of the contract was clear and unambiguous).

Arbitration also was ordered on the issue of whether an employer was creating a sham corporation to operate with nonunion employees, the court of appeals pointing out that the trial court erred by examining the evidence and determining that there was no *prima facie* case that the corporation in question was the employer's alter ego.[81]

B. Use of Injunctions in 301 Suits

Injunctive relief continues to be sought as an adjunct to disputes arising under collective bargaining agreements, but the number of reported decisions has begun to decline since the initial upsurge following the decision of the Supreme Court in the *Boys Markets* case in 1970.[82] It is clear that there must be a collective bargaining agreement in existence with a provision for binding arbitration of the dispute in question before the issuance of injunctive relief can be granted, since these conditions are necessary for the exception to the general requirement that injunctions not be granted in labor disputes under the Norris-LaGuardia Act. The improvident and erroneous issuance of an injunction may lead to an award of damages in favor of the party wrongfully enjoined, but it has been held that such damages are limited to the bond set by the trial court in the original injunctive proceeding.[83]

Where the collective bargaining agreement has expired, no injunction against a strike will be granted, even though the parties have acquiesced in continuing work under the same conditions as the prior contract and even if a new master contract is in draft form but not yet executed.[84] However, a contract has been held to be binding after ratification by the members of the bargaining unit, even though it had not been signed by the officers of the union as required in the contract, the court holding that the sign-

[81] *Bricklayers Local 6* v. *Heminger, Inc.*, 483 F.2d 129, 84 LRRM 2033 (6th Cir. 1973).

[82] *Supra* note 5. The *Boys Markets* case is an exception to the restrictions of the Norris-LaGuardia Act, 29 U.S.C. 194, regarding the issuance of injunctions in labor disputes. See under the RLA, *American Airlines, Inc.* v. *Transport Workers Local 513*, 490 F.2d 636, 84 LRRM 2128 (5th Cir. 1973), *aff'g* 84 LRRM 2114 (N.D.Tex. 1972); *Ozark Air Lines, Inc.* v. *Air Line Pilots Assn.*, 361 F.Supp. 198, 83 LRRM 2919 (E.D.Mo. 1973).

[83] *Associated General Contractors of Illinois* v. *Teamsters*, 486 F.2d 972, 84 LRRM 2555 (7th Cir. 1973).

[84] *Abell Co.* v. *Baltimore Typographical Union No. 17*, 85 LRRM 2368 (D.Md. 1974); *Guild of New York Nursing Homes* v. *Local 144, Service Employees*, 84 LRRM 2660 (S.D.N.Y. 1973).

ing was purely a ministerial act not affecting the binding nature of the contract.[85] Where the dispute is not subject to arbitration, then no injunction can be granted, as in the case of an employer seeking an injunction against the trustees of a fringe benefit fund in order to prevent them from notifying the union of a delinquency in contributions.[86] The court held that the dispute was not subject to arbitration and, therefore, was a "labor dispute" within the meaning of the Norris-LaGuardia Act.

Most of the injunctive procedures involve a union's alleged breach of either an express or an implied no-strike clause under a collective bargaining agreement containing a broad arbitration clause.[87] The contract may reserve to the union the right to strike over a particular issue, thereby precluding the issuance of injunctive relief.[88] However, injunctive relief will not necessarily be denied to the employer as moot merely because the union accepts expedited arbitration of the dispute or alleges the slowness of arbitration procedures.[89] The question of a union's alleged contempt of a state court injunction proceeding that had been removed to the federal court under Section 301 was very recently treated at length by the Supreme Court in *Granny Goose Foods, Inc.* v. *Teamsters Local 70*, the Court finding that the federal district court had erred in holding the union in criminal contempt for violating a temporary restraining order issued by a state court against its strike activity prior to removal of the case to the federal court.[90]

Injunctive relief will also be denied if there is insufficient proof of irreparable harm to the plaintiff if the relief is not granted, as in the case where a union sought an injunction against the employer's planned reduction of shifts.[91] While the court found that the dispute was not moot, it denied an injunction on the ground that there was no loss of jobs and the damages were speculative. An injunction also was denied to a union seeking to prevent the shutdown of the employer's operation, the

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[85] *Colonial Sand & Stone Co.* v. *Geohagen*, 84 LRRM 2678 (S.D.N.Y. 1973).
[86] *L. A. Concrete Pumping, Inc.* v. *Majich*, ... F.2d ...., 84 LRRM 2655 (9th Cir. 1973).
[87] See *C F & I Steel Corp.* v. *Mine Workers*, 84 LRRM 2885 (D.Colo. 1973).
[88] *ITT Baking Co.* v. *Bakery Workers*, 84 LRRM 2925 (C.D.Calif. 1972).
[89] *American Can Co.* v. *Steelworkers Local 7420*, 84 LRRM 2768 (E.D.Pa. 1973).
[90] 415 U.S. 422, 85 LRRM 2481 (1974).
[91] *Pittsburgh Printing Pressmen No. 9* v. *Pittsburgh Press Co.*, 479 F.2d 607, 83 LRRM 2349 (3d Cir. 1973).

court holding, *inter alia,* that the union failed to make a clear showing of probable success on the merits, and the fact that the dispute was arbitrable was held to be insufficient of itself to cause the issuance of an injunction.[92] The court balanced the hardships of both parties caused by the issuance of an injunction and noted the delay of the union in pursuing its arbitral remedies.

While injunctive relief against a strike or lockout may be denied to the plaintiff, other relief may be granted under appropriate circumstances. Thus, in a case where a union alleged that layoffs due to a strike by another labor organization amounted to a lockout of the employer's employees, the court held that the plaintiff union had no dispute with the employer so its contract did not apply, but the court ordered the payment of fringe benefits under the contract to the employees during the layoff period.[93] The failure to exhaust administrative or other remedies also may be a factor in denying injunctive relief, as in the case of employees seeking to restrain the arbitration of certain seniority grievances.[94]

There have been a number of cases in the past year involving the granting of injunctive relief where employees refused to cross the picket line of another labor organization, the courts leaving to the arbitrator the usual defense grounded on the question whether such conduct is barred by the no-strike clause of the employer's collective bargaining agreement.[95] There appears to be some variation, however, in court decisions granting or denying injunctive relief as to whether the contract in question permits arbitration of the underlying dispute at the request of the employer, or whether the grievance procedure is wholly "employee orientated," thereby precluding the issuance of an injunction and

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[92] *Hoh* v. *Pepsico, Inc.,* 491 F.2d 556, 85 LRRM 2517 (2d Cir. 1974).

[93] *Brandenburg* v. *Capitol Distributors Corp.,* 353 F.Supp. 115, 82 LRRM 3004 (S.D.N.Y. 1972).

[94] *Sanders* v. *Air Line Pilots Assn.,* 361 F.Supp. 670, 83 LRRM 2690 (S.D.N.Y. 1973).

[95] *Monongahela Power Co.* v. *Local 2332, IBEW,* 484 F.2d 1209, 84 LRRM 2481 (4th Cir. 1973); *Barnard College* v. *Transport Workers,* 85 LRRM 2392 (S.D.N.Y. 1974); *Harrington & Co.* v. *Longshoremen Local 1416,* 84 LRRM 2821 (S.D.Fla. 1973); *Food Fair Stores, Inc.* v. *Food Drivers Local 500,* 363 F.Supp. 1254, 84 LRRM 2509 (E.D.Pa. 1973); *NAPA Pittsburgh, Inc.* v. *Local 926, Automotive Chauffeurs,* 363 F.Supp. 54, 84 LRRM 2307 (W.D.Pa. 1973).

an order to arbitrate the dispute in the absence of a grievance filed by an aggrieved employee.[96]

C. Survival of Contractual Rights

There continues to be a small number of cases concerning the survival of collective bargaining rights upon the sale or transfer of a business entity, pursuant to the decisions of the Supreme Court in the *Burns* and *Wiley* cases.[97] A district court held that an employer, which sold its plant, has no obligation to process a grievance even if arbitration was requested timely, where the buyer assumed all the obligations of the employer and the union approved that assumption.[98] It is clear that where an employer went out of business and the collective bargaining agreement has expired, a grievance arising after the termination of the contract, such as one for severance pay or welfare contributions, is not arbitrable, and oral representations by an employer are not sufficient to give rise to such an obligation.[99]

A successor employer may be required to arbitrate a dispute under the predecessor's collective bargaining agreement where the contract contained a successorship clause and the successor was the franchiser of the business who exercised extensive control over the predecessor's business.[100] In another action, employees failed to overturn an arbitrator's award that found that they had no seniority rights at the successor employer, where there was no challenge to the fairness or adequacy of the union's representation or the integrity of the arbitral process.[101]

IV. Conduct of Arbitration and Review of Awards

A. Arbitrators and Conduct of Hearings

In view of the deference and support given by the law to arbi-

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[96] Contrast with the *Monongahela* case cited *supra* note 95, *Firestone Tire & Rubber Co.* v. *Rubber Workers*, 476 F.2d 603, 82 LRRM 3124 (5th Cir. 1973); and *Kable Printing Co.* v. *Lodge 101, Machinists*, 359 F.Supp. 265, 84 LRRM 2785 (N.D.Ill. 1973); see also *Laundry Workers Local 93* v. *Bormon Inv. Co.*, *supra* note 80.

