APPENDIX B

ARBITRATION AND FEDERAL RIGHTS UNDER COLLECTIVE AGREEMENTS IN 1974*

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This report will summarize reported appellate level cases, decided since the last annual report of the committee, relating to the arbitral process under collective bargaining agreements and to the federally protected enforcement of contractual rights provided under Section 301 of the Labor-Management Relations Act (LMRA).[1] The volume of reported case law has increased dramatically during the past year, with the result that approximately 500 cases were used in the actual preparation of this report and another 200 considered for inclusion herein. This represents an increase of about 40 percent in reported litigation and is a graphic indication of the viability and growing use of arbitration in labor disputes.

Most of the cases cited below do not establish new points of law, but they are treated in this report to provide a reference to all litigation reported during the past year and to provide a convenient survey of the present state of case law affecting arbitration. Some areas discussed herein lend themselves to further discussion and deeper analysis which are beyond the purpose of this summary. For example, as discussed below, there is a growing split among federal courts in regard to the use of injunctions in, and the arbitrability of, disputes occasioned by the refusal of em-

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[1] 29 U.S.C. 185. The committee has attempted to cite in this report every reported appellate or federal district court decision affecting arbitration during the past year, omitting decisions of state trial courts and most decisions arising under the Railway Labor Act (RLA). Not every problem treated by a cited case is discussed herein, but only the points of law that appear to be of most interest to members of the Academy.

ployees to cross a stranger picket line, which may eventually be resolved by the U.S. Supreme Court. Another area of apparent disagreement among some courts is the question of 301 jurisdiction over disputes arising under union constitutions and bylaws.

While there has been an increase in all litigation under collective bargaining agreements, the sharpest noted increase during the past year has been in relation to pensions and similar employee benefits. There continues to be a high volume of litigation under the Supreme Court's *Boys Markets* doctrine,[2] whereby injunctions may be granted against the use of economic force where an obligation to arbitrate the dispute exists under a collective bargaining agreement. There also continues to be a large number of cases under the policy of the National Labor Relations Board (NLRB) deferring to arbitration under its *Collyer* and *Spielberg* cases,[3] although with the approval of this deferral policy by various federal courts of appeal, it is likely that this area of arbitral law will stabilize. The largest volume of reported case law touching upon the arbitral process continues to be individual employee actions for breach of contract by employers and breach of the duty of fair representation by unions, including those cases involving arbitration and civil rights statutes, despite the overwhelming odds against success in such actions. There is also a steady increase in cases involving the public sector as more states enact collective bargaining laws for public employees, although the case law in this area is still directed at clarifying such things as the right to bargain and what subjects can be bargained about, rather than centering on the arbitral process itself.

In sum, the Supreme Court's *Steelworkers* trilogy [4] continues to spawn an ever-increasing amount of litigation, providing evidence of the growth and vitality of the arbitration process in labor disputes in the United States. Since the last report the Supreme Court itself decided four new cases that touch upon the arbitral process under collective bargaining agreements. These cases are discussed separately below along with the lower court

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[2] *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U.S. 235, 74 LRRM 2257 (1970).

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

[4] *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).

case law reported during the past year that relates to the area of arbitral law involved in the Supreme Court's decision.

I. Supreme Court Decisions

A. Arbitration and Civil Rights Cases

The Supreme Court continues to be faced with the problem of balancing employee rights under the LMRA with the right to be free from employment discrimination under Title VII of the Civil Rights Act of 1964. Last year, the Court decided the case of *Alexander* v. *Gardner-Denver Co.*,[5] in which it unanimously decided that the prior submission of an employee's claim to arbitration under a collective bargaining agreement does not constitute an election of remedies precluding the employee from a later suit under Title VII. In February 1975, the Court, with only Justice Douglas dissenting, held in *Emporium Capwell Co.* v. *Western Addition Community Organization*[6] that an employer did not violate the LMRA by its discharge of minority-group employees for picketing the employer's premises and urging a consumer boycott in order to force the employer to bargain with them over issues of employment discrimination, when the union representing the employees had already taken their claims to arbitration. The Court based its holding on the principle of exclusive representation by the collective bargaining representative set forth in Section 9 (a) of the LMRA and stated as follows:

> "Accordingly, we think neither aspect of respondent's contention in support of a right to short-circuit orderly, established processes for eliminating discrimination in employment is well-founded. The policy of industrial self-determination as expressed in §7 does not require fragmentation of the bargaining unit along racial or other lines in order to consist with the national labor policy against discrimination. And in the face of such fragmentation, whatever its effect on discriminatory practices, the bargaining process that the principle of exclusive representation is meant to lubricate could not endure unhampered." (88 LRRM at 2668, 9 FEP Cases at 203)

The opinion of the Court does not dwell at length on the utilization of grievance-arbitration procedures, except to emphasize the availability of such procedures and the refusal of the dischargees to take advantage of and cooperate with the union's attempts to invoke such procedures. The Court opinion is limited to treating the issue of whether the discharges violated the LMRA, and

[5] 415 U.S. 36, 7 FEP Cases 81 (1974).
[6] 420 U.S. 50, 88 LRRM 2660, 9 FEP Cases 195 (1975).

the Court emphasizes that its finding that the discharges were lawful under that statute does not mean that they are immune from attack on other statutory grounds in an appropriate case including one under Title VII of the Civil Rights Act. The collective bargaining agreement in the *Emporium* case contained a nondiscrimination clause, which included in its ambit union activity as well as matters covered by Title VII, and there is no indication in the decision that the union was not diligent in prosecuting grievances filed by the employees under that clause of the contract. It is fair to conclude that under the *Gardner-Denver* and *Emporium* decisions the existence of a nondiscrimination clause in a collective bargaining agreement that has been diligently enforced by the parties by means of the grievance-arbitration procedures of the contract will have significant, though not controlling, weight in any subsequent employee actions under Title VII, or in suits for breach of contract or the duty of fair representation.

The requirement of the Court in the *Emporium* decision that employees protesting employment discrimination covered by Title VII must rely on the grievance-arbitration process, rather than confront the employer outside the contractual process, caused the dissenting Justice to complain that the Court's decision was making such employees "prisoners of the union." However, under both *Gardner-Denver* and *Emporium* the existence of a prior adverse arbitration award denying the claim of the employee or employees does not bar a Title VII action against the employer or union; an employee's right to alternate remedies is clearly established in both decisions. Thus, in a Title VII context, employees may obtain from the court a trial de novo on their Title VII claim despite the existence of an adverse arbitration award on the same claim,[7] since as one court pointed out, a determination of "fairness" under the LMRA or the Railway Labor Act (RLA) is not necessarily "lawful" or "equal" for purposes of Title VII.[8] It has been held that an arbitration award is entitled to "great weight" in a Title VII action,[9] although it is

[7] *Sanchez* v. *Trans World Airlines, Inc.*, 499 F.2d 1107, 8 FEP Cases 627 (10th Cir. 1974); *Strittmatter* v. *Goodyear Tire & Rubber Co.*, 496 F.2d 1244, 8 FEP Cases 814 (6th Cir. 1974); *McMiller* v. *Bird & Son, Inc.*, 376 F.Supp 1086, 7 FEP Cases 814 (W.D.La. 1974); *Burdzell* v. *Cities Service Co.*, 8 FEP Cases 467 (W.D.Pa. 1974); *Guy* v. *Robbins & Myers, Inc.*, 8 FEP Cases 311, 313 (W.D.Tenn. 1974); *Corranza* v. *McDonnell-Douglas Corp.*, 7 FEP Cases 1009 (C.D.Cal. 1973).

[8] *Taylor* v. *Armco Steel Corp.*, 373 F.Supp. 885, 8 FEP Cases 979 (S.D.Tex. 1973).

[9] *Dripps* v. *United Parcel Service*, 8 FEP Cases 1315 (W.D.Pa. 1974).

clear that for this to be the case the arbitrator must make findings on the discrimination issue rather than limit his award to the contract issue, such as the "just cause" standard. Thus, an arbitrator may find no just cause for a discharge and thereby find the contract violated, while the court, under the same set of facts, may find no discrimination present within the meaning of Title VII.[10]

For a court to consider in a Title VII action prior available grievance-arbitration procedures, the collective bargaining agreement in question must contain a provision forbidding the type of discrimination protected by Title VII.[11] Thus, the contract or its procedures may not be directly involved in the Title VII action if no contract right is directly involved, although the court may permit joinder of the union in such an action against an employer to aid in the interpretation of the contract and to protect the interests of other employees.[12] The courts may require the use of arbitration procedures as part of the remedy in Title VII cases as a means of resolving disputes relating to a court order or consent decree.[13] The failure of the plaintiffs in an employment discrimination case under Title VII to request the processing of a grievance by the union or to ask it to take action against the discriminatory practice may free the union from liability in an action against it and the employer.[14] However, in a racial discrimination action under the Civil Rights Act of 1866 against an employer and union alleging unlawful hiring practices, the Seventh Circuit held that the plaintiffs need not exhaust contractual remedies where their right to be covered by the collective bargaining agreement was in issue.[15]

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[10] *Franks* v. *Bowman Transp. Co.*, 495 F.2d 398, 8 FEP Cases 66 (5th Cir. 1974).

[11] *Trivett* v. *Tri State Container Corp.*, 368 F.Supp. 134, 7 FEP Cases 1290 (E.D. Tenn. 1973); *EEOC* v. *Multi-Line Cans, Inc.*, 7 FEP Cases 490 (M.D.Fla. 1974); *Newman* v. *Avco Corp.*, 7 FEP Cases 385 (M.D.Tenn. 1973).

[12] *Cooper* v. *General Dynamics*, 378 F.Supp. 1258, 8 FEP Cases 567 (N.D.Tex. 1974); *Kaplan* v. *Local 659, IATSE*, 7 FEP Cases 894 (C.D.Cal. 1973); *Held* v. *Missouri-Pacific RR*, 373 F.Supp. 997, 7 FEP Cases 789 (S.D.Tex. 1974); *cf. EEOC* v. *General Motors Corp.*, 7 FEP Cases 846 (N.D.Ohio 1974); *Turner* v. *Seaboard Coast Line RR*, 7 FEP Cases 919 (E.D.N.C. 1974); *Johnson* v. *Thomson Brush Moore, Inc.*, 7 FEP Cases 921 (N.D.Ohio 1974).

[13] *Newman* v. *Avco Corp.*, 380 F.Supp. 1282, 8 FEP Cases 714 (M.D.Tenn. 1974); *U.S.* v. *H.K. Porter Co.*, 7 FEP Cases 1021 (N.D.Ala. 1974), on remand from 491 F.2d 1105, 7 FEP Cases 1020 (5th Cir.).

[14] *Thornton* v. *East Texas Motor Freight Inc.*, 497 F.2d 416, 7 FEP Cases 1245 (6th Cir. 1974).

[15] *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309, 8 FEP Cases 577 (7th Cir. 1974).

Many actions against employers under civil rights statutes are combined with actions against the labor organization representing the employees alleging a breach of the duty of fair representation. During the past year, many such combined actions have involved seniority systems under collective bargaining agreements [16] and the handling of grievances by the union.[17] In one case, a declaratory judgment action under Section 301 was brought by an employer against the Equal Employment Opportunity Commission (EEOC) and the union to resolve an alleged conflict between the collective bargaining agreement and an EEOC conciliation agreement in regard to the layoff of employees. The Third Circuit found no conflict between the collective bargaining agreement and the conciliation agreement, and held that traditional seniority systems are not contrary to public policy.[18] In view of the state of the economy and the current proposed EEOC guidelines regarding the layoff of minority-group employees or women, further litigation in this area can be expected.[19] In regard to grievance handling, one court held that an 11-month delay from discharge to arbitration was not a breach of fair representation and was not attributable to racial discrimination on the part of the union.[20]

In upholding summary judgment of a Title VII fair-representation action concerning an employer's promotion policy, the Sixth Circuit noted that the union had processed the employee's discrimination grievance and the employee had been afforded an opportunity to take the promotion test but had declined.[21]

Sex discrimination was also a frequent subject of combined Title VII and fair-representation actions,[22] and in one case in-

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[16] *Bryan* v. *Pittsburgh Plate Glass Co.*, 494 F.2d 799, 7 FEP Cases 822 (3rd Cir. 1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 7 FEP Cases 627 (5th Cir. 1974); *Bush* v. *Lone Star Steel Co.*, 373 F.Supp. 526, 7 FEP Cases 1258 (E.D.Tex. 1974); *Miller* v. *Missouri-Pacific RR*, 372 F.Supp. 170, FEP Cases 773 (W.D.La. 1974); *Pettway* v. *American Cast Iron Pipe Co.*, 7 FEP Cases 1010 (N.D.Ala. 1972); *U.S.* v. *Lee Way Freight, Inc.*, 7 FEP Cases 710, 751 (W.D.Okla. 1973); *Dawkins* v. *Nabisco, Inc.*, 7 FEP Cases 535 (N.D.Ga. 1973); *Sabala* v. *Western Gillette, Inc.*, 371 F.Supp. 385, 7 FEP Cases 443 (S.D.Tex. 1974).

[17] *Smith* v. *South Central Bell Tel. Co.*, 7 FEP Cases 609 (M.D.Tenn. 1974); *Pruitt* v. *Commercial Carriers, Inc.*, 7 FEP Cases 592 (N.D.Ala. 1974).

[18] *Jersey Central Power & Light Co.* v. *Electrical Workers*, 508 F.2d 687, 9 FEP Cases 117 (3rd Cir. 1974).

[19] See 88 LRR 216 (Mar. 17, 1975).

[20] *Luster* v. *Local 709, Machinists*, 7 FEP Cases 561 (N.D.Ga. 1973).

[21] *Patmon* v. *Van Dorn Co.*, 498 F.2d 544, 8 FEP Cases 44 (6th Cir. 1974).

[22] See *Williams* v. *General Foods Corp.*, 492 F.2d 399, 7 FEP Cases 827 (7th Cir. 1974), and various cases cited above.

volving the question of maternity benefits, a state court held that an arbitrator did not exceed his authority when he held that EEOC guidelines regarding the treatment of pregnancy the same as any other disability may be applied to the collective bargaining agreement on the ground that the provisions of Title VII are a part of the contract, as are the actual disability provisions.[23]

B. Arbitration and Successor Employers

During the past year, the Supreme Court again tackled the difficult question of the obligation of a successor corporation to arbitrate under the seller's collective bargaining agreement, expanding on its prior decisions in the *Wiley* and *Burns* cases.[24] In *Howard Johnson Co.* v. *Hotel and Restaurant Employees* [25] the Court reversed a decision of the Sixth Circuit and held that Howard Johnson, the successor employer, was not required to arbitrate under a collective bargaining agreement between the union and the seller of the business. In this case, Howard Johnson was the franchiser of a restaurant and motor lodge owned and operated by the seller, and it agreed with the seller to purchase the assets of the restaurant and motor lodge, except for the land, but it did not agree to assume any of the seller's obligations under the collective bargaining agreement with the union. The successor hired only a small fraction of the seller's employees and none of its supervisors, and the Supreme Court found that, under these facts, there was plainly no substantial continuity of identity in the work force hired by the successor with that of the seller and no express or implied assumption by the successor of the collective bargaining agreement between the seller and the union. Accordingly, the Court held that the union could not force the successor, in a Section 301 action, to arbitrate the extent of its obligations to the employees of the seller. The Court noted that, in contrast to the *Wiley* case, the instant case involved only the sale of assets and that the initial employer remained in existence as a viable entity with substantial retained assets, so that the union had a realistic remedy to enforce its contractual obligations against the seller, which had agreed to arbitrate the extent of its liability to the union and its former employees. The Court also

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[23] *Goodyear Tire & Rubber Co.* v. *Local 200, Rubber Workers,* 8 FEP Cases 128 (Ohio App. 1974).

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

[25] 417 U.S. 249, 86 LRRM 2449 (1974), *rev'g* 482 F.2d 489, 83 LRRM 2804 (6th Cir. 1973).

noted that the arbitration with the seller would presumably explore the question of whether the seller breached the successorship provision of its collective bargaining agreement and what the remedy for this breach might be.

The most important factor, however, in the Court's mind in the *Howard Johnson* decision was the fact that the successor decided to select and hire its own independent work force to commence its operation of the restaurant and motor lodge, whereas in *Wiley,* the surviving corporation hired all of the employees of the disappearing employer. The Court also emphasized that the successor in the *Howard Johnson* case was not the alter ego of the predecessor corporation, but there was a good faith sale of the restaurant and motor lodge to a separate entity. Similar to its *Burns* decision, the Court reiterated that there is nothing in the federal labor laws that requires an employer who purchases the assets of a business to hire all of the employees of the predecessor employer, and noted approvingly the emphasis that the lower courts have placed on whether the successor employer hires a majority of the predecessor's employees when determining the legal obligations of the successor in Section 301 suits under the *Wiley* doctrine.

Where the purchaser of a business is clearly a successor employer under the guidelines noted above, the courts may order arbitration of grievances under the predecessor's collective bargaining agreement or enjoin a breach of contract.[26] The Fifth Circuit refused to require a successor to arbitrate a grievance under the union's contract with the predecessor employer where the successor had hired only 35 percent of the predecessor's work force, holding that the continuity of identity of the work force was not sufficiently substantial.[27] Where an employer closed the plant of a wholly owned subsidiary and consolidated its opera-

[26] *Teamsters Local 249* v. *Bill's Trucking, Inc.,* 493 F.2d 956, 85 LRRM 2713 (3rd Cir. 1974); *Steelworkers* v. *U.S. Gypsum Co.,* 492 F.2d 713, 85 LRRM 2962 (5th Cir. 1974); *Local 228, Moving Picture Operators* v. *Gayety Theatre,* 87 LRRM 3020 (N.D.Ohio 1974); *Textile Workers Local 179* v. *Western Textile Prod. Co.,* 374 F.Supp. 633, 86 LRRM 2039 (E.D.Mo. 1974); *Retail Clerks Local 775* v. *Purity Stores, Inc.,* 41 Cal.App.3rd 225, 88 LRRM 2513 (Cal.App. 1974); for NLRB decisions, see *International Offset Corp.,* 210 NLRB No. 140, 86 LRRM 1305 (1974); *Anita Shops, Inc.,* 211 NLRB No. 74, 86 LRRM 1347 (1974); *Chico Convalescent Hosp.,* 210 NLRB No. 81, 86 LRRM 1357 (1974); regarding the issuance of an injunction to enforce a collective bargaining agreement against the alleged alter ego of the contracting employer, see *Operating Engineers Local 66* v. *Linesville Constr. Co.,* 322 A.2d 353, 88 LRRM 2310 (Pa.Sup.Ct. 1974).