[97] *NLRB* v. *Burns Intl. Security Services, Inc.*, 406 U.S. 272, 80 LRRM 2225 (1972), and *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 55 LRRM 2769 (1964).

[98] *Rubber Workers* v. *Lee National Corp.*, 83 LRRM 2518 (S.D.N.Y. 1973).

[99] *Local 246, Teamsters* v. *Thompson's Dairy, Inc.*, 489 F.2d 1272, 85 LRRM 2405 (D.C. Cir. 1974); *Ward Foods, Inc.* v. *Local 50, Bakery Workers*, 360 F.Supp. 1310, 83 LRRM 3108 (S.D.N.Y. 1973) (action under U.S. Arbitration Act available only to party seeking to compel arbitration under a written agreement, 9 U.S.C. 4).

[100] *Detroit Joint Board, Hotel Workers* v. *Howard Johnson, Inc.*, 428 F.2d 489, 83 LRRM 2804 (6th Cir. 1973).

[101] *Andrus* v. *Convoy Co.*, 483 F.2d 604, 83 LRRM 2683 (9th Cir. 1973).

tration as the preferable means for settling industrial disputes, the conduct of the arbitration hearing itself can have more to do with the enforceability and validity of an arbitrator's award than the merits of the particular grievance. Therefore, case law dealing with the procedural and other problems surrounding the arbitration hearing are of special interest to arbitrators and those dealing with the arbitral process. It is axiomatic that under the *Steelworkers* trilogy the arbitrator's award must draw its essence from the contract. In so doing, the arbitrator has the authority to define precisely what constitutes a breach of a provision of the contract and then apply that definition to the facts before him.[102] The Sixth Circuit recently held that even though the arbitrator found that an employee committed a "dischargeable offense" set forth in company rules, the arbitrator did not exceed his authority when he went on to determine whether under the particular facts presented the employee was "properly" discharged and then reinstated without back pay.[103] The court held that for it to agree with the employer's contention that under these circumstances the arbitrator could not mitigate its penalty would render meaningless the express authority of the arbitrator under the contract to decide grievances involving disciplinary action.

In another recent decision, the First Circuit vacated an arbitration award and ordered the parties to resubmit a discharge grievance to arbitration, where the court found that the arbitrator not only erred in his view of the facts, but also his sole articulated basis for the award was concededly in error, which error according to the arbitrator's rationale would have caused a different result.[104] The arbitrator had ordered the grievant reinstated without back pay based upon the lack of any suspension when in fact there had been a suspension. The court was careful to point out that its decision should not be interpreted as encouraging efforts to subvert the arbitral process, and it reemphasized that: ". . . Our holding today is only that where the 'fact' underlying an arbitrator's decision is concededly a non-fact and where the parties cannot fairly be charged with the misapprehension, the award cannot stand." (85 LRRM at 2535) The court assumed

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[102] *Boilermakers Local 347* v. *Pullman, Inc., Trailmobile Div.*, 357 F.Supp. 536, 83 LRRM 2324 (E.D.Pa. 1973).

[103] *Timken Co.* v. *Steelworkers*, 492 F.2d 1178, 85 LRRM 2532 (6th Cir. 1974); see also *Plumbers Local 52* v. *Daniel of Alabama, supra* note 79.

[104] *Electronics Corp.* v. *Local 272, IUE*, 492 F.2d 1255, 85 LRRM 2534 (1st Cir. 1974).

the error of the arbitrator was due to lack of emphasis in the employer's presentation and to the lapse of time before decision, so that there was no reflection on the fairness of the arbitration; but it held that the parties should be free to proceed with a different arbitrator on remand if they chose to do so. The court also noted that there may be a rationale consistent with the facts which could support a similar award on resubmission to arbitration.

Where the contract does not define the standard of proof, the arbitrator may establish the appropriate standard; and in one case where the collective bargaining agreement permitted the use of polygraph tests but did not provide how they may be used in arbitration, the Fifth Circuit held that the arbitrator did not err when he excluded the results of the polygraph tests in determining whether an employer had proper cause for discharging two employees suspected of theft.[105] It also was held by the Fifth Circuit in another case that an attack upon the validity of the underlying contract based upon fraud in its inducement poses a legal question for the courts to determine rather than the arbitrator, since the arbitrator derives his power solely from the collective bargaining agreement and cannot hold it to be legally ineffective, but must limit his consideration to the merits of the grievance that the parties have agreed to submit to arbitration.[106] However, another lower court held that the question of fraudulent inducement to enter the collective bargaining agreement may be decided by the arbitrator where the arbitration clause is broad enough to encompass such a claim, and that the court may consider only a claim that the employer's assent to the arbitration clause itself was fraudulently induced.[107]

Procedural questions, such as whether multiple grievances may be submitted to hearing before one arbitrator or rulings on the subpoena of evidence for the hearing, are issues that must be determined by the arbitrator rather than by a court.[108] The con-

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[105] *Meat Cutters Local 540* v. *Neuhoff Bros. Packers, Inc.*, 481 F.2d 817, 83 LRRM 2652 (5th Cir. 1974).

[106] *Garment Workers, ILGWU* v. *Ashland Industries, Inc.*, 488 F.2d 641, 85 LRRM 2319 (5th Cir. 1974).

[107] *Anna's Queen, Inc.* v. *Restaurant Employees Local 1*, 85 LRRM 2375 (S.D.N.Y. 1974); see also *Teamsters Local 25* v. *Penn Transp. Corp.*, 359 F.Supp. 344, 83 LRRM 2537 (D.Mass. 1973) (contract ruled valid since the employer failed to take action to rescind it if it were fraudulent).

[108] See *Great Scott Supermarkets, Inc.* v. *Local 337, Teamsters*, 363 F.Supp. 1351, 84 LRRM 2514 (E.D.Mich. 1973); *American Can Co.* v. *Papermakers Local 412*, 356 F.Supp 495, 82 LRRM 3055 (E.D.Pa. 1973).

tract procedures for choosing an arbitrator must be followed, and in one case the Fifth Circuit refused to enforce an award issued by only the union representative on an arbitration panel, where the employer had refused to participate in the selection of a neutral arbitrator on the ground that the dispute was not arbitrable.[109] The court indicated that the union should have sought a court order compelling the company to follow the contractually agreed-upon procedures. In another case where the contract called for an arbitration panel of three members and the dispute over damages for breach of a no-strike clause had resulted in an award by a single arbitrator, the court held that a factual question was presented as to whether the union had agreed to a single arbitrator or had waived its right to object.[110] If the union had not agreed to the procedure or waived its right to object, then the single arbitrator had no authority to issue the award.

An award against a labor organization was confirmed where the arbitrator had not issued it within the 30-day period after the close of the hearing required by the collective bargaining agreement, the court holding that the union waived any claim regarding timeliness by its failure to object prior to the issuance of the award and there was no showing that it suffered any prejudice by the delay.[111] Also, a court refused to overturn an award and remand it to the arbitrator where he issued his decision before the timely filing of the union brief, since the brief added nothing to the testimony or evidence before the arbitrator and the transcript revealed that the arbitrator had full benefit of the positions of both parties.[112]

Defenses to the enforcement or confirmation of an award based upon bias or partiality of the arbitrator or his disregard of the law or evidence presented in the arbitration hearing are difficult

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[109] *Sam Kane Packing Co.* v. *Meat Cutters Local 171,* 477 F.2d 1128, 83 LRRM 2298 (5th Cir. 1973).

[110] *Meat Cutters Local 195* v. *Cross Bros. Meat Packers, Inc.,* 84 LRRM 2144 (E.D.Pa. 1973).

[111] *Petroleum Workers* v. *Standard Oil Co.,* 83 LRRM 3114 (C.D.Calif. 1973); see also, regarding refusal of a continuance, *Machinists Local 701* v. *Holiday Oldsmobile,* 356 F.Supp. 1325, 84 LRRM 2200 (N.D.Ill. 1972).

[112] *Local 139, Glass Bottle Blowers* v. *Anchor Hocking Corp.,* 361 F.Supp. 514, 84 LRRM 3000 (W.D.Pa. 1973).

to establish.[113] The courts are not always consistent as to how detailed the arbitration opinion itself must be to prevent a remand for further clarification of the award.[114] It is not uncommon for an arbitrator to clarify his award, especially as to the remedy, upon his own motion or pursuant to the remand of a court, and the Fifth Circuit has indicated that the preferable procedure is for clarification problems to be handled by the same arbitrator rather than being litigated in a separate arbitration proceeding before a new arbitrator.[115]

B. Enforcement or Vacation of Awards

Where a collective bargaining agreement provides that the determination of the arbitrator is final and binding and the arbitrator did not show any manifest disregard for the terms of the agreement in reaching his decision, then his award is entitled to enforcement by the court without review on its merits or going behind the award itself.[116] For example, an arbitrator's decision finding that an employer had violated a settlement agreement by transferring assets to a contractor who then went out of business and awarding extensive damages to the union was enforced by the Fifth Circuit, the court holding that it cannot review the merits of the award, even in deciding the question of arbitrability, nor can it attempt to interpret the collective bargaining agreement, even though its interpretation of the agreement might be different or it might disagree with the arbitrator's fact-findings.[117] In appropriate circumstances where irreparable harm

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[113] *Machinist Local 701* v. *Holiday Oldsmobile, supra* note 111; *Brewery Workers Joint Board, IBT* v. *P. Ballentine & Sons,* 83 LRRM 2712 (D.N.J. 1973); *Textron, Inc., Bell Aerospace Co. Div.* v. *Local 516, UAW,* 356 F.Supp 354, 82 LRRM 2970 (W.D.N.Y. 1973) (only reported case found that clearly involved tripartite arbitration during the past year).

[114] Compare *N. New York Builders Exch., Inc.* v. *Gordon,* 141 A.D.2d 25, 341 N.Y.S.2d 714, 83 LRRM 2017 (N.Y.App. Div. 1973), with *Hillside Housing Corp.* v. *Local 32-E, Service Employees,* 40 A.D.2d 795, 82 LRRM 2751 (N.Y.App.Div. 1972).

[115] *Newspaper Guild Local 25* v. *Hearst Corp.,* 481 F.2d 821, 82 LRRM 2728 (5th Cir. 1973); see also *Electrical Workers, IUE* v. *Peerless Pressed Metal Corp.,* 489 F.2d 768, 82 LRRM 3089 (1st Cir. 1973); *Teamsters Local 25* v. *Penn Transp. Corp., supra* note 107.

[116] *Schlesinger* v. *Service Employees Local 252,* 367 F.Supp. 760, 84 LRRM 2910 (E.D.Pa. 1973); *Frick* v. *American Oil Co.,* 83 LRRM 3099 (E.D.Pa. 1973); *Local 1164, Automobile Workers* v. *Allis-Chalmers Mfg. Co.,* 360 F.Supp. 552, 83 LRRM 2985 (E.D.Wis. 1973); *Bakery Workers Local 464* v. *Stroehmann,* 82 LRRM 2737 (E.D.Pa. 1972) (good statement of the legal principles involved); but see the case discussed in connection with note 104, *supra;* see also under the RLA, *Skidmore* v. *NRAB,* 85 LRRM 2429 (E.D.N.Y. 1973).

[117] *Asbestos Workers Local 66* v. *Leona Lee Corp.,* 489 F.2d 1032, 85 LRRM 2446 (5th Cir. 1974), *aff'g* 84 LRRM 2165 (W.D.Tex. 1973).

may result, a court may grant an injunction requiring compliance with an arbitration award.[118] Upon entering an order enforcing an arbitration award, the court may in its discretion add interest or assess attorney fees where no justification is found for the defendant's delay in complying with the award.[119]

Only where the arbitrator exceeds his authority by going outside of the record or ignores contract language may an award be vacated.[120] A party may be barred from asserting a claim before the court or from obtaining a remand where the defense in question was not raised before the arbitrator.[121] The court may clarify those issues which could not be raised before the arbitrator or a court in a prior proceeding, but where a party has had full and fair opportunity to present his claims in the arbitration or prior court proceeding, the award or decision may be *res judicata* in another court or administrative proceeding.[122]

An award against an employer does not entitle the union to join the employer association as party to an action to enforce the award absent a showing that the association owed the union any duty stemming from the award.[123] A failure on the part of a party to take timely action to vacate an award may result in dismissal of his action under the local statute of limitations.[124] Where an award is issued in one forum or federal jurisdiction and the plant involved is in a second forum, conflicts may arise as

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[118] *New Orleans Steamship Assn.* v. *Local 1418, ILA.*, 474 F.2d 1345, 84 LRRM 2300 (5th Cir. 1972); *Longshoremen Local 34* v. *Cargill, Inc.*, 357 F.Supp. 608, 84 LRRM 2134 (N.D.Calif. 1973).

[119] *Meat Cutters Local 81* v. *B-W-C Corp.*, 84 LRRM 2571 (W.D.Wash. 1973); *Teamsters Local 446* v. *Marathon County Farmers Co-op*, 83 LRRM 2995 (W.D.Wis. 1973); *Air Line Pilots Assn.* v. *Capitol Airways, Inc.*, 83 LRRM 2169 (S.D.N.Y. 1973).

[120] *Electronics Corp.* v. *Local 272, IUE, supra* note 104; *Timken Co.* v. *Local 1123, Steelworkers*, 482 F.2d. 1012, 83 LRRM 2814 (6th Cir. 1973); *Champaign Bd. of Ed.* v. *Champaign Ed. Assn.*, 304 N.E.2d 138, 85 LRRM 2041 (Ill.App. 1973).

[121] *Newspaper Guild Local 35* v. *Washington Post Co.*, 367 F.Supp. 917, 84 LRRM 3003 (D.D.C. 1973); *Machinists Local 701* v. *Holiday Oldsmobile, supra* note 111.

[122] Compare *Driscoll* v. *Humble Oil Co.*, 60 FRD 230, 85 LRRM 2237 (S.D.N.Y. 1973), with *Driscoll* v. *Exxon Corp.*, 366 F.Supp. 992, 85 LRRM 2240 (S.D.N.Y. 1973); see as to an arbitration award being *res judicata* in employee action under the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. 411, *Glasser* v. *Musicians*, 354 F.Supp. 1, 83 LRRM 2002 (S.D.N.Y. 1973).

[123] *Local 1852 Longshoremen* v. *Amstar Corp.*, 363 F.Supp. 1026, 84 LRRM 2815 (D.Md. 1973) (possible conflict of award with NLRB law discussed).

[124] *Teamsters Local 249* v. *Motor Freight Express, Inc.*, 356 F.Supp. 724, 82 LRRM 3110 (W.D.Pa. 1973).

to which forum is appropriate for an action to enforce or vacate the award.[125]

V. Specialized Problems Cognizable Under 301

A. Existence of Contract and Jurisdiction Under 301

Questions often arise as to whether there is in existence a contractual obligation upon which a 301 action may be predicated. Thus, one court held that it had no jurisdiction to enforce individual contracts between employees and the employer, even though the union approved of the contracts.[126] The court held that the approval of the union removed the taint of illegality from the individual contracts, but there was nothing in the collective bargaining agreement itself that could be construed as incorporating the individual contracts by reference. In another case, however, a contract between an employer and an employee who was an orchestra leader in the Musicians Union was held to be enforceable under 301, where the employee in question had apparent authority to bind the union and purported to act for its members.[127] The national agreement of a company was held not to apply to its subsidiary, where the subsidiary had an independent contract with the union and was not the alter ego of the parent company.[128] The Tenth Circuit remanded a case to the district court to determine the validity of a contract between a local union and a contractors association where the validity of the contract was questioned under the economic stabilization program and where there was a question whether the contract violated the rules and policies of the parent union.[129] A memorandum of understanding that incorporates all terms and is placed in effect between the parties may be the basis of a 301 action enjoining a union strike and requiring arbitration of the dispute, even though the collective bargaining agreement has not been put in final language.[130]

Where consistent with the past practice of the parties, a court

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[125] *White Motor Corp.* v. *UAW*, 491 F.2d 189, 85 LRRM 2373 (2d Cir. 1974), *aff'g* 365 F.Supp. 314, 84 LRRM 2532 (S.D.N.Y. 1973).

[126] *Local 67, Brewery Workers* v. *Duquesne Brewing Co.*, 354 F.Supp. 1033, 82 LRRM 2801 (W.D.Pa. 1973).

[127] *Musicians Local 336* v. *Bonatz*, 475 F.2d 858, 82 LRRM 2962 (3d Cir. 1973).

[128] *Automobile Workers* v. *Eltra Corp.*, 83 LRRM 3069 (E.D.Mich. 1973).

[129] *Gordon* v. *Laborers*, 490 F.2d 133, 84 LRRM 2952 (10th Cir. 1973).

[130] Compare *Harmony Dairy Co.* v. *Local 205, Teamsters*, 82 LRRM 2773 (W.D.Pa. 1972), with *Local 21, Longshoremen* v. *Reynolds Metals Co.*, 487 F.2d 696, 84 LRRM 2859 (9th Cir. 1973).

has enforced an arbitration award based upon union work rules attached to a collective bargaining agreement, even though the rules were not signed by the union representative as required by the contract, the court finding that the parties had orally demonstrated their intention to be bound by the rules.[131] In another case, a union was held to be bound by a release from a collective bargaining agreement signed by its lawyer and recording secretary.[132] A union was denied breach-of-contract damages against an employer for assigning work to a second labor organization rather than to the plaintiff union, the court holding that the plaintiff union was not a third-party beneficiary to the contract of the employer with the second union which required the employer to recognize and observe craft jurisdictional practices.[133] The court further held that no implied contract could be created by a long-standing practice of the construction industry in assigning work in accordance with the jurisdictional agreements between the various trade unions.