[27] *Boeing Co.* v. *Machinists,* 504 F.2d 307, 87 LRRM 2865 (5th Cir. 1974).

tions with related companies of the employer, the Eighth Circuit remanded a suit to compel arbitration by the employer for a determination by the lower court of whether the contract and arbitration clauses were still in existence pursuant to a letter of agreement between the parties or had actually been terminated as the employer contended.[28] The court clearly held that it is the province of the court, rather than the arbitrator, to determine the question of whether the contract and arbitration clauses were in existence. The court may also restrain a union's attempt to seek arbitration where the court finds that there is no successorship and where the employees of the new employer are represented by another union pursuant to an NLRB election in which the plaintiff union participated.[29] In one case, however, the court enforced an arbitration award in which the grievance procedure was initiated prior to the expiration of the contract, but where, after the expiration of the contract, the union seeking enforcement was succeeded by another labor organization.[30]

C. Injunctions and Breach of No-Strike Clauses

The use of injunctions relating to strikes in the face of an obligation by the union to arbitrate disputes under the Supreme Court's decision in *Boys Markets Inc.* v. *Retail Clerks*[31] continues to be a prolific source of litigation requiring recurring clarification by the Supreme Court itself. Last year the Court decided, and this survey reported, the decisions in *Gateway Coal Co.* v. *Mine Workers*[32] and *Granny Goose Foods, Inc.* v. *Teamsters Local 70.*[33] Subsequent to the foregoing decisions, the Court was faced with the question of state-court jurisdiction under Section 301 to enjoin a union's breach of a no-strike clause in the case of *Arnold Co.* v. *Carpenters District Council.*[34] Based upon the litigation outlined below and the evident split of authority in the area of granting injunctive relief where employees are honoring

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[28] *Automobile Workers Local 125* v. *Intl. Tel. & Tel. Corp.*, _____ F.2d _____, 88 LRRM 2213 (8th Cir. 1975), *rev'g* 85 LRRM 2721 (D.Minn. 1974).

[29] *United Bindery, Inc.* v. *Local 119-B, Graphic Arts Union,* 88 LRRM 2542 (D.N.J. 1973).

[30] *Longshoremen Local 142* v. *Land & Constr. Co.,* 498 F.2d 201, 86 LRRM 2874 (9th Cir. 1974).

[31] 398 U.S. 235, 74 LRRM 2257 (1970).

[32] 414 U.S. 368, 85 LRRM 2049 (1974).

[33] 415 U.S. 422, 85 LRRM 2481 (1974).

[34] 417 U.S. 12, 86 LRRM 2212 (1974), *revising and remanding* 279 So.2d 300, 83 LRRM 2033 (Fla.Sup.Ct. 1973); *on remand,* 299 So.2d 9, 88 LRRM 2424 (Fla. Sup.Ct. 1974).

the picket line of another labor organization, it may be anticipated that the Supreme Court will be further called upon to settle issues raised under its *Boys Markets* case.

Based upon prior Supreme Court law, the *Arnold* decision was routine in nature, holding that the Florida state courts had jurisdiction of an action by an employer under Section 301 to enjoin a union's breach of a no-strike clause of the collective bargaining contract, which contained a binding settlement procedure for the jurisdictional dispute in question, even though the strike in question was arguably an unfair labor practice under the forced-work-assignment provisions of the LMRA. The Court reaffirmed its 1971 decision in *Motor Coach Employees* v. *Lockridge,*[35] which held that state and federal courts need not defer to the exclusive competence of the NLRB where the activity in question also constitutes a breach of a collective bargaining agreement within the meaning of Section 301. The Supreme Court decision, which was unanimous, quoted approvingly the NLRB's *Collyer* decision, noting that the NLRB's position harmonizes with the congressional intent set forth in Section 203 (d) of the LMRA that grievance disputes be settled by methods agreed upon by the parties. In this regard, the Court stated as follows:

> "The Board's practice and policy in declining to exercise its concurrent jurisdiction over arguably unfair labor practices which also violate provisions of collective-bargaining agreements for voluntary adjustment of disputes, highlights the congressional purpose that Section 301 suits in state and federal courts should be the primary means for 'promoting collective bargaining that [ends] with agreements not to strike.' *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 453, 40 LRRM 2113 (1957). The assurance of swift and effective judicial relief provides incentive to eschew economic weapons in favor of binding grievance procedures and no-strike clauses." (86 LRRM 2214–15)

Thus, the decision of the Court in the *Arnold* case, in keeping with the policies of the LMRA, continues to promote the use of grievance-arbitration procedures by making available the injunctive powers of both federal and state courts against the resort to economic force by one of the parties to a collective bargaining agreement. During the past year, the volume of injunctive activity under the *Boys Markets* exception to the application of the Norris-LaGuardia Act prohibition against the issuance of injunc-

[35] 403 U.S. 274, 77 LRRM 2501 (1971).

tions in labor disputes continued at a high rate.[36] To warrant the issuance of injunctive relief under a *Boys Markets* situation, there must be a contract with a mandatory arbitration provision that gives rise to at least an implied obligation not to strike or to lock out.[37] The courts have granted injunctions against strikes and ordered the disputes to be arbitrated even in cases where the union has raised questions as to the existence or expiration of the contract or to the applicability of the arbitration clause to the dispute.[38] A construction employer was granted an injunction where it was not signatory to the collective bargaining agreement, but where both parties had operated under the contract at the project site and the union had ratified the project agreement.[39] In another case, an employer was granted an injunction against the refusal of the employees to carry the employer's tools to and from a construction site and the dispute was found to be arbitrable even though there was no written contract provision but an unwritten customary practice for at least 15 years giving rise to an implied provision of the contract not in conflict with the written contract.[40] However, where the contract specifically excepts the particular dispute from coverage by the no-strike clause or permits the strike in question, injunctive relief will not be granted.[41]

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[36] See, for example, *Old Ben Coal Corp.* v. *Local 1487, Mine Workers,* 500 F.2d 950, 87 LRRM 2078 (7th Cir. 1974); *Sun Shipbuilding Co.* v. *Boilermakers Lodge 802,* 497 F.2d 922, 87 LRRM 3275 (3rd Cir. 1974), *aff'g* 87 LRRM 3218 (E.D.Pa.) (employer grievance); *General Bldg. Contrs. Assn.* v. *Local 542, Operating Engineers,* 371 F.Supp. 1130, 86 LRRM 2677 (E.D.Pa. 1974); *Theaterical Contrs. Assn.* v. *Local 829, Scenic Artists,* 87 LRRM 3038 (E.D.N.Y. 1974); see under a state act where the court held there was no right to an injunction, *Operating Engineers Local 286* v. *Sand Pointe Country Club,* 83 Wn.2d 498, 518 P.2d 985, 86 LRRM 2405 (Wash.Sup.Ct. 1974).

[37] *Log Scalers Assn., Columbia River Corp.* v. *Columbia River Log Scaling and Grading Bureau,* 88 LRRM 2974 (D.Ore. 1975); *Teledyne Wis. Motor* v. *Local 283, UAW,* 88 LRRM 2486 (E.D.Wis. 1975); *Teamsters Local 604* v. *Paddock Chrysler-Plymouth, Inc.,* 365 F.Supp. 599, 86 LRRM 2416 (E.D. Mo. 1973).

[38] *Wallace Ind. Constructors of Miss.* v. *Plumbers Local 568,* 88 LRRM 2350 (S.D.Miss. 1974); *Contractors Assn. of Eastern Pa.* v. *Local 158, Highway Workers,* 86 LRRM 2861 (M.D.Pa. 1974); but compare *Hribar Trucking, Inc.* v. *Teamsters Local 43,* 379 F.Supp. 993, 87 LRRM 2300 (E.D.Wis. 1974).

[39] *Baggett Ind. Constructors, Inc.* v. *Plumbers Local 568,* 88 LRRM 2353 (S.D.Miss. 1974).

[40] Compare *Midwest Glasco* v. *Glassworkers Local 513,* 87 LRRM 3065 (E.D.Mo. 1974), with *Morauer & Hartzell, Inc.* v. *Local 77, Operating Engineers,* 88 LRRM 2087 (D.D.C. 1974).

[41] *National Mine Service Co.* v. *Steelworkers Local 8016,* _____ F.2d _____, 88 LRRM 2847 (4th Cir. 1975), *aff'g* 385 F.Supp. 856, 87 LRRM 3288 (N.D.W.Va. 1974); *Western Pub. Co.* v. *Graphic Arts Local 254,* 381 F.Supp. 445, 87 LRRM 2541 (E.D. Wis. 1974); *cf. Printing Pressmen Local 210* v. *Times-World Corp.,* 381 F.Supp. 149, 87 LRRM 3009 (W.D.Va. 1974).

The party seeking an injunction has the burden of proving that irreparable injury will result if such relief is not granted and that equitable considerations mandate the use of such extraordinary relief, or that arbitration alone is not an adequate remedy; and the suing party may be held liable for defense costs and expenses where a temporary restraining order was improperly granted.[42] Where there has been a series of strikes in violation of a contract and they are likely to recur, a court may issue an injunction forbidding future such strikes during the life of the contract.[43] Thus, in employer actions for damages for breach of an express or implied no-strike clause, injunctive relief may be obtained in the same action, although there is no current strike, where it can be shown that there are unsettled grievances and that there is a pattern of refusal by the union to abide by the arbitration and implied no-strike clauses of a collective bargaining agreement.[44]

A union's request for an injunction against the admiral in charge of a shipyard to prevent the changing of the working hours of employees allegedly in violation of the collective bargaining agreement was denied on the ground that there is no 301 jurisdiction where the employer is the United States.[45] However, in another case, an injunction was granted against the U.S. Postal Service, whose employees are now included under the LMRA, regarding the elimination of wash-up time pending determination of the dispute in an arbitration proceeding.[46] A Third Circuit

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[42] *Anheuser-Busch* v. *Teamsters Local 633*, _____ F.2d _____, 88 LRRM 2785 (1st Cir. 1975), *rev'g* 87 LRRM 2308 (D.N.H. 1974); *Optical Workers Local 408* v. *Sterling Optical Co.*, 500 F.2d 220, 86 LRRM 3194 (2nd Cir. 1974); *North American Coal Corp.* v. *Mine Workers*, 497 F.2d 459, 86 LRRM 2339 (6th Cir. 1974), contempt convictions of union officers and members rev'd and vacated, _____ F.2d _____, 88 LRRM 2096 (6th Cir. 1975); *Electrical Workers Local 278* v. *Jetero Corp.*, 496 F.2d 661, 88 LRRM 2184 (5th Cir. 1974), modifying 88 LRRM 2182, 2185 (S.D.Tex. 1973); for a case holding that the plaintiff may be liable for the defendant's costs and expenses where a temporary restraining order was improperly obtained, see *Celotex Corp.* v. *Oil Workers*, 373 F.Supp. 29, 86 LRRM 2402, 87 LRRM 2389 (M.D.Pa. 1974).

[43] *C F & I Steel Corp.* v. *Mine Workers*, 507 F.2d 170, 87 LRRM 3196 (10th Cir. 1974).

[44] *Central Appalachian Coal Co.* v. *Mine Workers*, 376 F.Supp. 914, 86 LRRM 2277 (S.D.W.Va. 1974) (parent corporation bringing suit though collective bargaining agreements are with its subsidiaries); see also *New England Tel. Co.* v. *IBEW*, 384 F.Supp. 752, 87 LRRM 3198 (D.Mass. 1974) (both international and local union that breached contract held to be proper parties in view of the control the international has over the locals).

[45] *Technical Engineers Local 1* v. *Williams*, 510 F.2d 966, 88 LRRM 2965 (4th Cir. 1975), *aff'g* 88 LRRM 2961 (E.D.Va. 1974).

[46] *Letter Carriers* v. *U.S. Postal Service*, 88 LRRM 2678 (S.D.Iowa 1975).

decision granted a permanent injunction against a strike to force the employer to use the permanent umpire for the coal industry to settle employee grievances under the contract, the court holding that it can fashion procedure for the selection of an arbitrator when the parties cannot agree.[47] Requests for an injunction by one of the parties or by employees to prevent the submission or resubmission of a dispute to arbitration are rarely granted by the courts, since defenses to arbitration of a dispute are usually for the arbitrator to consider and determine.[48] Also, a strike to enforce an arbitration award will not usually merit injunctive relief,[49] unless either the grievance procedure is not exhausted or abiding by the award would entail the violation of some other statutory obligation.[50]

Employer actions for damages against a labor organization for breach of a no-strike clause are frequently referred to arbitration for a determination of the union's right to strike or the employer's right to damages,[51] unless the contract gives the employer a right to direct legal action for the breach of contract.[52] A union may be held liable for damages caused by an unauthorized or wildcat strike, unless it can show that it did not incite, sanction, or approve the strike and that it used all reasonable means to per-

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[47] *Bethlehem Mines Corp.* v. *Mine Workers,* 494 F.2d 726, 85 LRRM 2834 (3rd Cir. 1974).

[48] *Fall* v. *Copperweld Specialty Steel Corp.,* 88 LRRM 2520 (N.D.Ohio 1974); *Teamsters Local 804* v. *United Parcel Service, Inc.,* 86 LRRM 2294 (S.D.N.Y. 1974); *Chase Bag Co.* v. *Textile Workers,* 369 F.Supp. 682, 88 LRRM 2172 (E.D.Mo. 1973); *cf. Garlick Funeral Homes, Inc.* v. *Local 100, Service Employees,* 87 LRRM 2254, 85 LRRM 2746 (E.D.N.Y. 1974).

[49] *Narragansett Improvement Co.* v. *Local 251, Teamsters,* _____ F.2d _____, 87 LRRM 3232 (1st Cir. 1974), *remanding* 87 LRRM 2024 (D.R.I. 1974); *McNally Bros., Inc.* v. *Local 816, Teamsters,* 376 F.Supp. 612, 85 LRRM 2897 (S.D.N.Y. 1974); *cf, Womeldorf, Inc.* v. *Teamsters Local 110,* 369 F.Supp. 901, 87 LRRM 2316 (W.D.Pa. 1974) (case involving local union's refusal to abide by compromise entered into by members of joint grievance committee); see also, for an action to restrain the enforcement of an arbitration award, *Pilot Freight Carriers* v. *Teamsters,* 506 F.2d 914, 88 LRRM 2408 (5th Cir. 1975).

[50] *Chief Freight Lines Co.* v. *Local 523, Teamsters,* 87 LRRM 3015 (W.D.Okla. 1974).

[51] *H & M Cake Box, Inc.* v. *Bakery Workers Local 45,* 593 F.2d 1226, 86 LRRM 2160 (1st Cir. 1974), *aff'g* 86 LRRM 2157 (D.Mass. 1973); *California Trucking Assn.* v. *Teamsters Local 70,* 88 LRRM 2037 (N.D.Cal. 1974); *Granny Goose Foods, Inc.* v. *Teamsters Local 70,* 88 LRRM 2029 (N.D.Cal. 1974); *P.T. & L. Constr. Co.* v. *Teamsters Local 469,* 66 N.J. 97, 329 A.2d 603, 88 LRRM 2368 (N.J.Sup.St. 1974); compare where the contract contains neither an arbitration nor a no-strike clause, *Iodice* v. *Calabrese,* 512 F.2d 383, 88 LRRM 3042 (2nd Cir. 1975).

[52] *California Trucking Assn.* v. *Teamsters Local 70,* 86 LRRM 2643 (N.D.Cal. 1974).

suade the strikers to end the walkout.[53] The employer, however, may be precluded from recovering damages where it is found that the strike was caused by abnormally dangerous working conditions under the Supreme Court's *Gateway* decision,[54] or where the employer terminated the contract entirely when the union breached the no-strike clause, thereby losing its right to damages before and after its abrogation of the contract.[55] The Third Circuit held in the latter case that the employer's loss of its right to damages for breach of contract was the price it must pay for total and permanent relief from the obligations of the contract.

The most difficult and controversial cases reaching the courts in the past year for injunctive relief and/or damages for breach of a no-strike clause concerned situations in which employees honored the picket line of another union or a stranger picket line. Leaving aside specific contract language that can change the results of individual cases,[56] the courts have divided sharply over whether a refusal to cross another union's picket line constitutes an arbitrable dispute with the primary employer under its no-strike clause. Following the lead of the Fifth Circuit decision in *Amstar Corp.* v. *Meat Cutters,*[57] some courts have refused injunctive relief where employees are honoring the picket line of another labor organization on the ground that no arbitrable dispute exists between the employer and the union in the absence of a specific contract provision restricting the union's right to honor picket lines of other labor organizations.[58] These courts reason that the labor dispute results from the work stoppage, rather than the work stoppage being the result of a labor dispute arising from conditions of employment, and that the *Boys Markets* holding was a "narrow one" and did not make injunctive relief appropri-

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[53] *Wagner Elec. Corp.* v. *Local 1104, IUE,* 496 F.2d 954, 86 LRRM 2601 (8th Cir. 1974); *Celotex Corp.* v. *Steelworkers,* 88 LRRM 2478 (E.D.Pa. 1974); *Eazor Express, Inc.* v. *Teamsters Local 377,* 376 F.Supp. 841, 86 LRRM 2793 (W.D.Pa. 1974) (employer must, however, mitigate damages); compare *Penn Packing Co.* v. *Meat Cutters Local 195,* 497 F.2d 888, 86 LRRM 2657 (3rd Cir. 1974).

[54] *U.S. Steel Corp.* v. *Mine Workers Dist. 5,* 381 F.Supp. 990, 87 LRRM 2335 (W.D.Pa. 1974).

[55] *Childrens Rehab. Center, Inc.* v. *Local 227, Service Employees,* 503 F.2d 1077, 87 LRRM 2264 (3rd Cir. 1974).

[56] See *Pilot Freight Carriers, Inc.* v. *Local 560, Teamsters,* 373 F.Supp. 19, 86 LRRM 2322 (D.N.J. 1974).

[57] 468 F.2d 1372, 81 LRRM 2644 (5th Cir. 1972).

[58] *Plain Dealer Pub. Co.* v. *Cleveland Typographical Union No. 53,* 88 LRRM 2155 (N.D.Ohio 1974); *Buffalo Forge Co.* v. *Steelworkers,* 88 LRRM 2063 (W.D.N.Y. 1974); *Carnation Co.* v. *Local 949, Teamsters,* 86 LRRM 3012 (S.D.Tex. 1974).

ate as a matter of course so as to undermine the vitality of the Norris-LaGuardia Act.

A larger number of courts follow the decision of the Fourth Circuit in *Monongahela Power Co.* v. *IBEW, Local 2332,*[59] and hold that under a broad arbitration clause the refusal of employees to cross the picket line of another labor organization presents an arbitrable issue under contract clauses restricting the right to strike or granting employees the right to refuse to cross a bona fide picket line.[60] The Third Circuit, in a split decision, held that the district court properly enjoined the honoring of a stranger picket line under an implied no-strike clause on the ground that the dispute was arbitrable, the majority holding that there is no meaningful distinction between the question presented in this case and one presented if the employer had discharged its employees for refusing to cross the stranger picket line and the union had grieved the discharge under the settlement of disputes provision of the contract.[61] In this connection, the Third Circuit majority opinion noted as follows:

> "To make a distinction which would in effect force the employer to discharge employees in order to bring the settlement of disputes provisions into operation would be counter-productive of the intended purpose of the provisions and of the national policy favoring settlement of industrial disputes by peaceful means." (88 LRRM at 2366)

In two cases involving picketing by nonemployees, protesting the impact of the national gasoline shortage, and the consequent refusal of the employees to cross the picket line, the Fourth Circuit found that the subject matter was arbitrable under a broad arbitration provision and granted injunctive relief based upon the implied obligation of the employees not to strike.[62] The

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[59] 484 F.2d 1209, 84 LRRM 2481 (4th Cir. 1973).

[60] *Wilmington Shipping Co.* v. *Longshoremen Local 1426,* 506 F.2d 1042, 86 LRRM 2846 (4th Cir. 1974), *aff'g* 86 LRRM 2845, 2854 (E.D.N.C. 1973); *Inland Steel Co.* v. *Local 1545, Mine Workers,* 505 F.2d 293, 87 LRRM 2733 (7th Cir. 1974); *NAPA Pittsburgh, Inc.* v. *Local 926, Teamsters,* 502 F.2d 321, 87 LRRM 2044 (3rd Cir. 1974), *cert. den.,* 87 LRRM 3035; *Pilot Freight Carriers, Inc.* v. *Teamsters Local 391,* 497 F.2d 311, 86 LRRM 2337 (4th Cir. 1974); *Pilot Freight Carriers, Inc.* v. *Teamsters Locals 151 and 728,* 86 LRRM 2419 (N.D.Ga. 1974); *Bethlehem Mines Corp.* v. *Mine Workers,* 375 F.Supp. 980, 86 LRRM 2398 (W.D.Pa. 1974).

[61] *Island Creek Coal Co.* v. *Mine Workers,* _____ F.2d _____, 88 LRRM 2364, 2608 (3rd Cir. 1975).

[62] *U.S. Steel Corp.* v. *Mine Workers,* _____ F.2d _____, 87 LRRM 2806 (4th Cir. 1974); *Armco Steel Corp.* v. *Mine Workers,* 505 F.2d 1129, 87 LRRM 2974 (4th Cir. 1974).

Fourth Circuit noted in one of these decisions (*Armco Steel*) that the right of employees to refuse to cross picket lines may be waived by the union in agreeing to a no-strike provision of a contract, and it explicitly expressed no opinion on the right of the employer to recover damages against the union.

The question of the recovery of damages for the refusal of employees to cross the picket line of a sister union was involved in two district court decisions in the District of Columbia. In the first case, the court denied the union's motion to dismiss an employer's action for damages caused by the union's refusal to cross the picket line of a sister union on the ground that the contract required arbitration of the dispute.[63] In another but later case, the same court held that the employer was not entitled to damages under Section 301 for a strike caused by the refusal of union members to cross the picket line of a sister union where the contract prohibited a strike pending arbitration of any dispute "arising out of the interpretation of or application of" the contract.[64] In the latter case, the court found that the refusal to cross the picket line did not involve a dispute with the employer that arose out of the interpretation or application of the contract with the union and, therefore, was not subject to arbitration under the contract. Accordingly, the refusal of the employees to cross the picket line was found to be a protected right under Section 7 of the LMRA.

The divergent lines of authority in regard to how narrow the *Boys Markets* case will be applied to situations involving the honoring by employees of a stranger picket line indicate that resolution of this question, and the consequent question as to the liability of the union for damages, will eventually have to be resolved by the Supreme Court. In the meantime, arbitrators will have to scrutinize closely the contract language under the grievance and no-strike provisions when considering these issues. It can also be expected that, in light of the confusion in the court opinions in this area, attempts will be made by the parties to clarify the language of their agreements in regard to the honoring of stranger picket lines.

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[63] *Rhode Island & M Assoc.* v. *Local 99, Operating Engineers,* 88 LRRM 2007, 2009 (D.D.C. 1974).

[64] *12th and L Ltd. Partnership* v. *Local 99, Operating Engineers,* 88 LRRM 2572 (D.D.C. 1975).

D. Disciplinary Proceedings

In the arbitration of disciplinary actions, the question frequently arises whether the company adequately investigated the facts and circumstances of the situation before making its disciplinary decision. Collective bargaining agreements often contain language providing for union representation when an employee is interviewed prior to disciplinary action. The problem of what is called "industrial due process" has been significantly affected by the decision of the Supreme Court in *NLRB* v. *J. Weingarten, Inc.*[65]

In *Weingarten* the Court affirmed (six to three) a decision of the National Labor Relations Board, which held that the employer had violated Section 8 (a) (1) of the National Labor Relations Act. The Court approved the Board's distinction between an "investigatory" interview of the employer and the employee and a "disciplinary" interview. In the latter type, which was not actually involved in the case, the employer has "a mandatory affirmative obligation to meet with the union representative." Presumably this obligation arises from Section 8 (a) (5) of the NLRA.

With respect to the "investigatory" interview, which was involved in the case, the Court majority sustained the Board's holding that Section 7 of the NLRA protected the right of an employee to refuse to participate in an investigatory interview by the company without union representation, if the employee "reasonably believes the investigation will result in disciplinary action." The employer violates Section 8(a)(1) if he refuses to permit the union representation, or if he disciplines the employee for insisting on it, or for refusal to participate in the interview without it.

In holding that exercise of the employee right was a "concerted" activity, the Court stated:

> "This is true even though the employee alone may have an immediate stake in the outcome; he seeks 'aid or protection' against a perceived threat to his employment security. The union representative whose participation he seeks is however safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the

[65] *NLRB* v. *J. Weingarten*, 420 U.S. 251, 88 LRRM 2689 (1975).

employer does not initiate or continue a practice of imposing punishment unjustly. The representative's presence is an assurance to other employees in the bargaining unit that they too can obtain his aid and protection if called upon to attend a like interview."

While recognizing the Section 7 right, the Court stated also that:

"[E]xercise of the right may not interfere with legitimate employer prerogatives. The employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and foregoing any benefits that might be derived from one."

Weingarten is sure to raise difficult problems of application for the Board and for arbitrators. One predictable problem will be in determining whether an interview is "investigatory" or "disciplinary." Another will be in ascertaining whether the employee had a "reasonable belief" that the investigation would result in disciplinary action. Perhaps the most difficult will be reconciling the respective rights of the employee and the employer. These problems will be difficult enough for the Board, which decides only statutory questions. They will be even more difficult for arbitrators who must somehow, in disciplinary cases with an "industrial due process" component, accommodate the statutory rights and the contract language and practices. Experience may vindicate Justice Powell's dissenting view that the subject should have been left to the collective bargaining process.

II. Enforcement of Right to Arbitration

A. Suits Compelling or Staying Arbitration

There continues to be a large number of 301 actions where the courts are called upon to decide whether to compel or stay the arbitration of grievances. As noted by the Seventh Circuit, in holding that a union's grievance regarding an employer lockout was not arbitrable because the contract containing the no-strike or no-lockout provision had expired at the time of the dispute: [66]

" . . . [I]t is well established that 'whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a

[66] *Oil Workers Local 7-210* v. *American Maize Products Co.*, 492 F.2d 409, 86 LRRM 2438 (7th Cir. 1974), *aff'g* 86 LRRM 2435 (N.D.Ind. 1972).

matter to be determined by the Court on the basis of the contract entered into by the parties.' *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 241, 50 LRRM 2433, 2435 (1962)." (86 LRRM at 2439).

In fulfillment of the obligation to determine whether and what issues must be arbitrated, the courts will refuse to compel arbitration where it is clear that the matter in dispute is excluded from coverage by the collective bargaining agreement.[67] In a case involving grievances relating to merit increases that under the contract were within "the judgment and discretion" of the employer, the Seventh Circuit remanded the case for hearing by the district court to determine whether the parties intended to submit such grievances to arbitration, since they disagreed upon whether the bargaining history made such grievances arbitrable.[68] During the past year, arbitration was refused in cases where the court found no agreement between the particular employer and the union involved,[69] where a state court found a contract invalid under state law because a union security clause was signed when the employer had no employees,[70] where the grievance claimed breach of an oral side agreement on the ground that the grievance procedure was limited to disputes regarding the terms and conditions of the contract and the award in such case could not draw its substance from the collective bargaining agreement,[71] or where the court found that the time limitations had clearly not been followed, contrary to the terms of the agreement.[72]

However, the courts generally hold that disputes are subject to arbitration unless it can be said with positive assurance that the arbitration clause is not subject to an interpretation that covers the asserted dispute, and that all procedural prerequisites relative to the dispute are for the arbitrator, not the courts, to

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[67] *Sperry Rand Corp.* v. *Engineers Union, IUE,* 371 F.Supp. 198, 85 LRRM 2615 (S.D.N.Y. 1974); *Fabijanic* v. *Sperry Rand Corp.,* 370 F.Supp. 62, 85 LRRM 2666 (S.D.N.Y. 1974); *Transit Union Div. 1491* v. *Tennessee Trailways, Inc.,* 366 F.Supp. 971, 86 LRRM 2565 (E.D.Tenn. 1972).

[68] *Local 81, Technical Engineers* v. *Western Elec. Co.,* _____ F.2d _____, 88 LRRM 2081 (7th Cir. 1974).

[69] *Operating Engineers Local 18* v. *Dayton Power & Light Co.,* 500 F.2d 766, 86 LRRM 3136 (6th Cir. 1974), *aff'g* 86 LRRM 3134 (S.D.Ohio 1973); see also *Teamsters Local 531* v. *Dumpson,* 88 LRRM 2258 (E.D.N.Y. 1974) (in addition, the court found defendant to be a public employer and, therefore, not an employer within the meaning of Section 301).

[70] *52 Flavors, Inc.* v. *Retail Clerks Local 150,* 88 LRRM 2539 (N.Y.App.Div. 1974).

[71] *Marine Engineers Dist. 2* v. *Falcon Carriers, Inc.,* 374 F.Supp. 1342, 86 LRRM 2121 (S.D.N.Y. 1974).

[72] *Teamsters Locals 222 and 976* v. *Motor Cargo,* 88 LRRM 2522 (Utah Sup.Ct. 1974).

determine.[73] Thus, in a complex dispute regarding a strike-settlement agreement that was considered part of the collective bargaining agreement, the Sixth Circuit ordered the matter sent to arbitration without regard to the time limits or procedural limitations in the collective bargaining agreement, holding that arbitration was a viable means for resolving the particular dispute.[74] The fact that the employer has taken ameliorative action in regard to the particular grievance prior to the court hearing on the union's request for arbitration will not necessarily make the union's action moot where the court finds there is a continuing controversy.[75]

It has also been held that, where an expired contract so provides, arbitration may be ordered regarding the future terms of a contract (interest or contract arbitration).[76] Arbitration has been ordered in regard to the question of the employer's compliance with an outstanding arbitration award, where the arbitrator ruled that specific claims under the award would be subject to the grievance-arbitration procedure.[77] Arbitration may also be ordered on the basis of disputes arising out of documents that have been specifically incorporated as part of a collective bargaining agreement or that modify such agreement.[78] In one case where an employer had two contracts with identical arbitration clauses with the same union, the court ordered arbitration of the dispute between the parties as to which contract would apply to a particular construction project.[79] In a case involving an employee suit against a union for severance pay under an arbitration award, the court found that the award had been incorporated by

[73] *Tally Togs, Inc.* v. *Clothing Workers Local 169,* 85 LRRM 2589 (S.D.N.Y. 1974); *Communications Workers* v. *United Tel. Co. of Ohio,* 85 LRRM 2771 (N.D.Ohio 1973); *Guilderland School Dist.,* 45 A.D.2d 485, 356 H.Y.S.2d 689, 87 LRRM 2252 (N.Y.App. 1974); under the RLA, see *Burlington Northern* v. *Ry. Supervisors Assn.,* 503 F.2d 58, 87 LRRM 2432 (7th Cir. 1974).

[74] *NCR Employees Union* v. *Natl. Cash Register Co.,* 489 F.2d 716, 86 LRRM 2154 (6th Cir. 1973), *aff'g* 86 LRRM 2153 (S.D.Ohio).

[75] *Electrical Workers Local 77* v. *Puget Sound P. & L. Co.,* 506 F.2d 523, 87 LRRM 3158 (9th Cir. 1974).

[76] *Printing Pressmen Local 50* v. *Newspaper Printing Corp.,* 88 LRRM 2219 (M.D.Tenn. 1974).

[77] *Dist. 50, Allied & Tech. Workers* v. *Conn. Natural Gas Corp.,* 86 LRRM 2940 (D.Conn. 1974).

[78] *Davis* v. *Pro Basketball, Inc.,* 381 F.Supp. 1, 87 LRRM 2285 (S.D.N.Y. 1974); *American Assn. of Univ. Professors* v. *N.Y. Inst. of Technology,* 86 LRRM 2937 (S.D.N.Y. 1974); compare *Teamsters Local 852* v. *Reliance Elec. Co.,* 88 LRRM 2393 (S.D.N.Y. 1973), where a letter of understanding was held not to apply to benefit sought by union in a breach-of-contract suit.

[79] *Sletten Constr. Co.* v. *Local 400, Operating Engineers,* 383 F.Supp. 853, 88 LRRM 2493 (D.Mont. 1974).

reference into a collective bargaining agreement, which, in turn, had been incorporated by reference into the collective bargaining agreement covering the suing employees.[80] Similarly, the disputes arising under insurance, pension, and like plans have been held to be arbitrable, even though such plans are contained in agreements separate from the collective bargaining agreement, especially where the rights of employees under the benefit plans are determined by the interpretation of the provisions of the basic agreement, although the insurance carrier may not be a proper party in such action since it is not a party to the collective bargaining agreement and its rights and obligations cannot be determined in the arbitration proceeding.[81]

Grievances that arise out of events that occur after the termination or expiration of a collective bargaining agreement are not arbitrable or subject to a breach of contract action,[82] unless the court can find an interim contract that provides that the grievance-arbitration machinery of the expired contract remains in effect pending negotiation of a new collective bargaining agreement.[83] Thus, where a union sued for severance pay where the collective bargaining agreement had been terminated and the employer thereafter closed the business, the court held that the union was not entitled to severance pay since such right was not a vested right and had expired with the contract.[84]

B. Multiparty Arbitration

Grievance-arbitration disputes having more than the usual two parties present special problems not occurring in other actions to compel arbitration. Most of these cases involve work-assignment disputes between two unions, and unless all parties concerned are joined in the action, the court will be reluctant summarily to order arbitration under a collective bargaining agreement with

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[80] *McKenstry* v. *Marine Engineers,* 373 F.Supp. 577, 87 LRRM 2667 (N.D.Cal. 1974).

[81] *Steelworkers* v. *General Steel Ind., Inc.,* 499 F.2d 215, 86 LRRM 2348 (8th Cir. 1974).

[82] *Los Angeles Newspaper Guild Local 69* v. *Hearst Corp.,* 504 F.2d 636, 87 LRRM 2597 (9th Cir. 1974); *Cashin* v. *Spencer & Son Co.,* 87 LRRM 2602 (N.D.N.Y. 1974); *New York Trans. Co.* v. *Typographical Union No. 6,* 43 A.D.2d 231, 350 N.Y.S.2d 676, 86 LRRM 2354 (N.Y.App. 1974).

[83] *AFTRA* v. *Taft Broadcasting Co.,* 368 F.Supp. 123, 85 LRRM 2557 (W.D.Mo. 1973).

[84] *Bakery Workers Local 358* v. *Holde Bros., Inc.,* 87 LRRM 2646 (E.D.Va. 1974).

one of the unions.[85] The Seventh Circuit recently ordered such a dispute to be submitted to the national joint board set up under the constitution of the building and construction trades, where both unions were signatory to such procedure, rather than to a local board established under one of the union contracts.[86] The court held that the employer was also bound to honor the national joint board arbitration procedures by reason of a contractual provision that required the employer to respect agreements national in scope between the union with which it had a contract and other international unions covering work jurisdiction. Another court ordered tripartite arbitration over a vacation-pay dispute under separate contracts with identical arbitration clauses that one union had with both its predecessor and its successor employer.[87] The court held that a contractual provision in the predecessor's contract binding successor employers does not eliminate the duty to arbitrate disputes based upon conditions existing prior to the expiration of the predecessor's contract, and that the usual procedural defenses of laches, estoppel, and waiver, plus the effect of a "hold harmless" clause in the sales contract between the successor and its predecessor, were matters that must be decided by the arbitrator.