Questions also arise as to the validity of oral agreements between an employer and a union. It is usually held under the parol evidence rule that while extrinsic evidence cannot be used to vary the terms of a written contract unless necessary to resolve an ambiguity, an oral agreement may be enforceable if it is found as a matter of fact to be a separate agreement not integrated in a written contract.[134] Thus, in one case the court held that there was no parol condition on a collective bargaining agreement, in a dispute concerning unpaid trust fund contributions, and that a certain subcontract be obtained.[135] In another case a union enforced an oral contract that required the employer to give it the same wage rates that the employer may negotiate with certain other labor organizations.[136]

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[131] *Daniel Constr. Co. v. Teamsters Local 991*, 364 F.Supp. 731, 84 LRRM 2486 (S.D.Ala. 1973).

[132] *Teamsters Local 5 v. Foodtown Pharmacies, Inc.*, 84 LRRM 2453 (M.D.La. 1973).

[133] *Local 11, IBEW v. C. W. Driver, Inc.*, 82 LRRM 2800 (C.D.Calif. 1972).

[134] Compare *Bakery Workers Local 12-B v. A & P Co.*, 357 F.Supp. 1322, 83 LRRM 2216 (W.D.Pa. 1973), with *DeVore v. Weyerhaeuser Co.*, 85 LRRM 2454 (Ore.Sup. Ct. 1973); see also *Daniel Constr. Co. v. Teamsters Local 991, supra* note 131.

[135] *Lee Washington, Inc. v. Washington Health & Welfare Trust*, 310 A.2d 604, 84 LRRM 2604 (D.C.App. 1973).

[136] *Cooperative Street Ry. Shop Employees Assn. v. New Orleans Public Service Inc.*, 353 F.Supp. 1100, 82 LRRM 3007 (E.D.La. 1972).

It is clear that under 301 there is jurisdiction of only the labor organization itself and not its officers or members.[137] One recent case held that the court had jurisdiction under 301 of an action by former union employees against their union employer for certain benefits where the obligation stemmed from a vote of the union membership to extend to union employees all benefits to which the members became entitled under collective bargaining agreements, the court holding that the interpretation of the agreements was necessary in order to determine the benefits to which the union employees may be entitled.[138] It was held by the Seventh Circuit that federal courts have no subject matter jurisdiction under 301, or any other basis, of a suit by U. S. government employees against a union for wrongful expulsion.[139]

B. Breach of Contract and Damage Actions

Section 301 actions are frequently based on a straight breach-of-contract theory seeking damages or other relief. To sustain such an action there must be a contract in effect, as illustrated by the dismissal of an employee action for breach of contract against their employer where the court found that before the alleged violations occurred the contract had been terminated by the notices necessary to initiate negotiations on a new contract.[140] Further, the plaintiff must have exhausted any available contractual grievance procedures or remedies.[141] There must also be a contractual provision that has been violated. Thus, where a union sought damages for the closing of a business in midcontract, the court found no contractual provision limiting the employer's right to close the business and no ambiguity in the contract permitting the introduction of extrinsic evidence to vary its terms, and therefore dismissed the union's action.[142] Sometimes a declaratory judgment in regard to the legality of a contract clause is

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[137] *Central Operating Co.* v. *Utility Workers Local 426*, 491 F.2d 244, 85 LRRM 2334 (4th Cir. 1974); *Sackett* v. *Wyatt*, 32 Cal.App.3d 592, 85 LRRM 2107 (1973); see also cases cited *supra* note 61.

[138] *Seria* v. *Steelworkers Local 302*, 85 LRRM 2199 (W.D.Pa. 1973).

[139] *Stevens* v. *Carey*, 483 F.2d 188, 84 LRRM 2054 (7th Cir. 1973).

[140] *Rae* v. *United Parcel Service of Pa.*, 356 F.Supp. 465, 83 LRRM 2095 (E.D.Pa. 1973).

[141] *Local 368, IUE* v. *Western Elec. Co.*, 359 F.Supp. 651, 83 LRRM 2422 (D.N.J. 1973); see also cases cited in notes 27 through 31, 36 through 39, 64, and 94, *supra*.

[142] *Bakery Workers 12-B* v. *A & P Co.*, *supra* note 134.

sought,[143] or specific performance of a contract, combined with injunctive relief, in either federal or state courts.[144]

Most of the breach-of-contract actions reported involve an employer seeking damages for a union's breach of an express or implied no-strike clause in a collective bargaining agreement. Such actions are against the labor organization and not against individual union officers,[145] and the contract must be in effect when the strike took place.[146] An oral agreement is not sufficient to sustain such an action where the employer failed to make the changes required to implement the contract as a prerequisite to its effectiveness, thereby making the written contract grievance procedure and no-strike clause ineffective.[147] A union was held liable for breach of a no-strike clause of an association contract where it failed to submit to the contract grievance procedure the issue of whether the struck employer was an alter ego of the signatory employer or a separate and distinct employer.[148] The Third Circuit held in a split decision that a district court erred by staying an employer action for damages for breach of a no-strike clause pending arbitration, where the grievance procedure of the contract was not susceptible of a construction that the parties were bound to arbitrate employer grievances where under the contract the initiative in processing grievances is with the union.[149]

The courts uniformly hold that the employer's breach of the contract or the failure to comply with a grievance settlement does not justify the union's breach of a no-strike clause.[150] In granting damages for breach of an implied no-strike clause, a court has refused an injunction against future strikes where there was no

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[143] *Mobil Oil Corp.* v. *Oilworkers,* 483 F.2d 603, 83 LRRM 3046 (5th Cir. 1973).

[144] *Engineers & Scientists of Cal., MEBA* v. *Pacific Gas & Elec. Co.,* 84 LRRM 2986 (N.D.Calif. 1973); see also, regarding state court jurisdiction, *Philadelphia Marine Trade Assn.* v. *Local 1291, ILA,* 302 A.2d 98, 84 LRRM 2300 (Pa.Sup.Ct. 1973); *cf. Ralph's Grocery Co.* v. *Meat Cutters Local 421,* 84 LRRM 2023 (C.D.Calif. 1973) (remand to state court).

[145] *Central Operating Co.* v. *Utility Workers Local 426, supra* note 137.

[146] *Motor Carrier Council of St. Louis* v. *Local 600, Teamsters,* 486 F.2d 650, 85 LRRM 2097 (8th Cir. 1973).

[147] *Metro Distributors, Inc.* v. *Local 372, Teamsters,* 85 LRRM 2211 (E.D.Mich. 1973).

[148] *Keeton-King Contractors* v. *Carpenters Local 1277,* 85 LRRM 2297 (D.Ore. 1973).

[149] *Affiliated Food Distributors, Inc.* v. *Local 229, Teamsters,* 483 F.2d 418, 84 LRRM 2043 (3d Cir. 1973); see also cases cited *supra* note 96.

[150] *Peggs Run Coal Co.* v. *District 5, Mine Workers,* 475 F.2d 1396, 85 LRRM 2161 (3d Cir. 1973); *Gonzales Road Boring, Inc.* v. *Local 701, Operating Engineers,* 85 LRRM 2075 (D.Ore 1973).

present dispute between the employer and the union.[151] Damages may be assessed against a union where its members honored the picket line established by fellow union members seeking to organize the employees of an independent contractor in the plant.[152] Where the union defends on the basis that the strike was unauthorized, the test is most frequently whether the union fulfilled its contractual duty to use "every reasonable means" to end the wildcat strike, and its belated disavowal of the strike may not be sufficient to relieve it of liability.[153] The damages in such actions, including the legal expenses incurred in bringing the unlawful strike to an end, can be quite extensive, although the court will deny punitive damages based upon the misconduct of the union unless there is clear proof of actual participation in or ratification of the tortious conduct.[154]

Breach-of-contract actions sometimes involve suits between labor organizations or their officers. Courts have, for example, taken jurisdiction of actions by local union officers against their international union for breach of the union constitution regarding such matters as removal of officers, trusteeships over local unions, consolidation of locals, and revocation of charters.[155] A court denied a damage action filed by one labor organization against another labor organization for breach of a no-raid agreement, the court holding that the action was barred where the defendant had filed a representation petition with the NLRB.[156] The court, therefore, deferred to the superior authority of the Board in representation matters.

C. Trust and Pension Fund Cases

During the past year a marked increase in litigation involving various trust funds handling health, welfare, and pension pro-

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[151] *Consolidation Coal Co.* v. *Mine Workers Local 6869,* 362 F.Supp. 1073, 84 LRRM 2091 (S.D.W.Va. 1973).

[152] *Firestone Tire & Rubber Co.* v. *Rubber Workers Local 887,* 84 LRRM 2741 (M.D.Ga. 1973).

[153] *Adley Express Co.* v. *Local 107, Teamsters,* 365 F.Supp. 769, 85 LRRM 2153 (E.D.Pa. 1973); *Penn Packing Co.* v. *Meat Cutters Local 195,* 85 LRRM 2022 (E.D.Pa. 1973); *Wagner Electric Co.* v. *Local 1104, IUE,* 361 F.Supp. 647, 84 LRRM 2512 (E.D.Mo. 1973).

[154] *Dow Chemical Co.* v. *IUE,* 480 F.2d 438, 83 LRRM 2417 (5th Cir. 1973) (judgment for almost $300,000).

[155] *Plentty v. Laborers,* 83 LRRM 2328 (E.D.Pa. 1973); *Local 853, Carpenters* v. *Carpenters,* 83 LRRM 2759 (D.N.J. 1972).

[156] *Local 1547, IBEW* v. *Local 959, Teamsters,* 361 F.Supp. 1006, 83 LRRM 2785 (D.Alas. 1973).

grams was reported, although Section 301 was not always the jurisdictional basis for such litigation. For example, cases arose under the Welfare and Pension Plans Disclosure Act,[157] the Labor-Management Reporting and Disclosure Act,[158] diversity of citizenship,[159] and as declaratory judgment actions.[160] Jurisdiction under 301 was denied where trustees of a fund sued the subcontractor and an insurance company that had signed a labor and material bond, since the controversy centered on the provisions of the bond rather than on a collective bargaining agreement.[161] Jurisdiction under 301 was also denied to a union member who sued the pension fund trustees regarding the denial of a disability pension where the denial involved only a medical judgment that the plaintiff was not disabled, rather than a question regarding the interpretation and enforcement of the member's rights under the collective bargaining agreement.[162] Most of the cases involve suits for contributions or construction of the agreement setting up the trust fund,[163] or suits by employees who have been denied a particular trust fund benefit.[164]

It has generally been held that there is jurisdiction under 301 where trustees of a fund are suing for an accounting or unpaid contributions, since they are the real parties in interest in attempting to vindicate individual employee rights arising under a collective bargaining agreement, and the union is held not to be an indispensable party to such actions.[165] The trustees are con-

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157 *Phillips* v. *Unity Welfare Assn.*, 83 LRRM 2789 (E.D.Mo. 1973).

158 *Pignotti* v. *Sheet Metal Workers Local 3*, 477 F.2d 825, 83 LRRM 2081 (8th Cir. 1973).

159 *Scheuer* v. *Central States Pension Fund*, 358 F.Supp. 1332, 83 LRRM 2662 (E.D.Wis. 1973).

160 *Brune* v. *Morse*, 475 F.2d 433, 82 LRRM 2965 (8th Cir. 1973); *Hayes* v. *Morse*, 474 F.2d 1265, 82 LRRM 2853 (8th Cir. 1973); *Napier* v. *Firemen's Assn. of Chicago*, 83 LRRM 2073 (Ill. App. 1973).

161 *Martin* v. *Parkhill Pipeline, Inc.*, 364 F.Supp 474, 84 LRRM 2752 (N.D.Ill. 1973).

162 *Austin* v. *Calhoun*, 360 F.Supp. 515, 84 LRRM 2449 (S.D.N.Y. 1973).

163 See *Teamsters Local 688* v. *Crown Cork & Seal Co.*, 488 F.2d 738, 85 LRRM 2060 (8th Cir. 1973), *rev'g* 352 F.Supp. 485, 82 LRRM 2865 (E.D.Mo. 1972); *Mangum* v. *A-1 Painting Contractors*, ... F.2d ...., 83 LRRM 2209 (4th Cir. 1973); *Local 174, Automobile Workers* v. *Anaconda American Brass Co.*, 475 F.2d 682, 82 LRRM 3033 (6th Cir. 1973); *Papermakers* v. *Penntech Papers Co.*, 360 F.Supp. 236, 83 LRRM 2687 (W.D.Pa. 1973); *Thomas* v. *Blue Coal Co.*, 355 F.Supp. 510, 83 LRRM 2275 (M.D.Pa. 1973).

164 See, for example, *Blankenship* v. *Mine Workers Welfare Fund*, 82 LRRM 3071, 3073 (D.D.C. 1973); *Baake* v. *General American Transp. Corp.*, 352 F. Supp 692, 82 LRRM 3135 (N.D.Ill. 1972).

165 *Owen* v. *One Stop Food & Liquor Store, Inc.*, 359 F.Supp 342, 83 LRRM 2529, 84 LRRM 2139 (N.D.Ill. 1973); *Riordan* v. *One Stop Food & Liquor Store, Inc.*, 85 LRRM 2427 (N.D.Ill. 1974).

sidered independent of control by the union and, therefore, the union's failure to exhaust remedies under the collective bargaining agreement is not a bar to the action by the trustees or by employees under the trust agreement.[166] However, where the trust agreement involved provides for arbitration of disputes, then such procedure must be utilized; and if such procedure leads to a final and binding decision, then such determination may bar further court action.[167]

Where the retirement plan in question was part of a collective bargaining agreement requiring arbitration of any differences, a district court rejected the argument of the union that retirees are not employees under the Supreme Court's *Pittsburgh Plate Glass*[168] decision and, therefore, were not bound by the arbitration provisions of the collective bargaining agreement. The court held that the *Pittsburgh Plate Glass* case applied only to unfair labor practice cases under the LMRA and not to breach-of-contract cases under Section 301.[169] An arbitrator, pursuant to the submission agreement, also has petitioned a federal court for a ruling on the legality of certain trust fund payments under Section 302 of the LMRA.[170] A court also has issued an injunction regarding the establishment of a pension plan where an employer unreasonably refused to observe a contract provision calling for it to agree upon a neutral party to administer the fund in accordance with Section 302.[171]

VI. Arbitration and the NLRB

A. Court Decisions Upholding NLRB Deferral to Arbitration

The NLRB's policy of deferring decision in cases involving the interpretation of a collective bargaining agreement until contractual remedies have been exhausted (*Collyer* doctrine), and thereafter deferring to arbitrators' awards where they have decided the

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[166] *Hammil* v. *Hoover Ball & Bearing Co., Stubnitz Spring Div.*, 85 LRRM 2231, 2235 (E.D.Pa. 1973); *Wishnick* v. *One Stop Food & Liquor Store, Inc.*, 359 F.Supp 239, 83 LRRM 2471, 84 LRRM 2137 (N.D.Ill. 1973).

[167] *Castro* v. *NYSA-ILA GAI Trust Fund*, 84 LRRM 2797 (S.D.N.Y. 1973); *Crawford* v. *Cianciulli*, 357 F.Supp. 357, 83 LRRM 2228 (E.D.Pa. 1973).

[168] *Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 78 LRRM 2974 (1971).

[169] *Pottery Workers* v. *Celotex Co.*, 84 LRRM 3007 (D.D.C. 1973).

[170] *In re Outside Tape Fund*, 478 F.2d 374, 83 LRRM 2410 (2d Cir. 1973).

[171] *Local 1669, United Transportation Union* v. *Safeway Trails, Inc.*, 84 LRRM 2111 (D.D.C. 1973).

statutory issue and the arbitration proceedings are found to have been fair and regular (*Spielberg* doctrine), has been approved during the past year by two different federal courts of appeal. While the impact on the NLRB's deferral policy by reason of the recent Supreme Court decision in *Alexander* v. *Gardner-Denver,* discussed above,[172] is at this time unknown, there is nothing in the Supreme Court decision or that of the appellate courts upholding the NLRB policy to indicate that the policy is in any imminent danger. As noted by the appellate courts upholding deferral to arbitration by the NLRB, the NLRA explicitly encourages the friendly adjustment of industrial disputes. This may provide the rationale distinguishing the permissible deferral of unfair labor practice charges under the NLRA from the reluctance of the courts to permit a similar deferral policy in civil rights actions under Title VII of the Civil Rights Act of 1964.

In *Nabisco, Inc.* v. *NLRB,*[173] the first of the appeals court decisions upholding NLRB deferral, the Second Circuit held in a case involving a union's alleged refusal to bargain that there was no abuse in discretion by the NLRB deferring to the contractual grievance procedure and retaining jurisdiction pending submission of the dispute to arbitration in the event the dispute was not resolved. The arbitration clause in the *Nabisco* case was not necessarily mandatory, but arbitration was required only upon a majority vote of a joint committee. More recently, in *Associated Press* v. *NLRB,*[174] the District of Columbia Court of Appeals held that the NLRB properly deferred a case under *Collyer,* and thereafter applied its *Spielberg* doctrine to the arbitrator's award, in a case involving the revocation by employees of their dues check-off authorizations to the union pursuant to Section 302 of the LMRA. The court and the NLRB concluded that the arbitrator's reasonable interpretation of Section 302 was not inconsistent with either the fundamental purposes or the specific provisions of the sections of the NLRA which it is the duty of the NLRB to implement. The court rejected a claim that the award was not binding on the employees because the union was hostile to their position and because they were not a party to the arbitration pro-

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[172] The cases are cited in notes 2 and 10, *supra.*

[173] *Nabisco, Inc.* v. *NLRB,* 479 F.2d 770, 83 LRRM 2612 (2d Cir. 1973).