Courts will occasionally order arbitration under a collective bargaining agreement in a work-assignment dispute without the participation of the second labor organization involved. For example, one district court ordered bilateral arbitration of a grievance that alleged that the employer had hired another union's members to work on a construction project, where the employer claimed that the plaintiff's contract did not apply, and where the only issue apparently was the geographic jurisdiction of the plaintiff union and there was no strike or intent to strike involved.[88] In another work-assignment dispute, a district court ordered bilateral arbitration over the employer's objection that the matter was essentially a tripartite dispute, noting that the alternative was to force the controversy to a strike in order to bring it before the

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[85] Compare *Teamsters Local 100* v. *Quick-Freeze Cold Storage, Inc.*, 375 F.Supp. 725, 86 LRRM 2142 (S.D.Ohio 1974), with *Painters Local 1423* v. *P.P.G. Ind., Inc.*, 378 F.Supp. 991, 86 LRRM 3166 (N.D.Ind. 1974).

[86] *Sheet Metal Workers Local 416* v. *Helgesteel Corp.*, _____ F.2d _____, 88 LRRM 2254 (7th Cir. 1974), *rev'g* 335 F.Supp. 812, 80 LRRM 2113 (W.D.Wis. 1972).

[87] *Brick & Clay Workers Local 552* v. *Hydraulic Press Brick Co.*, 371 F.Supp. 818, 87 LRRM 3260 (E.D.Mo. 1974).

[88] *Operating Engineers Local 139* v. *Carl A. Morse, Inc.*, 88 LRRM 2145, 2680 (E.D.Wis. 1974, 1975).

NLRB.[89] The court, in ordering bilateral arbitration, stressed the long-established and well-documented judicial preference for arbitration of labor disputes and the underlying policy of federal law to foster resolution of such disputes by the parties in a voluntary manner, citing the following language of the Supreme Court:

> "Grievance arbitration is one method of settling disputes over work assignments; and it is commonly used, we are told. To be sure, only one of the two unions involved in the controversy has moved the state courts to compel arbitration. So unless the other union intervenes, an adjudication of the arbiter might not put an end to the dispute. Yet the arbitration may, as a practical matter, end the controversy or put into movement forces that will resolve it. *Carey* v. *Westinghouse Elec. Corp.*, 375 U.S. 261, 55 LRRM 2042, at 2044 (1964)." (86 LRRM at 2384)

Bilateral arbitration was ordered and injunctive relief granted against a work stoppage in a case where the union refused to perform certain work under its residential building contract signed with the employer, claiming the work in question was commercial in nature and, therefore, within the jurisdiction of a sister local.[90] In contrast, however, the enforcement of a bilateral arbitration award in favor of one union in a jurisdictional dispute case was stayed by a court pending NLRB resolution of the dispute, where no notice had been given to the other labor organization of the arbitration procedure.[91] Under NLRB practice, the Board will decide jurisdictional disputes where it does not find an agreement by all parties to a voluntary method of settlement of the dispute, even where a federal court case is pending wherein an order for tripartite arbitration is sought.[92]

The Second Circuit refused to confirm a tripartite arbitration award where the court found the language of the award contradictory and remanded the case for further arbitration. The parties were to select the arbitrator, and if they were unsuccessful in doing so, the court would appoint one.[93] The court noted that an arbitrator need not follow the niceties observed by federal

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[89] *Nashua Typographical Union No. 365* v. *Telegraph Pub. Co.*, 365 F.Supp. 262, 86 LRRM 2383 (D.N.H. 1973).

[90] *Frommeyer & Co.* v. *Bricklayers Local 64*, 87 LRRM 2512 (E.D.Pa. 1974).

[91] *Iron Workers Local 3* v. *Jendoco Constr. Co.*, 87 LRRM 2960 (W.D.Pa. 1974).

[92] *Baltimore Pressmen's Union No. 31* (A.S. Abell Co.), 213 NLRB No. 73 87 LRRM 1183 (1974).

[93] *Textron, Inc.* v. *Local 516, UAW*, 500 F.2d 921, 86 LRRM 3240 (2nd Cir. 1974).

courts in handling evidence, but can go outside the contract, absent explicit language to the contrary, and consider the NLRB certification of the union to whom the employer assigned the work.

III. Conduct of Arbitration and Enforcement of Awards

A. Conduct of Arbitration Hearings

Issues relating to the fairness of the arbitration hearing and partiality of the arbitrator often are brought before the courts, usually in actions attacking the enforcement of an award. In resolving a grievance regarding an employer's termination of a pension plan, the Eighth Circuit held that the arbitrator could look to the former expired agreements between the parties and the past practice under such agreements to help determine the understandings underlying the new agreement and to resolve the grievance presented, as long as the resulting award drew its essence from the contract.[94] It is generally accepted that in discharge cases the arbitrator has discretion to determine that the contract language was not reasonably applied to the employee and that the award can provide for a compromise remedy.[95] In one case, a district court held that the arbitrator exceeded his authority in finding for the union in a dispute involving the improper assignment of work by ordering the wages of the employee paid to the union, rather than providing for reimbursement only of the dues lost by the union, which was its only monetary loss.[96] The court found the award to be punitive and modified it accordingly.

An arbitrator did not violate a contract requirement to act only on the basis of the submission stipulation where the stipulations of the parties were defective, a district court held. This raised a procedural question which the arbitrator could decide as long as the express terms of the contract were not violated.[97] In another case, the court held that the arbitrator was within the

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[94] *Automobile Workers* v. *White Motor Corp.*, 505 F.2d 1193, 87 LRRM 2707 (8th Cir. 1974), *aff'g* 86 LRRM 2246 (D.Minn.); *Textron, Inc.* v. *Local 516, UAW, supra* note 93.

[95] *Upholsterers Local 636* v. *American Carpet Mills, Inc.*, 86 LRRM 2611 (N.D.Ga. 1974).

[96] *Bakery Workers Local 369* v. *Cotton Baking Co.*, 377 F.Supp. 1172, 86 LRRM 3028 (W.D.Ga. 1974).

[97] *Procter & Gamble Co.* v. *Independent Oil Workers*, 87 LRRM 3179 (D.Md. 1974).

scope of his authority when he heard a transfer grievance where the submission agreement related to the seniority clause of the contract.[98] The court noted that the issue was raised by the employer in its posthearing brief, and that the arbitrator could consider the history of the collective bargaining negotiations to determine that he could decide an employee grievance that was not included in the original grievance set for arbitration, since the essence of his opinion was drawn from the contract and his holding was a plausible interpretation of the contract in light of all the factors considered. An award will be enforced unless it is apparent that the award clearly goes beyond the scope of the submission documents; and in so holding, one court enforced an award of an arbitration panel dealing with employee rights created by the union in its bylaws, where the bylaws had been incorporated by reference into the collective bargaining agreement agreed to by the employer.[99]

The parties may waive the time limits specified in the contract for rendering a decision on a grievance, and an award not rendered within the time specified by the contract will be enforced if the arbitrator received permission from the union and the employer to render a late award.[100] In one case where the parties had orally agreed to the extension of time for the award, the court enforced it, noting that the contract did not provide for automatic invalidation of a late award, and that the employer had unilaterally caused the delay and had shown no adverse effect by reason of the delay.[101] The same case held that where an employer refused to strike the names from the list of proposed arbitrators, the union was not required to do so unilaterally and proceed to arbitration *ex parte*, but could seek a district court order to compel arbitration.

An arbitrator's refusal to grant a postponement of the hearing requested by the employer so that it could provide additional witnesses was held not to deprive the employer of a fair hearing, where the employer gave the arbitrator no reason for the post-

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[98] *Yakima Newspaper Guild Local 27* v. *Republic Pub. Co.*, 375 F.Supp. 945, 86 LRRM 2725 (E.D.Wash. 1974).

[99] *Keystone Co.* v. *Pressmen Local 119*, 87 LRRM 3191 (M.D.Pa. 1974).

[100] *Carlton* v. *Morley Co.*, 88 LRRM 2971 (W.D.Ky. 1975) (employee action to vacate award).

[101] *Teamsters Local 604* v. *Placke Chevrolet Co.*, 382 F.Supp. 1156, 87 LRRM 2193 (E.D.Mo. 1974).

ponement and the arbitrator had acted within his discretion.[102] In another case, a district court held that the arbitrator's denial of a continuance was not grounds for denying enforcement of an award where the ends of justice would not have been served by the delay.[103] The same case upheld the use by the union of employer witnesses to establish its case, and held that the arbitrator's denial of the employer's request that a certified reporter transcribe the proceedings was not erroneous, since the lack of a transcript for court review does not justify vacation of an award. Another district court, however, vacated a $100,000 damage award in favor of the union where the arbitrator denied the employer's request for adjournment of the hearing after the employer's administrative assistant conducting the employer's case became sick and went to the hospital, the court finding that the arbitrator had abused his discretion in this instance.[104]

Employees frequently attack arbitration awards, especially in discharge cases. In one case the employee was successful where he had been discharged for writing an article critical of the employer and the union, and the court found that the arbitrator was partial against the employee and in favor of the employer and the union.[105] The trial court also found a breach of fair representation, in that the union attorney had handled the grievance in a perfunctory manner, and a wrongful discharge by the employer because the employee's free speech rights had been violated under the First Amendment of the Constitution, which the court found could not be considered just cause under a collective bargaining agreement. On appeal, the Second Circuit held that the award of punitive damages to the employee was erroneous and that the remedy should be limited to reinstatement with back pay, including attorney fees.

The courts hold that arbitrators need not explain the reasons for their findings, although courts have indicated that the better practice would be to address directly each serious issue raised by

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[102] *Teamsters Local 251* v. *Narragansett Co.*, 503 F.2d 309, 87 LRRM 2279 (1st Cir. 1974), *aff'g* 86 LRRM 3086 (D.R.I. 1974).

[103] *Berger* v. *Leonard Workman Co.*, 86 LRRM 2315 (S.D.N.Y. 1973).

[104] *Allendale Nursing Home* v. *Local 1115 Joint Board*, 377 F.Supp. 1208, 87 LRRM 2498 (S.D.N.Y. 1974).

[105] *Holodnak* v. *Avco Corp.*, 514 F.2d 285, 88 LRRM 2950 (2nd Cir. 1975), *aff'g as modified* 387 F.Supp. 191, 87 LRRM 2337 (D.Conn. 1974).

the parties.[106] In a discharge case, a court held that it was not prejudicial for the employer's representative to show the arbitrator eight law suits that the employee had filed, including one against the American Arbitration Association, where the employee had not raised the issue before the arbitrator.[107] The same court held that the employee's contention that certain witnesses necessary for his case were not present before the arbitrator was without merit, where the employee did not raise the question of the availability of the "necessary" witnesses before the arbitrator or seek his aid in that regard, even assuming that the employee could show that he suffered substantial harm by reason of the absence of the witnesses.

B. Enforcement of Awards in General

Courts will not review arbitration awards on the merits, but will only determine whether the arbiter acted within the authority granted, whether the award draws its essence from the contract, and whether there was obvious disregard of the law.[108] Suits for enforcement or vacation of awards may be brought in federal court under Section 301 or under the Federal Arbitration Act,[109] and the limitation period for filing such actions, using either state or federal law, may be relatively short, consistent with the federal policy favoring rapid resolution of labor disputes.[110] Where an award is ambiguous, the court may grant a request to remand the proceeding to the arbitrator for clarification.[111] Pro-

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[106] *Bylund* v. *Safeway Stores, Inc.*, 86 LRRM 2686 (D.Ore. 1974); see also the court's preference that an arbitration panel address directly each of the serious issues raised by the parties, *REA Express, Inc.* v. *BRAC*, 88 LRRM 2319 (S.D.N.Y. 1974).

[107] *Eckert* v. *Budd Co.*, 88 LRRM 2979 (E.D.Pa. 1975).

[108] *Bieski* v. *Eastern Auto Forwarding Co.*, 497 F.2d 921, 87 LRRM 3275 (3rd Cir. 1974), *aff'g* 87 LRRM 3257 (D.Del. 1973); *Machinists Dist. 145* v. *Modern Air Transport, Inc.*, 495 F.2d 1241, 86 LRRM 2886 (5th Cir. 1974); *Amerada Hess Corp.* v. *Local 22026, Oil Workers*, 385 F.Supp. 279, 87 LRRM 2698 (D.N.J. 1974); *Harrison School Dist.* v. *Harrison Assn. of Teachers*, 87 LRRM 2752 (N.Y.App. 1974); *W. Girvan, Inc.* v. *Robilotto*, 33 N.Y.2d 425, 86 LRRM 2730 (N.Y.Ct. App. 1974); under the RLA, see *Employees Protective Assn.* v. *Norfolk & Western Ry.*, _____ F.2d _____, 88 LRRM 2938 (4th Cir. 1975); *Giordano* v. *Modern Air Transport, Inc.*, 504 F.2d 882, 87 LRRM 3231 (5th Cir. 1974); *Northwest Airlines, Inc.* v. *Air Line Pilots*, 88 LRRM 2052 (D.D.C. 1974).

[109] *Automobile Workers* v. *White Motor Corp.*, 374 F.Supp. 421, 85 LRRM 2548 (D.Minn. 1973).

[110] *Mine Workers* v. *Jones & Laughlin Steel Corp.*, 378 F.Supp. 1206, 86 LRRM 3089 (W.D.Pa. 1974) (three-month limitation, so action to vacate 11 months after award dismissed).

[111] *Paperhandlers Union No. 1* v. *U.S. Trucking Corp.*, 85 LRRM 2718 (S.D.N.Y. 1974); under the RLA, see *Wisniewski* v. *Pittsburgh, C & Y Ry.*, 379 F.Supp. 297, 88 LRRM 2335 (W.D.Pa. 1974).

cedural issues under the grievance-arbitration procedure, such as questions relating to time limits and whether three arbitrators are necessary under the collective bargaining agreement, are for the arbitrator to determine and will not be reviewed on the merits by the courts.[112] Suits seeking to vacate arbitration awards may be filed by the employees involved, as well as by the employer or the union, but would appear to have no greater chance of success when filed by the employees.[113]

The arbitrator is limited to interpreting the written language of the contract and cannot supplement the written collective bargaining agreement by relying on the intent of one of the parties during the negotiations [114] or on an unwritten but long-standing understanding between the two parties.[115] A party does not waive its objections to arbitrability by proceeding to arbitration and then seeking to vacate an adverse award, instead of refusing from the outset to arbitrate the dispute.[116] Awards will be vacated by the courts where they violate the unambiguous terms of the collective bargaining agreement[117] or are based upon an illegal contract.[118] The expiration of the contract prior to the issuance of an award did not prevent enforcement of the award requiring the employer to reopen his plant.[119] Nor will the refusal of a party to join in the submission of the dispute to arbitration

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[112] *Newspaper Guild Local 10* v. *Philadelphia Newspapers, Inc.*, 87 LRRM 2670 (E.D.Pa. 1974); *Meat Cutters Local 195* v. *Cross Bros. Meat Packers, Inc.*, 372 F.Supp. 1274, 85 LRRM 2935 (E.D.Pa. 1974); *Costello Constr. Corp.* v. *Local 559, Teamsters*, 88 LRRM 2999 (Conn.Sup.Ct. 1974).

[113] *Crigger* v. *Allied Chemical Corp.*, 500 F.2d 1218, 86 LRRM 3162 (4th Cir. 1974), *aff'g* 367 F.Supp. 1133, 86 LRRM 3156 (D.W.Va. 1973); *Yulio* v. *Moore-McCormick Lines, Inc.*, 88 LRRM 2552 (S.D.N.Y. 1975); *Crenshaw* v. *Allied Chemical Corp.*, 88 LRRM 2376 (E.D.Va. 1975); *Seward* v. *Brown & Williamson Tobacco Co.*, 88 LRRM 2381 (W.D.Ky. 1974); *Bannon* v. *Amer. Air Filter Co.*, 88 LRRM 2048 (W.D.Ky. 1974); *Lunceford* v. *Teamsters*, 87 LRRM 2011 (C.D.Cal. 1974); *Sheeder* v. *Eastern Express, Inc.*, 375 F.Supp. 655, 86 LRRM 3106 (W.D.Pa 1974).

[114] *Eastern Air Lines, Inc.* v. *Local 550, Transport Workers*, 384 F.Supp. 1300, 88 LRRM 2657 (S.D.Fla. 1974).

[115] *Mine Workers Dist. 5* v. *Pennweir Constr. Co.*, 87 LRRM 2658 (W.D.Pa. 1974).

[116] *Eltra Corp.* v. *Local 365, UAW*, 87 LRRM 2416 (S.D.N.Y. 1974).

[117] *Koehring Co.* v. *Local 699, IUE*, 87 LRRM 2472 (S.D.Ohio 1974); *Belardinelli* v. *Werner Continental, Inc.*, 128 N.J.Super. 1, 318 A.2d 777, 86 LRRM 2138 (N.J.App. 1974).

[118] *Botany Ind., Inc.* v. *Clothing Workers, N.Y. Jt. Bd.*, 506 F.2d 1246, 87 LRRM 3227 (2nd Cir. 1974), *dismissing as moot* 75 F.Supp. 485, 86 LRRM 2046 (S.D.N.Y. 1974) (bankruptcy proceeding also involved).