[174] *Associated Press* v. *NLRB,* 492 F.2d 662, 85 LRRM 2440 (D.C.Cir. 1974) (see footnote 24 of this case for the citation of other cases where courts have acknowledged the *Collyer* doctrine with apparent approval).

ceeding. The court held that the employer had fully and adequately defended the position of the employees at the arbitration hearing. It should be noted that in reaching his decision, the arbitrator was required to construe provisions of the LMRA, especially Section 302, in addition to the check-off authorizations and the collective bargaining agreement.

The refusal of the NLRB to defer to arbitration was upheld during the past year by a decision of the Third Circuit, which found no error in the NLRB's refusing to defer to an arbitrator's award that certain employer bonuses were gifts and could be unilaterally discontinued.[175] The court held with the NLRB that the arbitrator's finding ignored a long line of Board and court precedent that bonuses may be considered as an element of wages. The NLRB itself refused to extend its deferral policy to a situation where an employer denied it was bound by a collective bargaining agreement and asked that the NLRB decline to assert its jurisdiction in the unfair labor practice proceeding in order to leave the union to its court remedies under Section 301 for breach of the alleged contract.[176]

B. NLRB Deferral Decisions

The *Spielberg* situations where the NLRB defers to an existing award of an arbitrator or joint committee are much less frequent than the pre-arbitration deferral cases.[177] Such awards are binding only on those employees whose grievances were involved in the arbitration proceeding or the employers who were actually parties to the proceeding.[178] In one case the NLRB deferred to both an award of an arbitrator and a decision of a Colorado civil rights tribunal.[179] The NLRB may refuse to defer to an award involving an employee grievance where the record reveals that the union is involved in the discrimination against the employee, or there is personal antagonism or hostility by union officials

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[175] *Ryder Technical Institute* v. *NLRB*, 488 F.2d 457, 84 LRRM 2794 (3d Cir. 1973).

[176] *Washington Refrigeration Service Co.*, 206 NLRB No. 130, 84 LRRM 1639 (1973).

[177] See, for example, *Independent Printing Co.*, 206 NLRB No. 34, 84 LRRM 1207 (1973); *National Radio Co.*, 205 NLRB No. 112, 84 LRRM 1105, 1226 (1973); *Roadway Express, Inc.*, 203 NLRB No. 25, 83 LRRM 1149 (1973); *McLean Trucking Co.*, 202 NLRB No. 102, 82 NLRB 1652 (1973).

[178] See *Retail Clerks Local 324* (Esgrow, Inc), 206 NLRB No. 103, 84 LRRM 1431 (1973); *United Parcel Service, Inc.*, 205 NLRB No. 63, 84 LRRM 1098 (1973).

[179] *Adolph Coors Co.*, 208 NLRB No. 94, 84 LRRM 1127 (1974).

toward the employee, or the union has taken a position adverse to the employee's grievance.[180]

Since the decision of the NLRB to defer to arbitration in *Collyer* situations is discretionary and the present policy is upheld by only a bare majority of the five-member Board, it is not always predictable when the NLRB will or will not defer to arbitration in a given case. For example, one case during the past year involving alleged unilateral action by an employer resulted in a decision reversing a prior decision of the Board to defer to arbitration.[181] The Board held in its second decision that the contract clause involved was clear and unambiguous and did not authorize the employer's action, so that the special competence of an arbitrator was not required to determine the contract's meaning. Thus, the Board will not defer where there is no question of contract interpretation, or where statutory rather than contract rights are involved, such as a union's request for information needed to process grievances.[182]

There will be no deferral in cases involving the repudiation of a contract by one of the parties,[183] or where the violation exhibits a rejection of the collective bargaining principle and strikes at the foundation of the grievance and arbitration mechanisms upon which the *Collyer* doctrine relies, such as a discharge for refusal to abandon a grievance.[184] The NLRB will reassert jurisdiction after deferral to the arbitral process where an employer has failed to comply with the grievance-arbitration procedures, such failure being held to be a repudiation of the employer's obligation to bargain in good faith.[185] The Board also refuses to defer to arbitration in cases where the employer refuses to waive procedural defenses, such as the expiration of time limits to proceed to

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[180] *Longshoremen & Warehousemen Local 27* (Port Angeles Labor Committee), 205 NLRB No. 142, 84 LRRM 1546 (1973); *Motor City Electric Co.*, 204 NLRB No. 77, 83 LRRM 1567 (1973); *T.I.M.E.-DC, Inc.*, 203 NLRB No. 174, 83 LRRM 1509 (1973).

[181] *Oak Cliff-Golman Baking Co.*, 207 NLRB No. 138, 85 LRRM 1035 (1973), *rev'g* 202 NLRB No. 72, 82 LRRM 1688.

[182] *American Standard, Inc.*, 203 NLRB No. 169, 83 LRRM 1245 (1973); *TRW, Inc., United-Carr Div.*, 202 NLRB No. 112, 82 LRRM 1795 (1973).

[183] *Communication Workers* (Western Electric Co.), 204 NLRB No. 94, 83 LRRM 1583 (1973); *Mountain State Constr. Co.*, 203 NLRB No. 167, 83 LRRM 1208 (1973).

[184] *North Shore Pub. Co.*, 206 NLRB No. 7, 84 LRRM 1165 (1973); *cf. Square D Co.*, 204 NLRB No. 14, 83 LRRM 1293 (1973).

[185] *Medical Manors, Inc.*, 206 NLRB No. 124, 84 LRRM 1421 (1973).

arbitration.[186] However, the employer's failure to give an answer to a grievance at the third step was held by the Board not to be a refusal on the part of the employer to recognize existing grievance procedures so as to prevent deferral of the union's charge.[187]

There will be no deferral in cases involving the question as to whether a contract exists, or the question whether the alleged violation related to any collective bargaining agreement in effect.[188] Similarly, there will be no deferral in a case where the union has been decertified after commencement of the dispute,[189] or where an employer affected by the decision is not a party to the arbitration proceeding,[190] or where the grievance procedure under the contract became effective after the alleged unfair labor practice occurred.[191] In one case, the Board refused to defer to arbitration where the contractual arbitrator, the commissioner of the National Football League, was held not to be a "disinterested party" to the events involved in the unfair labor practice charge.[192]

The NLRB holds that it is its obligation to determine whether employees constitute an accretion to an existing bargaining unit and refuses to defer to arbitration when such issues are presented.[193] Also, in work assignment or unit placement disputes involving two or more unions, the Board will normally refuse to defer to arbitration unless all parties agree to be bound by tripartite arbitration.[194] As an example of the Board's retained authority over representation matters, it clarified a unit in favor of one union despite the claim of a second union, and even

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[186] *Bunker Hill Co.*, 208 NLRB No. 17, 85 LRRM 1264 (1973); *Detroit Edison Co.*, 206 NLRB No. 116, 84 LRRM 1385 (1973).

[187] *Jemco, Inc.*, 203 NLRB No. 32, 83 LRRM 1045 (1973).

[188] *Teamsters Local 85* (Tyler Bros. Drayage Co.), 206 NLRB No. 59, 84 LRRM 1641 (1973); *Reapp Typographic Service, Inc.*, 204 NLRB No. 122, 83 LRRM 1604 (1973).

[189] *Seng Co.*, 205 NLRB No. 36, 83 LRRM 1577 (1973).

[190] *Retail Clerks Local 1100* (White Front San Francisco), 203 NLRB No. 79, 83 LRRM 1145 (1973).

[191] *U.S. Postal Service*, 202 NLRB No. 119, 82 LRRM 1641 (1973).

[192] *National Football League*, 203 NLRB No. 165, 83 LRRM 1203 (1973).

[193] *Germantown Development Co.*, 207 NLRB No. 97, 84 LRRM 1495 (1973); *Westinghouse Electric Corp.*, 206 NLRB No. 113, 84 LRRM 1580 (1973); see also *Local 1547, IBEW* v. *Local 959, Teamsters, supra* note 156.