[119] *Atomic Uniform Corp.* v. *Local 91, ILGWU*, 86 LRRM 2331 (S.D.N.Y. 1973).

affect the validity of a subsequent award.[120] The union that is presently certified by the NLRB as the bargaining representative of the employees was allowed to intervene to protect the employees' rights in the employer's action to set aside an arbitration award won by a different union that previously represented the employees.[121]

A number of arbitration awards were enforced during the past year that presented somewhat interesting problems or situations. An award requiring a paid lunch period was enforced as to six local unions of an international which was signatory to a collective bargaining agreement on behalf of all of the locals, although the grievance underlying the award was filed by only one local.[122] The court held that enforcement of the award as to all six locals was justified since the grievance involved the interpretation of the contract with which all six locals had an interest, and a multiplicity of law suits could be thereby avoided. An employer's settlement with the employee who filed the grievance does not warrant dismissal of the union's action to enforce an arbitration award, except to the extent that the settlement may have carried out the award; the court held that the employer's unilateral action violated his bargaining obligation, and it also awarded attorney fees to the union on the ground that the employer's arguments justifying his refusal to comply had little chance of prevailing.[123]

An award was enforced based upon a letter of agreement covering the matter of subcontracting, the court noting that the arbitrator's decision was derived from the essence of the letter-agreement.[124] An award was also enforced regarding the payment of a wage increase to employees, with 6 percent interest on the money withheld, which the court found met the requirements of the Economic Stabilization Act and the Pay Board

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[120] *Santa Clara Elec. Contr. Assn.* v. *Local 332, IBEW,* 86 LRRM 3052 (Cal.App. 1974).

[121] *Puerto Rico Tel. Co.* v. *Teamsters Local 901,* 369 F.Supp. 644, 85 LRRM 2621 (D.P.R. 1974).

[122] *Electrical Workers* v. *Kaiser Broadcasting Corp.,* 88 LRRM 2009 (E.D.Pa. 1974).

[123] *Carpenters Local 2157* v. *American Superior Midwest, Inc.,* 86 LRRM 2682 (W.D.Ark. 1974); as to the question of attorney fees, see also cases cited in notes 124 and 125 *infra.*

[124] *Automobile Workers Local 157* v. *Buhr Machine Tool Corp., 87* LRRM 2412 (E.D.Mich. 1974).

regulations.[125] Another award requiring severance pay, which was issued when an employee was in the military service, was enforced as to the veteran when he returned from military service pursuant to the requirements of the Universal Military Training and Service Act.[126] In a case involving the enforcement of a back pay award, the court held that NLRB regulations regarding back pay were not controlling as to the award.[127]

IV. Specialized Court Actions Relating to Arbitration

A. Actions Against Labor Organizations

A split in authority appears to have developed in regard to whether there is Section 301 jurisdiction of actions by local unions against their international under the parent body's constitution. The Tenth Circuit held last year, in an action to prevent the international from merging intermediate bodies of the union, that there was no jurisdiction of the action under federal law within the meaning of either Section 301 of the LMRA or Section 102 of the Labor-Management Reporting and Disclosure Act (LMRDA).[128] The court held that the union's constitution is not a "contract" within the meaning of Section 301, a holding that the court admitted may not be in line with the 1963 decision of the Fourth Circuit in *Parks* v. *Electrical Workers*.[129] The court expressed concern about opening the doors of federal courts to every dispute between a parent union and a local union over the meaning and effect of the union constitution and held that it was not the intent of Congress for the court to use the LMRA to police intra-union problems.

What appears to be the larger body of authority is represented by a decision of the First Circuit involving the International Brotherhood of Carpenters and a long-standing dispute in regard to the jurisdiction of a millwright local versus other carpenter

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[125] *Electrical Workers Local 494* v. *Artkraft, Inc.*, 375 F.Supp. 129, 86 LRRM 3111 (E.D.Wis. 1974).

[126] *Johnson* v. *Missouri-Pacific RR.*, 86 LRRM 2268 (E.D.Tex. 1970).

[127] *Longshoremen Local 34* v. *Cargill, Inc.*, 372 F.Supp. 807, 85 LRRM 2733 (N.D.Cal. 1974).

[128] *Smith* v. *Mine Workers*, 493 F.2d 1241, 85 LRRM 2941 (10th Cir. 1974); *cf. Local 101, United Transportation Union, UTU* v. *UTU*, 88 LRRM 2431 (N.Y.App. 1974), which was dismissed because the local union failed to exhaust the remedies provided under the international constitution.

[129] 314 F.2d 886, 52 LRRM 2281, 2577 (4th Cir. 1963), *cert. den.* 372 U.S. 976, 52 LRRM 2943.

locals.[130] The appeals court held that the federal district court properly exercised jurisdiction under Section 301 in an action by the local union alleging that the international union breached the international constitution and the local's charter when it failed to support the local's statewide claim to representation of millwrights, the court relying on the *Parks* decision of the Fourth Circuit. The First Circuit, therefore, held that the local's action was based upon a contract between labor organizations within the meaning of Section 301 and stated as follows:

> "[I]t is clear that the local and International are each suable entities under the act. When two such entities' relationship is a matter of contract, and that contract directly concerns the representation of workers in collective bargaining, there is no reason to assume that Congress did not intend the statute to apply simply because the two parties to the contract are related. Furthermore, this suit is on a contract and is not intended to enforce customs and practices of the unions which have not been reduced to a contract; exercising jurisdiction here will not involve the courts in regulating internal union matters which Congress did not intend to control." (85 LRRM at 2934–35)

The court was also not disturbed by the fact that the local was seeking damages on behalf of its members, since it held that Section 301 prohibits recovery only *against* individual members in such a representative action but that 301 is silent as to recovery *by* individual members.

In other actions, the Ninth Circuit refused to take jurisdiction under 301 of an injunctive action by one union against another to enforce a no-raid agreement where an NLRB election had been ordered pursuant to a petition filed by the defendant union.[131] The court bowed to the superior authority of the NLRB in representation matters and the right of employees to freedom of choice under Section 7 of the LMRA, but held that the plaintiff's action for damages for breach of the no-raid agreement may continue to trial since that would not interfere with Section 7 rights. Without discussion of the jurisdictional question, the Fifth Circuit upheld a dismissal of an action by local unions challenging their disbandment by the international union on the ground

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[130] *Local 1219, Carpenters* v. *Carpenters,* 493 F.2d 93, 85 LRRM 2933 (1st Cir. 1974), *aff'g* 85 LRRM 2929 (D.Me. 1973).

[131] *Local 1547, Electrical Workers* v. *Local 959, Teamsters,* _____ F.2d _____, 87 LRRM 3060 (9th Cir. 1974).

that the union constitution had been followed and the rights of members protected.[132] A Pennsylvania district court, however, explicitly held that it had jurisdiction under 301 of an action by local union *members* against the international union challenging the holding of a referendum on affiliation with another labor organization under the union constitution.[133] The district court held that the union constitution was a contract under 301 and had been violated by the officers of the parent union. A New York district court considered a 301 action by local union officials seeking an injunction and declaratory relief against the international president to prevent him from asserting jurisdiction over pending local proceedings on charges of official misconduct.[134] Two attempts by local unions to sue their international for breach of the duty of fair representation because of the negotiating position of the international, which worked to the detriment of the local union members in the resulting contract, were dismissed on the ground that no bad faith, collusion, or other basis for the breach of the duty of fair representation was shown.[135]

The question of Section 301 jurisdiction becomes even more difficult where the plaintiffs are individual union members rather than the local union itself.[136] For example, an Indiana district court held that it had no jurisdiction over an employee action against the local and international unions for damages caused by an illegal strike, which violated the union constitution, on the ground that a violation of the union constitution was not a violation of contract within the meaning of Section 301, where the subject matter involved only an intra-union problem unrelated to the collective bargaining agreement.[137] In the multitudinous fair-representation actions by union members or other individuals against unions relating to union membership, transfer of membership, union disciplinary proceedings, job referrals, seniority, and similar problems, some courts make it clear that a collective bargaining agreement must be present to sustain the Section 301

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[132] *Local 6256, Mine Workers* v. *Mine Workers,* 491 F.2d 1406, 87 LRRM 3275 (5th Cir. 1974), *aff'g* 87 LRRM 2191 (N.D.Ala. 1973).

[133] *Keck* v. *Employees Indep. Assn.,* 88 LRRM 2355 (E.D.Pa. 1974).

[134] *Daley* v. *Fitzsimmons,* 384 F.Supp. 637, 87 LRRM 2913 (S.D.N.Y. 1974).

[135] *Waiters Local 781* v. *Hotel Assn. of Washington, D.C.,* 498 F.2d 998, 86 LRRM 2001 (D.D.C. 1974); *Flint Glass Workers Local 90* v. *AFGWU,* 374 F.Supp. 600, 86 LRRM 2065 (D.Md. 1974).

[136] See *Russo* v. *Plumbers Local 676,* 372 F.Supp. 1265, 86 LRRM 2238 (D.Conn. 1974).

[137] *Cooper* v. *Chemical Workers,* 86 LRRM 3055 (S.D.Ind. 1974).

cause of action, although in most of these cases other statutory obligations are also involved, such as other sections of the LMRA, civil rights statutes, and the LMRDA.[138] Similar problems are encountered by employees and union members who are suing for breach of the duty of fair representation or breach of contract and who are covered by the RLA and the various statutes regulating the industries in which those employees work.[139]

A number of actions were reported during the past year involving dissident union members challenging the procedures for ratification of collective bargaining agreements under union constitutions; and unless there is a clear violation of the union's constitutional requirements, the courts are reluctant to interfere with these internal union processes.[140] The most interesting of these cases involved the attempt by dissident members of the Steelworkers union to enjoin the implementation of the experimental negotiating agreement between the union and ten steel-producing companies, in which the union gave up the right to strike and agreed to submit all unresolved issues to final and binding arbitration by an impartial arbitration panel.[141] The

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[138] Compare *Smith* v. *Local 25, Sheet Metal Workers,* 500 F.2d 741, 87 LRRM 2211 (5th Cir. 1974); *Gonzalez* v. *Local 1581, ILA,* 498 F.2d 330 (5th Cir. 1974), *aff'g* 87 LRRM 2244 (S.D.Tex. 1973); *Vincent* v. *Plumbers Local 198,* 384 F.Supp. 1379, 87 LRRM 2794 (M.D.La. 1974); *Stein* v. *Mutual Clerks,* 384 F.Supp. 444, 87 LRRM 2827 (D.Mass. 1974); *Black Musicians of Pittsburgh* v. *Musicians Locals 60 and 471,* 375 F.Supp. 902, 86 LRRM 2296 (W.D.Pa. 1994); with *Beriault* v. *Local 40, Longshoremen,* 501 F.2d 258, 87 LRRM 2070 (9th Cir. 1974); *Adamczewski* v. *Local 1487, Machinists,* 496 F.2d 777, 86 LRRM 2592 (7th Cir. 1974); *Byrd* v. *Local 24, IBEW,* 375 F.Supp. 545, 8 FEP Cases 390 (D.Md. 1974); *Simpson* v. *National Maritime Union,* 87 LRRM 3077 (S.D.N.Y. 1974); *McFadden* v. *Baltimore S.S. Trade Assn.,* 8 FEP Cases 391 (D.Md. 1972); *Moore* v. *Iron Workers Local 483,* and *Philipchuk* v. *Same,* 88 LRRM 2705 and 2709 (N.J.Sup.Ct. 1975); *Magallanes* v. *Laborers Local 300,* 88 LRRM 2446 (Cal.App. 1974); *cf.* under the LMRDA only, *Refino* v. *Local 445, Teamsters,* 87 LRRM 3039 (S.D.N.Y. 1974).

[139] *Augspurger* v. *Locomotive Engineers,* _____ F.2d _____, 88 LRRM 2609 (8th Cir. 1975), *aff'g* 86 LRRM 3202 (D.N.D. 1974); *Laturner* v. *Burlington Northern, Inc.,* 501 F.2d 593, 86 LRRM 3144 (9th Cir. 1974); *Manzardo* v. *Pullman Co.,* _____ F.2d _____, 86 LRRM 3045 (7th Cir. 1973), *aff'g* 86 LRRM 3040 (N.D.Ill. 1972); *Read* v. *Machinists Local 1284,* 383 F.Supp. 776, 87 LRRM 2918 (D.Del. 1974); *Hinesly* v. *Locomotive Engineers,* 86 LRRM 3204 (N.D.Iowa 1974); *Newton* v. *Ouachita Lodge 588, BRAC,* 86 LRRM 3020 (W.D.La. 1973); *Wheeler* v. *Locomotive Firemen,* 86 LRRM 2613 (D.S.C. 1973); *cf.* where union found to have no duty toward employees not in the bargaining unit, *Reynolds* v. *Machinists Local 2444,* 498 F.2d 1397, 87 LRRM 2125 (4th Cir. 1974), *aff'g* 87 LRRM 2123 (M.D.N.C. 1973); *cf.* under the Age Discrimination in Employment Act, *Carey* v. *O'Donnell,* 506 F.2d 107, 8 FEP Cases 572 (D.C.Cir. 1974).

[140] Compare *Gardner* v. *Woodcock,* 384 F.Supp. 239, 87 LRRM 2891 (E.D.Mich. 1974), and *Teamsters Local 445* v. *Teamsters,* 87 LRRM 3219, 3221 (S.D.N.Y. 1974); with *Taxi Rank and File Coalition* v. *Van Arsdale,* 86 LRRM 2359, 2362 (contempt action) (S.D.N.Y. 1974).

[141] *Aikens* v. *Abel,* 373 F.Supp. 425, 85 LRRM 2786 (W.D.Pa. 1974).

court held that there was no breach of fair representation by the adoption of the agreement at a union convention with prior notice by a representative ratification procedure, rather than by a referendum vote of the union's rank-and-file membership.

A number of decisions were handed down during the past year challenging the validity of union security clauses under various theories, such as being in violation of the First Amendment or a right-to-work law.[142] Where employees sued an employer for breach of contract for failure to give vacation pay, the court held that the employer could not bring a third-party claim against the union for money damages where the damages sought arose solely from the employer's breach of contract.[143] It is also clear that an employer cannot sue union members for damages caused by an unlawful strike, but its remedy against the employees is limited to discipline under the collective bargaining agreement.[144]

B. Breach of Contract and Damage Actions

There are continually a large variety of actions brought under the umbrella of Section 301 seeking to remedy the breach of a collective bargaining agreement or requesting damages for such breach. It is axiomatic that there must be a contract between the plaintiff and the defendant for 301 jurisdiction to apply; so the fact that the defendant union had an illegal hot cargo agreement with another employer did not give the plaintiff, who did business with the contracting employer, a cause of action against the union for damages under 301 caused by the illegal agreement.[145] Similarly, a supervisor promoted out of a bargaining unit and thereafter fired had no breach of contract action based upon the collective bargaining agreement that formerly covered his employment.[146]

Generally speaking, before bringing court action the grievance procedures under the bargaining agreement must be ex-

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[142] *Mobil Oil Corp.* v. *Oil Workers,* 504 F.2d 272, 87 LRRM 2673 (5th Cir. 1974); *Peltzman* v. *Central Gulf Lines, Inc.,* 497 F.2d 332, 86 LRRM 2554 (2nd Cir. 1974), *rev'g* 86 LRRM 2127 (S.D.N.Y.), *on remand* 88 LRRM 2924; *Buckley* v. *AFTRA,* 496 F.2d 305, 86 LRRM 2103 (2nd Cir. 1974); *Gabaldon* v. *Farm Workers,* 35 Cal.App.3rd 757, 86 LRRM 2034 (1973).

[143] *Minter* v. *Moss-American, Inc.,* 88 LRRM 2080 (E.D.Ill. 1974).

[144] *Great Scott Super Markets, Inc.* v. *Goodman,* _____ Mich.App. _____, 85 LRRM 2769 (1973).

[145] *Atchison, Topeka & Santa Fe Ry.* v. *Teamsters,* 511 F.2d 1193, 88 LRRM 2971 (9th Cir. 1975), *aff'g* 88 LRRM 2969 (N.D.Cal. 1973).

[146] *Johnson* v. *Colts, Inc.,* 87 LRRM 2485 (D.Conn. 1974).

hausted,[147] and a prior arbitration award will bar a subsequent damage action arising out of the same transaction.[148] Where grievance-arbitration procedures are available to the plaintiff under the collective bargaining agreement, the courts will stay an employee action pending completion of such proceedings.[149] Many of the reported cases involved procedural and similar problems, such as removal to federal court from state courts,[150] venue,[151] attorney fees,[152] and mootness.[153]

Among the most interesting, but unsuccessful actions reported during the past year were attempts by unions to recover damages against an employer for undermining its status as the representative, or former representative, of the employees by forcing it to strike, refusing to negotiate, and similar conduct.[154] In an action by employees against an employer who closed his business grounded on breach of contract for a guaranteed annual wage, the court found that a settlement agreement between the union and the employer providing for severance and vacation pay was a complete release of the employer.[155] A union's damage action for termination of a business during the term of a collective bargaining agreement was dismissed on the ground that there was no specific language in the contract guaranteeing employment during its term.[156] Similarly, the union's action for severance pay for certain employees after an employer closed his business was dis-

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[147] But see *Gilstrap* v. *Mitchell Bros. Truck Lines,* 88 LRRM 2942 (Ore.Sup.Ct. 1974), see under the RLA, *Haney* v. *Chesapeake & Ohio RR.,* 498 F.2d 987, 86 LRRM 2912 (D.C.Cir. 1974); *Bowlin* v. *Seaboard Coast Line RR.,* 88 LRRM 2463 (W.D.N.C. 1974).

[148] *Suissa* v. *American Export Lines, Inc.,* _____ F.2d _____, 88 LRRM 2262 (2nd Cir. 1974), *aff'g* 367 F.Supp. 1113, 87 LRRM 2095 (S.D.N.Y. 1973); *Hana Co.* v. *Sheet Metal Workers Local 38,* 87 LRRM 2068 (S.D.N.Y. 1974).

[149] *Brannon* v. *Warn Bros., Inc.,* _____ F.2d _____, 88 LRRM 2084 (9th Cir. 1974); *Comeaux* v. *Conroy, Inc.,* 382 F.Supp. 299, 87 LRRM 2921 (M.D.La. 1974).

[150] *Oquendo* v. *Dorado Beach Hotel,* 88 LRRM 2091 (D.P.R. 1974); *Talbot* v. *Natl. Super Markets of La.,* 372 F.Supp. 1050, 86 LRRM 2043 (E.D.La. 1974).