[194] *Pacific Northwest Bell Tel. Co.*, 207 NLRB No. 9, 84 LRRM 1398 (1973); *Pulitzer Pub. Co.*, 203 NLRB No. 105, 83 LRRM 1177 (1973); *Packerland Packing Co.*, 203 NLRB No. 39, 83 LRRM 1084 (1973); see also *Textron, Inc.* v. *Local 517, UAW, supra* note 113.

though the second union had a conflicting arbitration award that it was attempting to enforce in court.[195] The Sixth Circuit Court of Appeals refused an injunctive request from a labor organization attempting to enjoin an employer from pursuing a unit clarification before the NLRB and to compel arbitration of the dispute, the court holding that the authority of the NLRB in representation matters should not be interfered with by the injunctive process.[196]

The matter of deferral to arbitration is an affirmative defense that must be established by the respondent by pleading and proving the appropriate facts, and the NLRB will not defer where the issue was not litigated at the hearing but is raised for the first time on exceptions to the recommended order of an administrative law judge.[197] Deferral under *Collyer* frequently involves employer unilateral action,[198] but also includes a wide range of other alleged violations of the NLRA, such as harassment of stewards,[199] union discipline of supervisors,[200] the protected concerted activity of employees,[201] and successorship problems.[202] Deferral is frequently not possible in cases filed by union members against their labor organization, since contract arbitration procedures are usually not applicable to such disputes.[203] Also, where the interests of the contracting union and the employee are not in substantial harmony, or there is apparent antagonism between the interests of the grieving employee and the parties to the collective bargaining agreement, then the NLRB will refuse

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195 *Crown Cork & Seal Co.*, 203 NLRB No. 29, 83 LRRM 1088 (1973).

196 *Communications Workers* v. *United Tel. of Ohio*, 478 F.2d 2224, 83 LRRM 2224 (5th Cir. 1973).

197 *Iron Workers Local 70* (Padgett Welding, Inc.) 206 NLRB No. 20, 84 LRRM 1201 (1973); *Nedco Constr. Corp.*, 206 NLRB No. 17, 84 LRRM 1205 (1973); *MacDonald Engineering Co.*, 202 NLRB No. 113, 82 LRRM 1646 (1973); *Asko, Inc.*, 202 NLRB No. 30, 82 LRRM 1498 (1973).

198 See, for example, *U.S. Postal Service*, 207 NLRB No. 5, 84 LRRM 1618 (1973); *Columbus & Southern Ohio Electric Co.*, 205 NLRB No. 33, 83 LRRM 1558 (1973); *J. Weingarten, Inc.*, 202 NLRB No. 69, 82 LRRM 1559 (1973).

199 *United Aircraft Corp.*, 204 NLRB No. 133, 83 LRRM 1411 (1973); *Todd Shipyards Corp.*, 203 NLRB No. 20, 83 LRRM 1104 (1973).

200 *Columbia Typographical Union No. 101* (Washington Post Co.), 207 NLRB No. 123, No. 124, No. 125, 85 LRRM 1018, 1021, 1023 (1973); *Pressmen's Union No. 6* (Washington Post Co.) 207 NLRB No. 126, 85 LRRM 1025 (1973).

201 *Tyee Constr. Co.*, 202 NLRB No. 34, 82 LRRM 1548 (1973).

202 *National Heat & Power Corp.*, 201 NLRB No. 150, 82 LRRM 1436 (1973).

203 *Seafarers* (Sea-Land Service, Inc.), 207 NLRB No. 150, 85 LRRM 1177 (1973); *Communications Workers Local 1197* (Western Elec. Co.), 202 NLRB No. 45, 82 LRRM 1530 (1973); *Lithographers Local 271* (U.S. Playing Card Co.), 204 NLRB No. 65, 83 LRRM 1459 (1973).

to defer to the arbitral process.[204] Thus, in one case the NLRB refused to defer to an existing arbitration award where it doubted the fairness of the award and noted that the union and the employee's interests were not fully aligned due to past differences.[205] But the Board in the same case refused to find that the union was guilty of unfair representation, noting that the employee had defended himself well at the grievance board hearing.

Despite its care to see that the rights of individual employees are protected, the NLRB has held that individual employees will not be permitted to thwart its deferral policy and it will defer to arbitration even though individual employees may oppose such deferral.[206] As illustrated by the recent *Magnavox* decision of the Supreme Court,[207] the Board in these and all similar cases involving the rights of individual employees must be careful not to dilute the NLRA-protected rights of employees to form, join, or assist labor organizations or to refrain from such activities if they so desire. The attempt to strike such a balance is evident in the various deferral decisions of the NLRB.

C. Other Decisions Related to the NLRA

The issue of NLRB jurisdiction is frequently raised in various types of court litigation under Section 301. In one case where an employer sought court relief under 301 for a union's breach of contract, the court refused to enjoin an NLRB unfair labor practice case filed by the union, holding that the jurisdiction of the court and the Board are concurrent and neither proceeding divests the other of jurisdiction.[208] A Florida court, however, refused to take jurisdiction of an action to enjoin a union's alleged violation of a no-strike clause where the strike was arguably an unfair labor practice, holding that the NLRB had jurisdic-

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[204] *Booth Services, Inc.*, 206 NLRB No. 132, 84 LRRM 1598 (1973); *Laborers Local 207* (A & E Constr. Co.), 206 NLRB No. 128, 84 LRRM 1474 (1973); *U.S. Steel Corp., American Bridge Div.*, 206 NLRB No. 48, 84 LRRM 1553 (1973); *Sabine Towing & Transp. Co.*, 205 NLRB No. 45, 84 LRRM 1275 (1973); *Machinists Lodge 68* (West Winds, Inc.) 205 NLRB No. 26, 84 LRRM 1030 (1973); *Jack Watkins, G.M.C.*, 203 NLRB No. 98, 83 LRRM 1295 (1973); *Anaconda Wire & Cable Co.*, 201 NLRB No. 125, 82 LRRM 1419 (1973).

[205] *Marin Dodge, Inc.*, 206 NLRB No. 87, 84 LRRM 1341 (1973).

[206] *Great Scott Supermarkets, Inc.*, 206 NLRB No. 111, 84 LRRM 1563 (1973).

[207] *Supra* note 13.

[208] *Independent Stave Co.* v. *Coopers Local 7*, 82 LRRM 3106 (W.D.Mo. 1973); see also in regard to representation cases, *Communications Workers* v. *United Tel. of Ohio, supra* note 196.

tion.[209] Similarly, a New Jersey court held that it had no jurisdiction of an action by a union member against the union and its officers for wrongful interference with his right of employment, since the matter was preempted under the LMRA.[210]

The NLRB itself has held that an alleged breach of the duty of fair representation on the part of a union can be an unfair labor practice and it will not defer such a charge to the EEOC where race was the basis of the alleged discrimination.[211] The District of Columbia Circuit Court of Appeals, however, ruled that the NLRB erred in dismissing a complaint regarding the discharge of two Negro employees who were picketing their employer alleging racial discrimination and who acted independently of the union and its grievance procedures.[212] The court held that because of Title VII of the Civil Rights Act, the concerted activity involved in the present case could not be treated like other types of concerted activity in determining whether the employees were protected by the LMRA.

The Seventh Circuit refused damages to a union regarding an employer's failure to apply its contract at a new plant pursuant to an arbitration award, where the award was made contingent by the arbitrator on an NLRB determination that the award was in conformity with the NLRA and where the Board found that the unit belonged to another labor organization.[213] In another case involving a union's attempt to apply its collective bargaining agreement in New York to a nonunion plant of the employer in California, the Second Circuit reversed a finding by the NLRB that the union did not violate the LMRA in its attempt to enforce a New York arbitration award and apply it to the California plant, where the award concerned the application to the California employees of wages and other nonrecognitional provisions set forth in the New York contract.[214] The court noted that the California employees were not an accretion to the New York

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[209] *Carpenters Dist. Council* v. *Waybright,* 279 So.2d 300, 83 LRRM 2033, 84 LRRM 2548 (Fla.Sup.Ct. 1973).

[210] *Zarelli* v. *Clement Masons Local 669,* 84 LRRM 3024 (N.J.App. 1973).

[211] *Painters Local 1066* (Siebenoller Paint Co.), 205 NLRB No. 110, 84 LRRM 1013 (1973); but see *EEOC* v. *McLean Trucking Co., supra* note 19.

[212] *W. Addition Community Organization* v. *NLRB* (Emporium Capwell Co.), 485 F.2d 917, 83 LRRM 2738 (D.C.Cir. 1973).

[213] *Local 7-210, Oil Workers* v. *Union Tank Car Co.,* 475 F.2d 194, 82 LRRM 2823 (7th Cir. 1973).

[214] *Sperry-Rand Corp.* v. *NLRB,* 492 F.2d 63, 85 LRRM 2521 (2d Cir. 1974), *rev'g* 202 NLRB No. 18, 82 LRRM 1491 (1973).

unit, that the union's activities in enforcing the arbitration award amounted to a covert attempt to gain de facto recognition as bargaining agent for the California employees and thereby avoid the Board's election processes, and that the subject of wages and working conditions of the California employees was not a permissible subject of bargaining in the New York unit. The NLRB has held that a successor employer does not violate the statute by refusing to process grievances arising under the predecessor's contract, since under the Supreme Court's *Burns* decision the successor is not obliged to assume the predecessor's contract with the union.[215]

In certain types of disputes where all parties are bound by a private method of settlement, especially work assignment disputes, the NLRB will defer to such procedures.[216] However, the NLRB will find a violation of the NLRA if the union settles a grievance in such a way as to cause the employer to discriminate against an employee in violation of the statute.[217] Where a union has unlawfully refused to process a grievance, it may be ordered to take the grievance to arbitration, furnish the grievants with legal fees, and allow their own counsel at the arbitration hearing.[218] An employer may be required to furnish the union information necessary and relevant to processing a grievance, and the submission of a grievance to arbitration does not deprive the union of such right, although the Board may in its order protect the use of the information by the union.[219] Absent a breach by a union of its duty of fair representation, and there is a genuine belief in the lack of merit of grievances, unions are not required to take such grievances to arbitration.[220]

VII. The Public Sector and Arbitration

Many of the issues raised in the public sector involving arbitration are somewhat unique since such issues often relate to partic-

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[215] *Parkwood IGA*, 201 NLRB No. 141, 82 LRRM 1682 (1973).