[151] *Musicians* v. *NBC, Inc.,* 96 LRRM 2733 (S.D.N.Y. 1974).

[152] *Machinists Lodge 1194* v. *Sargent Ind.,* 63 FRD 623, 87 LRRM 2906 (N.D.Ohio Cir. 1974).

[153] *Rabinowitz* v. *Junior College Dist. 508,* _____ F.2d _____, 88 LRRM 2131 (7th Cir. 1974).

[154] *Rubber Workers Local 102* v. *Lee Nat'l Corp.,* 87 LRRM 2522 (S.D.N.Y. 1974); *Communications Workers* v. *Television Wisconsin, Inc.,* 87 LRRM 2162 (W.D.Wis. 1974).

[155] *Corcoran* v. *Allied Supermarkets, Inc.,* 498 F.2d 527, 86 LRRM 2883 (8th Cir. 1974).

[156] *Restaurant Employees Local 237* v. *Allegheny Hotel Co.,* 374 F.Supp. 1259, 86 LRRM 2256 (W.D.Pa. 1974).

missed on the ground that the employees were either terminated or on leave of absence prior to the closing.[157]

Other reported actions involved the specific performance of a contract regarding an employer's withdrawal from an employer association,[158] a breach-of-contract action by a union against an employer regarding the assignment of work,[159] and a union action against an employer regarding the level of payments under a profitsharing program under the collective bargaining agreement.[160] In a situation where the international union changed the territorial jurisdiction of the local union and gave such territory to a sister local, the original local's action against the employer for breach of contract was dismissed on the ground that the collective bargaining agreement was between the employer and the international, not the local union, and the international had the right to change the territories of its locals.[161]

C. Employee Benefit Plans

There has been a dramatic increase in the number of court actions filed in regard to employee-benefit plans, some of which use Section 301 as a basis for the suit, although other statutory grounds or traditional trust law may apply.[162] Where the collective bargaining agreement or the employee-benefit plan contains grievance-arbitration procedures for the resolution of disputes, such procedures must be exhausted before resorting to court action.[163] Even the trustees of a fund suing an employer for delinquent contributions as a third-party beneficiary under the

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[157] *Bakery Workers Local 12-B* v. *A & P Co.*, 371 F.Supp. 1120, 85 LRRM 2989 (W.D.Pa. 1974).

[158] *Laundry Workers Local 107* v. *Co-Mart Cleaners, Inc.*, 88 LRRM 2587 (D.Ore. 1974).

[159] *Carpenters Local 1302* v. *General Dynamics Corp.*, 87 LRRM 2189 (D.Conn. 1974).

[160] *Automobile Workers Local 495* v. *Diecast Corp.*, _____ Mich.App. _____, 217 N.W.2d 424, 86 LRRM 3004 (1974).

[161] *Plumbers Local 115* v. *Townsend & Bottum, Inc.*, 383 F.Supp. 1339, 87 LRRM 3276 (W.D.Pa. 1974).

[162] See, for example, *Beam* v. *Masters, Mates & Pilots*, _____ F.2d _____, 88 LRRM 2930 (2nd Cir. 1975); *Barninger* v. *Natl. Maritime Union*, 372 F.Supp. 908, 87 LRRM 2352 (S.D.N.Y. 1974); *Spitznass* v. *First Natl. Bank*, 87 LRRM 3100 (Ore. Sup.Ct. 1974); see in regard to an award of attorney fees, *Thomas* v. *Honeybrook Mines, Inc.*, 362 F.Supp. 747, 87 LRRM 2531 (M.D.Pa. 1974).

[163] *Boyd* v. *Fraser*, 382 F.Supp. 418, 88 LRRM 2094 (E.D.Mich. 1974); *Hayes* v. *C. Schmidt & Sons, Inc.*, 374 F.Supp. 442, 86 LRRM 2253, 87 LRRM 2466 (E.D.Pa. 1974); *Tombs* v. *Northwest Airlines, Inc.*, 83 Wn.2d 157, 516 P.2d 1028, 86 LRRM 2444 (Wash.Sup.Ct. 1973).

collective bargaining agreement must exhaust the grievance-arbitration procedures of the agreement before bringing a 301 suit.[164] However, the Fourth Circuit held that an employee could sue under Section 301 for disability benefits arising out of a collective bargaining agreement, and the court could reach the merits of the dispute where the court found that the grievance procedure did not apply to the dispute.[165]

Most of the reported cases involved employee suits for the denial of pension benefits,[166] which also may be combined with fair-representation and civil rights causes of action.[167] Contrary to most employee actions under collective bargaining agreements, the reported cases involving individual suits under employee-benefit plans indicate a much greater chance of success.[168] Employees had less success, however, in their court actions against employers and unions attacking the renegotiation of a pension plan,[169] or attempting to remain in an employer plan rather than being transferred to a union plan pursuant to the negotiations of the parties.[170]

Suits for unpaid contributions to trust funds under contracts that are incorporated by reference into collective bargaining agreements must be maintained by the trustees of the fund as third-party beneficiaries, rather than by the fund itself, and the union is not an indispensable party in such an action.[171] The

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[164] *Electrical Workers Local 308* v. *Dave's Elec. Inc.*, 382 F.Supp. 427, 87 LRRM 2611 (M.D.Fla. 1974).

[165] *Tolbert* v. *Union Carbide Corp.*, 495 F.2d 719, 85 LRRM 2868 (4th Cir. 1974).

[166] See *Dobis* v. *Huge*, 88 LRRM 2565 (D.D.C. 1974); *Miracle* v. *UMW Welfare Fund*, 373 F.Supp. 603, 86 LRRM 2600 (D.D.C. 1974) (supervisor denied pension); *Munts* v. *Fitzsimmons*, 88 LRRM 2958 (Ill.App. 1975) (employee found to be an independent contractor).

[167] *Wilburn* v. *S.S. Trade Assn. of Baltimore*, 376 F.Supp. 1228, 86 LRRM 2476, 7 FEP Cases 1182 (D.Md. 1974).

[168] *Pete* v. *UMW Welfare & Retirement Fund*, 517 F.2d 1275, 88 LRRM 2720 (D.C.Cir. 1975), *on rehearing en banc*, 517 F.2d 1267, 86 LRRM 3208 (1974) (pensions granted retroactively with interest); *Kiser* v. *Huge*, 517 F.2d 1237, 86 LRRM 3213 (D.C.Cir. 1974); *Maness* v. *Morse*, 88 LRRM 2623 (E.D.Mo. 1974); *Connell* v. *U.S. Steel Corp.*, 371 F.Supp. 991, 87 LRRM 2990 (N.D.Ala. 1974) (foreman granted pension, with attorney fees); *Cuff* v. *Gleason*, 382 F.Supp. 1144, 87 LRRM 2552 (E.D.N.Y. 1974).

[169] *Mumford* v. *Glover*, 503 F.2d 878, 87 LRRM 2945 (5th Cir. 1974).

[170] *Rothlein* v. *Armour & Co.*, 377 F.Supp. 506, 87 LRRM 2319 (W.D.Pa. 1974).

[171] *Carpenters* v. *Millwrights Trust Fund*, 88 LRRM 2618 (D.Colo. 1975); *Paul* v. *Lindgren*, 375 F.Supp. 843, 87 LRRM 3117 (N.D.Ill. 1974); *Carr* v. *Seattle Constr. Co.*, 11 Wash.App. 336, 522 P.2d 849, 88 LRRM 2561 (1974).

Tenth Circuit held that trustees could recover contributions for nonunion employees covered by a collective bargaining agreement, since a contract covers all employees performing work covered by the agreement, and the union's alleged failure to adequately represent nonunion employees did not relieve the employer of his obligations under the collective bargaining agreement.[172] It has been held that there is no 301 jurisdiction against the employer's surety for unpaid contributions, since the surety is not an employer or union nor a party to the contract within the meaning of Section 301.[173] On the other hand, another district court held that there was 301 jurisdiction of a suit by employers against the insurance company for indemnification for losses in a welfare-pension fund caused by the fraud of the employees of the fund, but gave summary judgment for the insurance company since the employers failed to give timely notice and proof of the loss as required by the contract.[174]

Plant closings are the occasion of many employee-benefit-plan suits, usually by unions against employers regarding the rights of employees under the funds that are to be terminated by the closures. In these cases the courts attempt to give maximum effect to the funds on behalf of the affected employees, and look not only at the literal terms of the collective bargaining agreement, but also at any supporting agreements, the intentions of the parties, and even to parol evidence.[175] A plant-closing agreement providing for the losing of pensions where not vested was held immune from employee attack by breach-of-contract/fair-representation suits against the employer and the union.[176] In view of the amount of litigation involving all aspects of employee benefit plans, arbitrators can expect an increasing number of such cases to be presented to them in the future.

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[172] *Manning* v. *Wiscombe,* 498 F.2d 1311, 86 LRRM 3183 (10th Cir. 1974).

[173] *Colorado Pipe Ind. Trustees* v. *Colorado Springs Plumbing & Heating Co.,* 88 LRRM 2816 (D.Colo. 1974).

[174] *Sheet Metal Contrs. Assn.* v. *Liskany,* 369 F.Supp. 662, 86 LRRM 2499 (S.D.-Ohio 1974).

[175] *Clark* v. *Kraftco Corp.,* _____ F.2d _____, 88 LRRM 2842 (2nd Cir. 1975), *rev'g* 85 LRRM 3030 (S.D.N.Y. 1974); *Brewery Workers* v. *Drake & Co.,* 373 F.Supp. 778, 86 LRRM 2057 (W.D.Pa. 1974); *Briggs* v. *Michigan Tool Co.,* 369 F.Supp. 920, 86 LRRM 2203 (E.D.Mich. 1974); *Machinists Lodge 1194* v. *Garwood Ind., Inc.,* 368 F.Supp. 357, 86 LRRM 2176 (N.D.Ohio 1973).

[176] *Craig* v. *Bemis Co.,* 374 F.Supp. 1251, 1258, 87 LRRM 3131, 3137 (S.D.Ala. 1974).

D. Individual Employee Actions

Continuing as the largest single area of litigation under Section 301, with clearly the smallest success ratio, are individual employee suits against unions for breach of the duty of fair representation, and wrongful discharge or breach-of-contract actions against employers. Many of these cases reported during the past year have been noted above in connection with other points of law. Most of these actions are dismissed, frequently on motion for summary judgment, for failure to exhaust remedies under the collective bargaining agreement [177] or available intra-union remedies.[178] Even the failure of an employee to plead exhaustion of contract remedies, or the futility of doing so, may lead to summary dismissal of the action,[179] and the failure to exhaust intra-union remedies is not excused by pleading ignorance of the union processes.[180]

Most of the employee actions against unions allege a breach of the duty of fair representation in processing grievances due to the union's arbitrary, hostile, discriminatory, or bad-faith attitudes.[181] The fact that the union acted negligently, incompetently, weakly, or ineffectively will not raise an issue as to its fair representation;[182] neither will the fact that the union failed to fulfill one of the steps of the grievance procedure that precludes

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[177] See, for example, *Priest* v. *Wolverine Express, Inc.*, 87 LRRM 2774 (W.D.Mich. 1974); *William* v. *Dana Corp.*, 86 LRRM 2371 (E.D.Mich. 1973); under the RLA, see *Mills* v. *Long Island RR.*, 87 LRRM 3242 (E.D.N.Y. 1974); *Garton* v. *No. Pacific Ry.*, 11 Wn.App. 486, 523 P.2d 964, 88 LRRM 2585 (1974); *Baillie* v. *Rollins*, 530 P.2d 440, 88 LRRM 2263 (Mont.Sup.Ct. 1974); for federal employees, see *Smith* v. *Tenn. Valley Auth.*, 381 F.Supp. 888, 87 LRRM 3202 (M.D.Tenn. 1974); for state law procedures, see *Wisconsin* v. *Wisconsin Employment Relations Comm.*, 223 N.W.2d 543, 88 LRRM 2177 (Wis.Sup.Ct. 1974).

[178] *Newgent* v. *Modine Mfg. Co.*, 494 F.2d 919, 86 LRRM 2468 (7th Cir. 1974); *Seigle* v. *Local 1336, UAW*, 87 LRRM 3021 (W.D.Ky. 1974); *Brookins* v. *Chrysler Corp.*, 381 F.Supp. 563, 87 LRRM 3024 (E.D.Mich. 1974); *Landry* v. *Rock Island RR.*, 86 LRRM 3130 (N.D.Ill. 1974); *Ward* v. *Local 45, UAW*, 87 LRRM 2813 (N.D.Ohio 1972); *Sherrill* v. *Local 862, UAW*, 86 LRRM 2720 (W.D.Ky. 1972).

[179] *Johnson* v. *Thomson Brush Moore, Inc.*, 86 LRRM 2071 (N.D.Ohio 1974).

[180] *McCloskey* v. *General Motors Corp.*, 88 LRRM 2414 (N.D.Ohio 1974); *Aldridge* v. *Ludwig-Honold Mfg. Co.*, 87 LRRM 3048 (E.D.Pa. 1974).

[181] In addition to other cases cited herein, see *Parmer* v. *Natl. Cash Register Co.*, 503 F.2d 275, 87 LRRM 2408 (6th Cir. 1974); *Dudley* v. *Woods Ind., Inc.*, 87 LRRM 2106 (D.Kan. 1974); *Causey* v. *Ford Motor Co.*, 382 F.Supp. 1221, 8 FEP Cases 354 (M.D.Fla. 1974).

[182] See *Gardner* v. *Local 600, UAW*, 87 LRRM 2097 (E.D.Mich. 1974); *Duckstein* v. *General Dynamics Corp.*, 499 S.W.2d 907, 86 LRRM 2431 (Tex.Civ.App. 1973).

arbitration of the grievance.[183] A union is expected to exercise its discretion as to how far to process a grievance, and a good-faith decision not to seek arbitration does not breach the duty of fair representation.[184] Although it is clear that the union need not invariably take the side of a grievant, an employee action may survive a motion to dismiss if factual issues are adequately raised indicating that the union improperly failed or refused to process a grievance on behalf of the employee.[185] Courts will, however, generally require that there be a contract or a contract provision in existence permitting union action before questioning its failure to process a grievance.[186]

The good-faith siding of a union in favor of one employee or group of employees over another, such as in seniority disputes, does not breach its duty of fair representation.[187] Thus, there is no breach of contract or the duty of fair representation where the union reached a compromise agreement with an employer to give red circle status to a classification that the employer wanted to eliminate entirely.[188] Although normally there can be no wrongful discharge action against an employer without a claim of a breach of fair representation against the union representing the discharged employee, it has been held that the lack of an arbitration provision in a contract may permit the wrongful discharge action to continue without the union where the union in good faith carried the grievance as far as it could, and under such cir-

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183 *Ruzicka* v. *General Motors Corp.*, 86 LRRM 2030, 88 LRRM 2240 (E.D.Mich. 1973), but in the wrongful discharge action against the employer, the court ordered a hearing on the merits before the umpire under the grievance procedure based on a counterclaim by the union.

184 *Stanley* v. *General Foods Corp.*, _____ F.2d _____, 88 LRRM 2862 (5th Cir. 1975); *Murray* v. *Oil Workers Local 8–472*, 88 LRRM 2119 (D.Conn. 1974); *Vedda* v. *Avery Eng. Co.*, 87 LRRM 2153, 2154 (N.D.Ohio 1974); *Hruby* v. *Mullins Mfg. Corp.*, 86 LRRM 2386 (N.D.Ohio 1973); *Tuma* v. *American Can Co.*, 373 F.Supp. 218, 85 LRRM 3005 (D.N.J. 1974).

185 *Schum* v. *South Buffalo Ry.*, 496 F.2d 328, 86 LRRM 2459 (2nd Cir. 1974); *Lucas* v. *Philco-Ford Co.*, 87 LRRM 2176 (E.D.Pa. 1974); *Lane* v. *Bethlehem Steel Corp.*, 8 FEP Cases 395, 86 LRRM 3115 (D.Md. 1972); *Shaw* v. *Metro-Goldwyn-Mayer, Inc.*, 37 CA3d 587, 86 LRRM 2486 (Cal.App. 1974).

186 *Fisher* v. *Copeland Refrig. Corp.*, 497 F.2d 923, 87 LRRM 3276 (6th Cir. 1974), *aff'g* 87 LRRM 3246 (S.D.Ohio 1973); *Hayes* v. *Consolidated Services Corp.*, 88 LRRM 3004 (D.Mass. 1974); see in regard to probationary employees, *Conrad* v. *Delta Air Lines*, 494 F.2d 914, 86 LRRM 2242 (7th Cir. 1974); see also the rejection of recovery based on the theory of quasicontract, *Duggan* v. *Machinists*, 510 F.2d 1086, 88 LRRM 2621 (9th Cir. 1975).

187 *Brauer* v. *Electrical Workers Local 45*, 86 LRRM 2390 (C.D.Cal. 1973); *Freeman* v. *Locomotive Engineers*, 375 F.Supp. 81, 85 LRRM 2806 (S.D.Ga. 1973).

188 *Brock* v. *Bunton*, 512 F.2d 720, 88 LRRM 3002 (8th Cir. 1975), *aff'g* 383 F.Supp. 127, 87 LRRM 2823 (E.D.Mo. 1974).

cumstances, the union need not take the dispute to a strike vote of the membership.[189]

It has been held that a discharged employee is not entitled to a trial-type hearing in the grievance procedure and to personally select his own representative for the grievance hearing, and the fact that union representatives were not as well educated or as skilled as the employer representatives does not establish a breach of fair representation where the good faith and good intentions of the union representatives are not questioned.[190] But where the union leadership or representatives are politically adverse to the grievant, or where the union clearly failed to properly represent the employee, the courts will at least hear the employee's action on the merits.[191] Similarly, a hearing on the merits of an employee action was granted by one court where issues of blacklisting by the employer and defamation by the union to prevent reemployment were raised.[192]

A small number of successful employee actions was reported during the past year where an award of damages was received by the employee-plaintiff. In two cases, the plaintiffs had been improperly denied their rightful seniority under a collective bargaining agreement.[193] In another case, a former union officer who was denied his job on return from a leave of absence prevailed in an action against the employer and the union, where the new leadership of the union revised its interpretation of the collective bargaining agreement regarding the return of employees from leaves of absence, thereby adversely affecting the former union leadership.[194] The Sixth Circuit upheld the jury verdict of wrongful discharge by an employer and breach of the duty of fair representation by the union, finding that the employee had made a good-faith effort to invoke the grievance procedure where

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189 Compare *Flowers* v. *Chrysler Corp.*, 87 LRRM 3033 (E.D.Mich. 1974), with *Hansel* v. *Parker Seal Co.*, 514 S.W.2d 673, 87 LRRM 2621 (Ky.App. 1974).

190 *Malone* v. *U.S. Postal Service*, 88 LRRM 3010 (W.D.Ky. 1974); also, where the discharged employees were allowed to pick their own attorney to represent them in the arbitration hearing, see *Easley* v. *Allied & Technical Workers*, 87 LRRM 2295 (M.D.Ala. 1974).

191 *Hines* v. *Local 377, Teamsters*, 506 F.2d 1153, 87 LRRM 2971 (6th Cir. 1974); *Margetta* v. *Pam Pam Corp.*, 501 F.2d 179, 87 LRRM 2161 (9th Cir. 1974).

192 *Breitegger* v. *CBS*, 43 Cal.App.3d 283, 88 LRRM 2600 (1974).

193 *Jones* v. *Trans World Airlines, Inc.*, _____ F.2d _____, 86 LRRM 2086 (2nd Cir. 1974); *Butler* v. *Yellow Freight System, Inc.*, 374 F.Supp. 747, 87 LRRM 3174 (W.D.Mo. 1974).

194 *Tedford* v. *Peabody Coal Co.*, 87 LRRM 2565 (N.D.Ala. 1974).

the timeliness of the filing of the employee's grievance was in dispute.[195] An employee recovered damages against the employer in a state court proceeding for wrongful layoff in violation of a collective bargaining agreement, and the court held that the damages could extend beyond the term of the contract.[196]

Procedurally, the courts will in appropriate employee actions, involving such matters as unpaid vacation pay, overtime, or wage increases, permit the cases to be maintained as class actions.[197] Generally speaking, an injunction against a discharge will not be granted unless irreparable injury can be shown.[198] The courts also hold that the plaintiffs may have a right to a jury trial since they are not seeking merely an equitable remedy, but these actions are analogous to the legal common law right to sue for compensation for breach of a legal duty.[199] The latter case also held that a joint employer-union grievance panel, made up of an equal number of employer and union representatives not interested in the particular case, was an impartial body authorized to make final and binding decisions, and that the evidence did not establish that the panel was controlled by the employer and the union.

V. Arbitration and the NLRB

A. Deferral to Arbitration

In addition to the decisions of the Second Circuit and District of Columbia Circuit discussed in last year's paper,[200] during the past year the NLRB's policy of deferring to the arbitral process in appropriate circumstances (*Collyer* cases), or deferring to an

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[195] *Scott* v. *Anchor Motor Freight, Inc.*, 496 F.2d 276, 86 LRRM 3024 (6th Cir. 1974).

[196] *Ball* v. *Ex-Cello-O Corp.*, _____ Mich.App. _____, 218 N.W.2d 85, 86 LRRM 3024 (1974).

[197] *Lerwill* v. *Inflight Services, Inc.*, 379 F.Supp. 690, 86 LRRM 3139 (N.D.Cal. 1974); *Kash* v. *Baker*, 86 LRRM 2150 (S.D.N.Y. 1974); *Buckholtz* v. *Swift & Co.*, 88 LRRM 2756 (D.Minn. 1973).

[198] *Bures* v. *Houston Symphony Society*, 503 F.2d 842, 87 LRRM 3124 (5th Cir. 1974).

[199] See, for example, *Rowan* v. *Howard Sober, Inc.*, 384 F.Supp. 1129, 86 LRRM 2674, 88 LRRM 2997 (E.D.Mich. 1975).

[200] *Nabisco, Inc.* v. *NLRB*, 479 F.2d 770, 83 LRRM 2612 (2nd Cir. 1973), and *Associated Press* v. *NLRB*, 492 F.2d 662, 85 LRRM 2440 (D.C.Cir. 1974); see, generally, under NLRB practice, *Granite City Steel Co.*, 211 NLRB No. 135, 87 LRRM 1006 (1974); *United Aircraft Corp.*, 213 NLRB No. 22, 87 LRRM 1069 (1974).

existing arbitration award (*Spielberg* cases), has received additional judicial approval. All of the deferral decisions involve a finding by the courts that the NLRB did not abuse its discretion in either refusing to decide a dispute that involves matters of contract interpretation, or refusing in other appropriate cases to defer to the grievance-arbitration processes or to an existing award. In a case involving the discharge of three employees under a maintenance-of-membership clause, the Fourth Circuit rejected the employer's objections to deferral on the ground that the union was opposed to the interest of the employees, that questions of contract interpretation were involved that were beyond the authority of an arbitrator, and that arbitration is the wrong solution since the Board had already heard the case on the merits.[201]

The Ninth Circuit also found no abuse of discretion in the NLRB's deferral to arbitration of a contract dispute, but cautioned that the NLRB cannot "abdicate its statutory responsibilities by inappropriate deferrals to arbitration." [202] The District of Columbia Circuit upheld the NLRB's deferral to arbitration in a case alleging that the employer violated his bargaining obligation by unilaterally changing working conditions.[203] The court stressed the fact that resolution of the contractual dispute by arbitration might be dispositive of the statutory unfair labor practice issue raised by the union's charge, and noted in connection with the factors used by the NLRB bearing on the probable effectiveness of arbitration to advance federal labor policy:

> "This congruence between the contractual dispute and the overlying unfair labor practice charge is significant. If it were not present, the Board's abstention might have constituted no deference, but abdication.
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> "[T]he fact that any ultimate award must conform to the policies of the Act does not guarantee that deferral itself is consistent with the Act. Prearbitral deferral might constitute an effective denial of any remedy if, for example, arbitration of the dispute would impose an undue financial burden upon one of the parties. Dismissal of the complaint in such a case would be contrary to the policies of the Act although all other criteria for application of the Collyer doctrine are met. Deferral might also be unjustified where it pre-

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[201] *Enterprise Pub. Co.* v. *NLRB*, 492 F.2d 1024, 85 NLRB 2746 (1st Cir. 1974).
[202] *Provision House Workers Local 274* v. *NLRB*, 493 F.2d 1249, 85 LRRM 2863 (9th Cir. 1974).
[203] *Electrical Workers* v. *NLRB*, 494 F.2d 1087, 85 LRRM 2576 (D.C.Cir. 1974).

vents an orderly exposition of the law in question. Successive arbitration awards could produce a variety of ad hoc solutions to the same problem, all consistent with the Act, but no uniform rule. In such circumstances further abstention by the Board might be contrary to Federal labor policy." (85 LRRM at 2579)

The NLRB's refusal to defer to arbitration has been upheld by the courts in an equal number of cases, although the Sixth Circuit noted in one such case involving a union's threats to fine its members if they followed the employer's instructions that "while it might have been better to defer the issues to arbitration, the Board's failure to do so does not amount to abuse of discretion." [204] The Seventh Circuit upheld the refusal of the NLRB to defer to arbitration in a case involving an employer's unilateral wage reductions, the Board and the court finding that the employer's conduct amounted to a complete rejection of the principles of collective bargaining, and noting that: [205] ". . . [T]he wage reductions were part and parcel of an unlawful course of conduct whereby Respondent intended to rid itself of the established bargaining relationship and its attendant obligations of which the contract wage rates were but a part." (85 LRRM at 2603) In a case involving the refusal of clerical employees to cross the picket line of production employees, the Seventh Circuit also approved the refusal to defer, where the NLRB had deferred to arbitration but then proceeded on the merits when the employer refused to submit the dispute to the grievance processes and to arbitration.[206]

The Fifth Circuit held that the NLRB properly exercised its discretion by declining to defer to arbitration in a case where the union allegedly caused the employer to unlawfully collect union dues from employees, since the interest of the employees and the union were in direct conflict and the employer could not be ex-

[204] *NLRB* v. *Lithographers Local 271,* 495 F.2d 763, 86 LRRM 2655 (6th Cir. 1974).

[205] *NLRB* v. *Chase Mfg. Co.,* 492 F.2d 1300, 85 LRRM 2602 (7th Cir. 1974); see also NLRB refusals to defer where employer discharged the union steward, *Morrison Knudsen Co.,* 213 NLRB No. 48, 87 LRRM 1655 (1974), and where the union repudiated the grievance-arbitration procedure by fining members for working behind a picket line, *Longshoremen Local 6* (Assoc. Food Store, Inc.), 210 NLRB No. 105, 86 LRRM 1534 (1974).

[206] *Gary-Hobart Water Co.* v. *NLRB,* 511 F.2d 284, 88 LRRM 2830 (7th Cir. 1975), *enf'g* 210 NLRB No. 87, 86 LRRM 1210 (1974); see also *Southwestern Bell Tel. Co.,* 212 NLRB No. 10, 87 LRRM 1446 (1974).

pected to protect the employees.[207] Similarly, in a *Spielberg* situation, the Fifth Circuit upheld the NLRB's refusal to defer to an arbitration award denying an employee's seniority grievance, where it was found that the award was contrary to a prior favorable final and binding award and the union and the employer were hostile to the employee's interests.[208] On the other hand, the District of Columbia Circuit held that the employer's refusal to abide by an award did not preclude deferral by the NLRB under *Spielberg*, since the remedy of judicial enforcement of the arbitration award was available to the union.[209] However, the court held that the NLRB erred when it failed to consider the union's additional charges relating to events that occurred after the arbitration hearing. The same circuit issued the only decision reversing a NLRB determination to defer to the arbitral process in a case where the Board honored the award of a grievance committee that sustained an employee's discharge for refusal to drive a truck that was overloaded.[210] The court held that the award was void as against public policy on the ground that the record failed to disclose that the grievance committee considered the issue of safety and the protection granted to the employee under Section 502 of the LMRA, or that it considered the question of a violation of state law regarding the weight of trucks.

Since the advent of the *Collyer* doctrine, there has been an increase in the number of postarbitral (*Spielberg*) cases reaching the NLRB.[211] The NLRB has held that the burden of pleading and proving a prima facie case for the application of either *Spielberg* or *Collyer* as a defense to an NLRB complaint rests with the respondent, and that it will not defer where the record is incomplete as to whether the *Spielberg* or *Collyer* requirements have

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[207] *NLRB* v. *Railway Clerks*, 498 F.2d 1105, 86 LRRM 3199 (5th Cir. 1974); see also *Standard Fruit & S.S. Co.*, 211 NLRB No. 21, 87 LRRM 1134 (1974).

[208] *T.I.M.E.-DC, Inc.* v. *NLRB*, 504 F.2d 294, 87 LRRM 2853 (5th Cir. 1974).

[209] *Electrical Workers Local 715* v. *NLRB*, 494 F.2d 1136, 85 LRRM 2823 (D.C.Cir. 1974); *cf. Southwestern Bell Tel. Co.*, 212 NLRB No. 53, 86 LRRM 1655 (1974), *on remand from Communications Workers* v. *NLRB*, _____ F.2d _____, 86 LRRM 3247 (D.C.Cir. 1973); but compare *Electronic Reprod. Service Corp.*, at note 226 *infra*.

[210] *McLean Trucking Co.* v. *NLRB*, 505 F.2d 342, 87 LRRM 2001 (D.C.Cir. 1974).

[211] See, for example, *International Great Lakes Shipping Co.*, 215 NLRB No. 121, 88 LRRM 1070 (1974); *Valley Ford Sales, Inc.*, 211 NLRB No. 129, 86 LRRM 1407 (1974); *Container Corp. of Am.*, 210 NLRB No. 149, 86 LRRM 1312 (1974); *Ohio Ferro-Alloys Corp.*, 209 NLRB No. 77, 85 LRRM 1466 (1974).

been met in the particular case.[212] In a case where the arbitration award reinstated a discharged chief shop steward with partial back pay amounting to 40 percent, the NLRB held that it will not require arbitrators to adhere to its principles regarding back pay and it deferred to the award, holding that it was not repugnant to the purposes and policies of the NLRA to award reinstatement without back pay.[213] Where the NLRB previously had deferred to arbitration under *Collyer,* it refused to defer to the resulting arbitration award relating to the unilateral discontinuance of a turkey bonus where the arbitrator specifically refused to rule on the employer's fulfillment of his bargaining obligation despite the NLRB deferral.[214] Accordingly, the NLRB considered the merits of the charge and found no violation of the employer's bargaining obligation.

The NLRB continues to hand down a large number of decisions dealing with pre-arbitral deferral under its *Collyer* doctrine, but the number of decisions was somewhat less during the past year as the law regarding deferral becomes more settled. Such deferral may even take place in the context of a settlement of a grievance between the employer and the union, provided the interests of the employer and the union are not antagonistic to that of the grievant.[215] For deferral to take place, there must be an established, stable bargaining relationship with a workable and freely used grievance procedure, and the employer's conduct must not indicate a rejection of such grievance-arbitration procedures.[216] There will be no deferral to arbitration where the existence of validity of the contract is in dispute,[217] or where it is found that there is no contract provision that is applicable to

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[212] Under postarbitral awards, see *John Sexton & Co.,* 213 NLRB No. 111, 87 LRRM 1241 (1974); under *Collyer,* see *Bancroft-Whitney Co.,* 214 NLRB No. 12, 87 LRRM 1266 (1974); *Erie Strayer Co.,* 213 NLRB No. 45, 87 LRRM 1162 (1974); *Asbestos Workers Local 22* (Rosendahl, Inc.), 212 NLRB No. 142, 87 LRRM 1604 (1974); *Local 9, Operating Engineers* (Fountain Sand & Gravel Co.), 210 NLRB No. 28, 86 LRRM 1303 (1974).

[213] *Crown Zellerbach Corp.,* 215 NLRB No. 34, 88 LRRM 1179 (1974).

[214] *Radioear Corp.,* 214 NLRB No. 33, 87 LRRM 1330 (1974).

[215] Compare *Tyee Constr. Co.,* 211 NLRB No. 90, 86 LRRM 1405, 1553 (1974), with *Whirlpool Corp.,* 216 NLRB No. 51, 88 LRRM 1329 (1975).

[216] Compare *U.S. Postal Service,* 210 NLRB No. 95, 86 LRRM 1222 (1974), with *Westinghouse Learning Corp.,* 211 NLRB No. 4, 86 LRRM 1709 (1974).

[217] *Operating Engineers Local 701* (AGC), 216 NLRB No. 45, 88 LRRM 1243 (1975); *Dairy Employees Local 754, Teamsters* (Glenora Farms Dairy, Inc.), 210 NLRB No. 60, 86 LRRM 1585 (1974); *Fenix & Scisson, Inc.,* 207 NLRB No. 104, 85 LRRM 1380 (1974).

the dispute.[218] Also, the NLRB will refuse to defer to arbitration where the respondent is disregarding statutory obligations, such as the attempt to dictate who the agents for bargaining should be on behalf of the charging party,[219] a party's compliance with Section 8 (d) of the LMRA before compelling contract modifications,[220] or the refusal to furnish information potentially relevant to the union's processing of a grievance in the prearbitration stages of the grievance procedure.[221]

The NLRB has refused to defer in a case involving the suspension of an employee for representing a fellow worker at an equal employment opportunity hearing, holding that deferral to the grievance-arbitration procedure would frustrate the policy for which the equal employment procedures were set up.[222] Similarly, there is no deferral where the union is charged with discrimination against a nonmember in the operation of an exclusive hiring arrangement, and the available grievance-arbitration procedure was that provided unilaterally by the union and required the employee or applicant to share the expense of arbitration.[223]

However, the NLRB has held that it will not reconsider its deferral to arbitration simply because the charging party did not file a grievance or invoke arbitration, since it is the responsibility of the charging party to do so and not the respondent's.[224] Also, an employee's refusal to be bound by an award will not prevent deferral where there is no evidence that the union has refused to take the issue to arbitration.[225]

Probably the most important deferral decision of the NLRB during the past year was *Electronic Reproduction Service Corp.*,[226] which involved postaward deferral under *Spielberg*. In

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[218] *Operating Engineers Local 428* (Mercury Constructors, Inc.), 216 NLRB No. 104, 88 LRRM 1354 (1975); *Bio-Science Lab.*, 209 NLRB No. 106, 85 LRRM 1568 (1974); *Kevin Steel Prod., Inc.*, 209 NLRB No. 80, 86 LRRM 1361 (1974).

[219] *Harley Davidson Motor Co.*, 214 NLRB No. 62, 87 LRRM 1571 (1974).

[220] *Electrical Workers Local 742* (Randall Bearings, Inc.), 213 NLRB No. 119, 87 LRRM 1272 (1974).

[221] *Worcester Polytechnic Institute*, 213 NLRB No. 57, 87 LRRM 1616 (1974).

[222] *U.S. Postal Service*, 215 NLRB No. 81, 88 LRRM 1099 (1974).

[223] *Plumbers Local 198* (Natl. Mtn. Corp.), 210 NLRB No. 154, 86 LRRM 1460 (1974).

[224] *Columbia Typographical Union No. 101* (Adams Printing, Inc.), 214 NLRB No. 13, 87 LRRM 1275 (1974).

[225] *Bell Tel. Co. of Pa.*, 214 NLRB No. 144, 87 LRRM 1542 (1974).