[216] *Central Cartage Co.*, 206 NLRB No. 89, 84 LRRM 1273 (1973); *Iron Workers Local 380* (Skoog Constr. Co.), 204 NLRB No. 74, 83 LRRM 1448 (1973); compare cases cited in note 194 *supra*.

[217] *Rubber Workers Local 374* (Uniroyal, Inc.), 205 NLRB No. 28, 83 LRRM 1546 (1973).

[218] *Teamsters Local 186* (United Parcel Service), 203 NLRB No. 125, 83 LRRM 1472 (1973).

[219] *Fawcett Printing Corp.*, 201 NLRB No. 139, 82 LRRM 1661 (1973).

[220] *Meat Cutters Local 575* (Omaha Packing Co.), 206 NLRB No. 67, 84 LRRM 1548 (1973); *Communications Workers Local 9104* (Pacific Northwest Bell Tel. Co.), 205 NLRB No. 152, 84 LRRM 1143 (1973).

ular statutory rights or procedures, such as whether an employee facing discipline is entitled to a hearing open to the public at the third step of a grievance procedure.[221] The use of injunctive procedures as an aid to arbitration, therefore, will depend largely on whether there is statutory authority for the submission of the dispute to arbitration.[222] An employee may not have to exhaust contract grievance procedures where he asserts the violation of a constitutional right in his court action rather than the violation of a contractual right.[223]

The question as to whether arbitration of a dispute will be ordered or an award enforced frequently hinges on whether the matter in dispute has been left by statute to the expertise of either a public official or a policy-making body.[224] Statutory provisions in regard to tenure and termination of employees, especially teachers, is a constant source of litigation in regard to the applicability of contractual grievance procedures to nontenured employees, with the courts often having to balance two sets of statutory rights.[225] In a Connecticut case, a union was held to have waived its right to arbitration by filing and proceeding with its court action before requesting a stay of the proceedings pending arbitration of the dispute.[226] A settlement of a grievance at the second step has been held in New York to be an enforceable contractual right as binding as an arbitration award.[227] A Michigan court refused to enforce an arbitration award involving parking rights of city employees, where the employer had notified the union six months prior to the new contract of the discontinu-

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221 *Wilson* v. *San Francisco Municipal Ry.*, 29 Cal.App.3d 870, 82 LRRM 2729 (1973); see also, for example, *N.J. Turnpike Employees, Local 194, Technical Engineers* v. *New Jersey Turnpike Auth.*, 123 N.J.Super. 461, 303 A.2d 599, 83 LRRM 2250 (1973); *Teamsters Local 695* v. *Waukesha County*, 203 N.W.2d 707, 82 LRRM 2899 (Wis.Sup.Ct. 1973).

222 *Washington Metro Transit Auth.* v. *Local 922, Teamsters*, 82 LRRM 3021 (D.D.C. 1973); *Hamilton Bd. of Ed.* v. *Arthur*, 84 LRRM 2468 (Ohio App. 1973).

223 *Barry* v. *Flint Fire Dept.*, 205 N.W.2d 627, 83 LRRM 2173 (Mich.App. 1973).

224 *Englewood Bd. of Ed.* v. *Englewood Teachers Assn.*, 64 N.J. 1, 311 A.2d 729, 85 LRRM 2137 (1973); *Dunellen Bd. of Ed.* v. *Dunellen Education Assn.*, 64 N.J. 17, 311 A.2d 737, 85 LRRM 2131 (1973); *Doherty* v. *Boston School Committee*, 83 LRRM 2989 (Mass.Sup.Jud.Ct. 1973).

225 *Chautauqua Bd. of Ed.* v. *Chautauqua Teachers Assn.*, 84 LRRM 2772 (N.Y. App.Div. 1973); *Gorder* v. *Matanuska-Susitna School Dist.*, 84 LRRM 2683 (Alas. Sup.Ct. 1873).

226 *Waterbury Teachers Assn.* v. *City of Waterbury*, 84 LRRM 2151 (Conn. Sup.Ct. 1973).

227 *Antonopoulou* v. *Beame*, 32 NY2d 126, 296 N.E.2d 247, 343 N.Y.S.2d 346, 83 LRRM 3092 (1973).

ance of the prior practice and the new contract between the parties made no mention of free parking.[228]

Much of the reported litigation in the public sector involves the various compulsory arbitration statutes of the states, most of which at this time apply to police and fire department bargaining units.[229] It is clear that without statutory guidelines, there can be no compulsory arbitration of public sector disputes.[230] Once there is statutory authorization for such procedures, then disputes as to the coverage of the statutes and the subject matters that may be submitted to compulsory arbitration are frequent subjects of litigation.[231]

VIII. Conclusion

The most important case-law developments in the past year have been in the relationship of arbitration to civil rights litigation under Title VII, as illustrated by the Supreme Court's *Gardner-Denver* decision. Despite what at first glance may appear to be a downgrading of the arbitral process by the Supreme Court in the *Gardner-Denver* case, the decision is explicitly limited to the special circumstances concerning discrimination covered by the Civil Rights Act of 1964. Further, the Court reasserted in the *Gateway Coal* decision issued at about the same time "the strong federal policy favoring arbitration of labor disputes." The favor with which the courts continue to view the arbitral process is illustrated by the words of the federal Sixth Circuit Court of Appeals in its very recent decision in *Timken Co.* v. *Steelworkers*,[232] enforcing an arbitration award:

> "It is well established that the courts look with favor upon the procedure of settling employer-employee disputes by arbitration

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[228] *Local 1390, Council 55, AFSCME* v. *City of Lansing*, 207 N.W.2d 497, 83 LRRM 2639 (Mich. App. 1973).

[229] See, for example, *City of Biddeford* v. *Biddeford Teachers Assn.*, 83 LRRM 2098 (Me.Sup.Jud.Ct. 2973) (teachers); *Local 1518, Council 55, AFSCME* v. *St. Clair County*, 204 N.W.2d 369, 82 LRRM 2927 (Mich.App. 1972) (police-fire); *City of Providence* v. *Fire Fighters Local 799*, 305 A.2d 93, 84 LRRM 2197 (R.I. Sup.Ct. 1973); *Sioux Falls* v. *Fire Fighters Local 814*, 85 LRRM 2066 (S.D.Cir.Ct. 1973).

[230] *Coral Gables* v. *Coral Gables Employees Assn.*, 289 So.2d 453, 85 LRRM 2200 (Fla. App. 1974).

[231] *Allegheny County* v. *Hartshorn*, 304 A.2d 716, 83 LRRM 2660 (Pa.Comm.Ct. 1973); *Massachusetts Nurses Assn.* v. *Lynn Hosp.*, 306 N.E.2d 264, 85 LRRM 2330 (Mass.Sup. Jud. Ct. 1974); *Fire Fighters Local 1186* v. *City of Vallejo*, 35 Calif. App.3d 894, 85 LRRM 2424 (1973).

[232] *Supra* note 103.

rather than by resort to the courts. If a collective bargaining agreement is unclear and ambiguous in its terms, its construction should normally be determined by the arbitrator. This policy appears to rest upon two grounds: first, it is considered as an expeditious and relatively inexpensive means of settling grievances and thus as a factor in contributing to labor peace; and second, it obviates the enormous burden which would rest upon the judiciary if it should be required to settle, case by case, the endless number of grievances and disputes, many of them over trivial matters, which inevitably occur as between employers and employees."

There continues to be a great deal of ferment in regard to granting collective bargaining rights to public employees, and the state statutes that have been enacted are still in a very elementary stage. Due to employee-union pressure and due to the slowness of the states in granting collective bargaining rights to public employees and, parenthetically, to hospital employees, there are vigorous efforts on the federal level either to extend the NLRA to such employees or to establish a separate administrative agency enforcing collective bargaining rights for public employees on a federal level. Obviously, such legislation will have serious impact on the arbitration process if a large number of public employees or hospital employees are given collective bargaining rights enforceable through the administrative process. In view of such employee unrest and the possibility of federal legislation, it can be expected that there will be increased activity on state and local levels to grant employees collective bargaining rights. In either event, such legislation undoubtedly will expand the use of arbitration in some form to settle employee-employer disputes before or after a contract is entered into.

In conclusion, there does not appear to be any impediment on the horizon to the continued expansion of the use of arbitration to settle labor relations disputes, but rather it would appear that a steady increase in the caseload can be expected for the foreseeable future.

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