[226] 213 NLRB No. 110, 87 LRRM 1211 (1974), overruling to the extent inconsistent, *Yourga Trucking, Inc.*, 197 NLRB 928, 80 LRRM 1498 (1972), and *Airco Industrial Gases*, 195 NLRB 676, 79 LRRM 1467 (1972).

this case, the NLRB, with two members dissenting, deferred to an arbitrator's award upholding a layoff allegedly in violation of the LMRA, even though the award failed to disclose whether the issue of unlawful discrimination or pretextuality was ever raised or litigated at the arbitration hearing, and the issue was not raised *sua sponte* by the arbitrator. The majority opinion held that in discharge or discipline cases the basic contractual issue as to whether the grievant has been disciplined for cause also involves the consideration of whether the true reason for the action was a discriminatory one under the LMRA. The Board majority held that if "just cause" and "discrimination" issues are artificially separated, contractual efforts at dispute settlement are less likely to resolve the dispute and might lead to piecemeal litigation with one party withholding evidence material to its claim before the arbitrator for the purpose of pursuing the matter again before the NLRB. Accordingly, the majority held that under the *Spielberg* doctrine it will give full effect to arbitration awards dealing with discipline or discharge cases, except when unusual circumstances are shown, which demonstrate that there were bona fide reasons that caused the failure to introduce the evidence relating to discrimination at the arbitration proceeding, other than the mere desire by one party to try the same set of facts before two forums. The majority opinion also held that the Supreme Court's decision in the *Alexander* v. *Gardner-Denver* case did not invalidate the Board's *Spielberg* and *Collyer* principles, and noted that these principles had been explicitly enforced by the Supreme Court in the *Arnold* case discussed above in this report. The *Electronic Reproduction* case also held that the employer refused to execute a collective bargaining agreement submitted by the union pursuant to an arbitrator's award to which all parties agreed to be bound, and that in view of the employer's repudiation of the collective bargaining process, judicial enforcement of the award would not serve to remedy the unfair labor practice. Therefore, the Board held that the desirability of encouraging the use of the arbitration process must yield to its duty to protect the bargaining process.

B. Other NLRA Decisions Affecting Arbitration

There were many decisions touching on the grievance-arbitration process handed down by the courts and the NLRB during the past year, most of which involved various aspects of the re-

fusal by an employer or union to process grievances. It is clear that the discharge of an employee for filing a grievance or threatening to file a grievance violates the NLRA.[227] The NLRB will consider the employer's violation of the settlement of a grievance where the employer is allegedly motivated to inflict reprisals for the filing of an unfair labor practice charge, and will not leave such issues to be resolved in a Section 301 action where the question of motivation cannot be reached.[228] An employer may also be held to violate his bargaining obligation where he refused to entertain grievances as required by a collective bargaining agreement.[229] The employer may also violate the NLRA by refusing to accept the spokesman chosen by an informal employee committee to discuss grievances of the employees.[230]

The union may violate its duty, imposed by the NLRA, to represent fairly an employee in the processing of grievances where its actions are arbitrary and in bad faith and are motivated by hostility or animosity toward the employee because of his opposition to the union.[231] The NLRB found that a union violated its duty of fair representation in the processing of a grievance when it told a grievance panel the grievance had no merit, the Board holding that the union must process the grievance in a light most favorable to the grievant because the union acts as an advocate for the grievant.[232] A union was held to have violated the NLRA by maintaining locals restricted by sex and by requiring female employees to have grievances handled by their own local.[233] However, the union's mere failure to process an employee's grievance without other evidence of unlawful motivation will not violate the NLRA, even where there is some antagonism between the

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[227] *Lafferty Trucking Co.*, 214 NLRB No. 109, 87 LRRM 1622 (1974); *Ernst Steel Corp.*, 212 NLRB No. 32, 87 LRRM 1508 (1974).

[228] *Diversified Industries*, 208 NLRB No. 7, 85 LRRM 1394 (1974).

[229] *Massillon Pub. Co.*, 215 NLRB No. 74, 88 LRRM 1040, 212 NLRB No. 137, 86 LRRM 1732 (1974); *Southwest Janitorial & Mtn. Corp.*, 209 NLRB No. 70, 85 LRRM 1590 (1974); but compare, where the employer has no duty to arbitrate under a contract, *Moffitt Bldg. Materials Co.*, 214 NLRB No. 110, 87 LRRM 1491 (1974).

[230] *Stephens Produce Co.*, 214 NLRAB No. 8, 88 LRRM 1363 (1974).

[231] *Teamsters, Service Station Operators* (Urich Oil Co.), 215 NLRB No. 154, 88 LRRM 1152 (1974); *Pacific Intermountain Express Co.*, 215 NLRB No. 113, 88 LRRM 1359 (1974); *Muste & Sons, Inc.*, 215 NLRB No. 35, 88 LRRM 1328 (1974); *Sargent Elec. Co.*, 209 NLRB No. 94, 86 LRRM 1290 (1974).

[232] *Teamsters Local 705* (Associated Trans., Inc.), 209 NLRB No. 46, 86 LRRM 1119 (1974).

[233] *Glass Bottle Blowers Assn.*, 210 NLRB No. 131, 86 LRRM 1257 (1974).

employee and the union representative,[234] or where the union negligently failed to process the grievance in a timely fashion to the serious detriment of the grievant, since negligence of itself is not arbitrary, irrelevant, invidious, or unfair so as to constitute a breach of the duty of fair representation.[235] The Ninth Circuit has held that in cases involving the unlawful refusal of a union to process a grievance, the NLRB, within its remedial discretion, may order the union to arbitrate the grievance.[236]

The Ninth Circuit held in a jurisdictional dispute proceeding that the NLRB erred by ignoring an arbitration award in favor of one union, even though the other union involved was not a party to the arbitration proceeding, and that under such circumstances, the union with the arbitration award did not violate the NLRA by engaging in a work stoppage.[237] The court found that the NLRB had completely ignored the arbitration award, as well as the employer's contract with the union holding the award and the employer's preference for submitting the work to that union, and that the Board failed to explain its reasons for doing so. The NLRB will not defer in jurisdictional disputes proceedings to impartial boards unless it is clear that the employer has agreed to the method of adjustment of the dispute.[238] However, an employer cannot unlawfully cancel a contract and assign the work to employees represented by another union without violating his obligation to participate in the contractually established grievance procedure to resolve the first union's grievance over work assignments.[239]

A district court held that it had no jurisdiction to enjoin an NLRB unfair-labor-practice case pending final decision of a Section 301 action in another district, since the court found that there was concurrent jurisdiction of the dispute by both the NLRB and the district court.[240] A Michigan court, however,

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[234] *Carpenters Local 1104* (Law Co.), 215 NLRB No. 98, 87 LRRM 1742 (1974).

[235] *Teamsters Local 692* (Great Western Unifreight), 209 NLRB No. 52, 85 LRRM 1385 (1974); see also *Steelworkers Local 1150* (FMC Corp.), 209 NLRB No. 159, 85 LRRM 1611 (1974).

[236] *NLRB* v. *Teamsters Local 396,* 509 F.2d 1075, 88 LRRM 2589 (9th Cir. 1975).

[237] *NLRB* v. *Local 50, Longshoremen,* 504 F.2d 1209, 87 LRRM 2325 (9th Cir. 1974).

[238] *Painters Local 79* (O'Brien Plastering Co.), 213 NLRB No. 106, 87 LRRM 1591 (1974).

[239] *Williams Enterprises, Inc.,* 212 NLRB No. 132, 87 LRRM 1044 (1974).

[240] *Local 294, Teamsters* v. *NLRB,* _____ F.2d _____, 85 LRRM 2751 (D.D.C. 1974).

found no common law conspiracy regarding the depriving of an employee of work, on the ground that since the LMRA prohibits such conduct, there was preemptive jurisdiction by the NLRB.[241] The Fifth Circuit upheld an NLRB determination that a sympathy strike was not barred by any no-strike agreement on the part of the union, since at the time of the strike, there was no contract in existence.[242]

VI. The Public Sector and Arbitration

There has been a steady increase in the amount of litigation touching upon the right of public employees to collective bargaining and to grievance-arbitration procedures. This right is completely dependent for its existence upon statutory authorization and the inevitable test of the constitutionality of the statute in state courts.[243] Under public employment bargaining laws, there are often substantial questions raised as to who is the public employer and which official has the authority to negotiate and enter into a collective bargaining agreement.[244] Once these basic hurdles are overcome, then questions as to what issues are bargainable in public employment and the legality of specific contract clauses often become the subjects of litigation.[245]

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[241] *Bebensee* v. *Ross Pierce Elec. Corp.*, _____ Mich.App. _____, 86 LRRM 2032 (1974).

[242] *Newspaper Production Co.* v. *NLRB*, 503 F.2d 821, 87 LRRM 2650 (5th Cir. 1974).

[243] See *Dayton Teachers Assn.* v. *Dayton Bd. of Ed.*, 41 Ohio St.2d 127, 88 LRRM 3053 (Ohio Sup.Ct. 1975); *Univ. of Missouri Curators* v. *Public Service Employees Local 45*, 88 LRRM 3039 (Mo.Sup.Ct. 1975); *Teamsters Local 320* v. *Minneapolis*, 88 LRRM 2415 (Minn.Sup.Ct. 1975); *Retail Clerks Local 187* v. *Univ. of Wyoming*, 88 LRRM 2781 (Wyo.Sup.Ct. 1975); *Danville School Directors* v. *Fifield, Danville Teachers Assn.*, 315 A.2d 473, 85 LRRM 2939 (Vt.Sup.Ct. 1974); *Louisiana Teachers Assn.* v. *Orleans Parish School Bd.*, 303 So.2d 564, 88 LRRM 2419 (La.App. 1974); *cf. Confederation of Police* v. *City of Chicago*, 382 F.Supp. 1245, 87 LRRM 2573 (N.D.Ill. 1974); *Winston-Salem Assn. of Educators* v. *Phillips*, 381 F.Supp. 644, 87 LRRM 2925 (M.D.N.C. 1974); see in regard to representation elections, *Manchester Mem. Hosp.* v. *Conn. St. Bd. of Lab. Rel.*, 88 LRRM 2528 (Conn.Sup.Ct. 1974).

[244] *Westford Chief of Police* v. *Town of Westford*, 313 N.E.2d 443, 88 LRRM 2509 (Miss.Sup.Jud.Ct. 1974); *Creedon Police Benev. Assn.* v. *City of Utica*, 44 A.D.2d 890, 355 N.Y.S.2d 678, 88 LRRM 2498 (N.Y.App. 1974); *Fisher* v. *Rzymek*, 324 A.2d 836, 325 E.2d 687, 87 LRRM 2717, 2719 (Pa.Comm.Ct. 1974).

[245] *Hawaii Bd. of Ed.* v. *Hawaii Pub. Emp. Rel. Bd.*, 88 LRRM 2543 (Hawaii Sup.Ct. 1974); *Clark Co. School Dist.* v. *Local Govt. Rel. Bd.*, 530 P.2d 114, 88 LRRM 2774 (Nev.Sup.Ct. 1974); *Pennsylvania Lab. Rel. Bd.* v. *Zelem*, 329 A.2d 477, 88 LRRM 2524 (Pa.Sup.Ct. 1974); *Wilkinsburg* v. *Sanitation Dept.*, 88 LRRM 2499 (Pa.Comm.Ct. 1975); *Weest* v. *Indianapolis School Commrs.*, 320 N.E.2d 743, 88 LRRM 2208 (Ind.App. 1974); *Pontiac Police Officers Assn.* v. *City of Pontiac*, 50 Mich.App. 382, 213 N.W.2d 217, 86 LRRM 2475 (1973); compare in civil rights case, *Chance* v. *New York Bd. of Ed.*, 7 FEP Cases 1203 (S.D.N.Y. 1973).

Where arbitration under a collective bargaining agreement is available to public employees, state courts often appear to be less likely to find issues arbitrable than they do in the private sector.[246] However arbitration may be ordered, or a stay of arbitration denied, by a state court, even though the grievant may also be pursuing at the same time available administrative remedies,[247] or where the arbitration is only advisory in nature.[248] Compulsory or interest arbitration of public employee disputes in lieu of the right to strike is being utilized by an increasing number of states, even for bargaining units other than police and fire departments.[249] However, it has been held in Michigan that such a compulsory arbitration statute may not apply to grievance disputes under an existing collective bargaining agreement.[250]

Where arbitration in public employment has been held, the awards issued usually were sustained by the state courts,[251] and it was held by the Rhode Island Supreme Court that the alleged lack of funds available to the public employer is no defense to the enforcement of an arbitration award requiring the payment of severance pay.[252] However, where the court finds that the award covers an issue that is not bargainable under the state stat-

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[246] See *South Stickney School Dist.* v. *Johnson*, 315 N.E.2d 634, 88 LRRM 2037 (Ill.App. 1974); *Kaleva-Norman-Dickson School Dist.* v. *Kaleva Teachers Assn.*, 52 Mich.App. 433, 217 N.W.2d 411, 86 LRRM 2673 (1974); but compare *Mt. Clemens Fire Fighters Local 838* v. *City of Mt. Clemens*, _____ Mich.App. _____, issued Feb. 13, 1975.

[247] *Poughkeepsie School Dist.* v. *Poughkeepsie Teachers Assn.*, 88 LRRM 2423 (N.Y.App. 1973).

[248] *Fredericks* v. *Monroe School Bd.*, 88 LRRM 2718 (Fla.App. 1975).

[249] *Fire Fighters Local 1186* v. *City of Vallejo*, 12 Cal.3rd 608, 116 Cal. Rptr. 507, 87 LRRM 2453 (Cal.Sup.Ct. 1974); *St. Paul Professional Employees Assn.* v. *City of St. Paul*, 88 LRRM 2861 (Minn.Sup.Ct. 1975); *Milwaukee Deputy Sheriff's Assn.* v. *Milwaukee County*, 221 N.W.2d 673, 88 LRRM 2169 (Wis.Sup.Ct. 1974); *Roseville* v. *Local 1614, Fire Fighters*, _____ Mich.App. _____, 220 N.W.2d 147, 88 LRRM 2315 (1974); *Local 1400, Fire Fighters* v. *Nacrelli*, 88 LRRM 2285 (Pa. Comm.Ct. 1974); *City of Reading* v. *Frat. Order of Police*, 325 A.2d 675, 87 LRRM 2481 (Pa.Comm.Ct. 1974); *Washington Metro Transit Auth.* v. *Transit Union Local 689*, 86 LRRM 2585 (D.D.C. 1974) (strike enjoined); regarding injunctions against public employee strikes, see *City of Dover* v. *Local 1312, Fire Fighters*, 322 A.2d 918, 87 LRRM 3083 (N.H.Sup.Ct. 1974).

[250] *Grosse Pointe Farms Police Officers Assn.* v. *Howlett*, _____ Mich.App. _____, 218 N.W.2d 801, 86 LRRM 3094 (1974).

[251] *Teamsters Local 77* v. *Pa. Turnpike Comm.*, 83 LRRM 2636 (Pa.Comm.Ct. 1975); *Sipkovsky* v. *Fitzgerald Bd. of Ed.*, _____ Mich.App. _____, 213 N.W.2d 846, 86 LRRM 2207 (1973); *Associated Teachers of Huntington, Inc.* v. *Huntington School Dist.*, 33 N.Y.2d 229, 306 N.E.2d 791, 85 LRRM 2795 (N.Y.Ct. of App. 1973).

[252] *Providence Teachers Local 958* v. *McGovern*, 319 A.2d 358, 86 LRRM 2899 (R.I.Sup.Ct. 1974).

ute, enforcement will be denied,[253] and, similar to awards in the private sector, enforcement will be denied where the contract is found not to cover the employees involved in the award.[254] In general, it appears that most of the principles established under federal law under Section 301 will be applied by state courts to grievance-arbitration problems under state legislation granting such dispute-resolution procedures to public employees, except where the state statute specifically provides otherwise.

VII. Conclusions

The extension of federal jurisdiction under the LMRA to nonprofit hospitals effective August 25, 1974,[255] and the proposed legislation to bring public employees under some kind of federal regulation similar to the NLRA, are indications that the work of arbitrators will continue to increase in the coming months and years. The case law discussed above, whether based on Supreme Court or lower court decisions, indicates that there is no relaxation on the part of the courts in the long-standing policy of favoring arbitration to settle labor relations disputes. The partiality of the courts toward the use of arbitration to settle any type of contractual dispute was highlighted during the past year by the Supreme Court decision in *Sherk* v. *Alberto-Culver Co.*,[256] wherein a majority of the Court held that an agreement to arbitrate disputes arising out of an international commercial transaction is to be respected and enforced by the federal courts under the Arbitration Act of 1925, even though one of the parties alleges that the transaction violated the Securities Exchange Act of 1934. The *Sherk* case is merely one more indication that the Supreme Court will continue to promote the use of the arbitral process to settle contract disputes.

It is also apparent from a study of the case law that the types of disputes being presented to arbitrators are becoming more varied

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[253] *Cheltenhorn Twp.* v. *Cheltenhorn Police Dept.*, 312 A.2d 835, 86 LRRM 2428 (Pa.Comm.Ct. 1973).

[254] *Beaver Co. Comm. College* v. *Society of Faculty*, 88 LRRM 2633 (Pa.Comm.Ct. 1975).

[255] See *Marquette General Hosp.*, 216 NLRB No. 44, 88 LRRM 1178 (1975); as for NLRB unit determinations in nonprofit hospitals, see *Baptist Medical Center-Princeton*, 216 NLRB No. 110, 88 LRRM 1257 (1975); and *Natl. Medical Hosp., Inc. of San Diego*, 215 NLRB No. 155, 88 LRRM 1074 (1974).

[256] 417 U.S. _____, 41 L.Ed.2d 270, 94 S.Ct. 2449 (1974).

as contracts become more sophisticated and comprehensive, and, accordingly, the issues are becoming more complex. It is also evident that the courts look with obvious favor on the use of arbitration in such difficult areas as pension and insurance programs and for resolving issues under nondiscrimination clauses as a means of relieving their ever-increasing caseload. In addition to more complex issues, the expansion of collective bargaining agreements into areas that were previously largely foreclosed from collective bargaining, such as nonprofit hospitals, will require arbitrators to frequently develop new approaches and solutions where prior precedent and guidance is scarce. Thus, it is clear that the arbitration process must be prepared to meet the new challenges and issues that will be presented to it in the immediate future, and that the need for skilled and competent arbitrators will continue to expand in the foreseeable future.