APPENDIX B

ARBITRATION AND FEDERAL RIGHTS UNDER COLLECTIVE AGREEMENTS IN 1975*

JAMES P. KURTZ**

The volume of reported litigation relating to the enforcement of contractual rights under Section 301 of the Labor Management Relations Act (LMRA) [1] and other legal actions concerning the arbitration process under collective bargaining agreements has begun to level off during the past year from the record-setting number of cases reported in the previous year. Despite this fact, the Supreme Court's *Steelworkers* trilogy [2] continues to spawn a vast amount of court litigation which guarantees that there is no lessening of the usage of the arbitral process. During the past year, the Supreme Court itself handed down another decision involving arbitration awards and individual employee law suits relating thereto, and a second case involving the issuance of injunctions where employees are honoring the picket line of another union or bargaining unit has been argued and is awaiting decision. Both of these cases and 1975 decisions of other courts related thereto are discussed below.

This report will summarize the high points of the appellate-level cases published during the past year and will cite at some point most of the more than 450 cases studied for use herein.

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* Report of the Committee on Law and Legislation for 1975, National Academy of Arbitrators, under the chairmanship of William P. Murphy. Members of the committee are Roger Blanpain, Theodore Dyke, Julius G. Getman, Raymond Goetz, Thomas P. Lewis, Robert G. Meiners, Perry Meyer, and Robert B. Moberly.

** Administrative Law Judge, Michigan Employment Relations Commission; Member of the Michigan Bar.

[1] 29 U.S.C. 185, which in pertinent part reads as follows: "Suits for violation of contracts between an employer and a labor organization . . ., or between any such labor organizations, may be brought in any district court of the United States . . ., without respect to the amount in controversy or without regard to the citizenship of the parties."

[2] *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). Once a case is cited in a footnote, it will not be footnoted again if referred to later in this report.

The committee has chosen for more extensive treatment those cases that appear to have the most impact on or importance to the arbitral process, starting with the Supreme Court decisions and the cases which may be of most interest and use to practicing arbitrators. The focus of attention herein is on reported decisions of the federal circuit courts of appeal, but also including decisions on the trial court level handed down by the federal district courts, since these cases represent the largest number of reported decisions and the purpose of Section 301 was to grant jurisdiction to these courts in matters relating to the enforcement of collective bargaining agreements. Due to the volume of federal litigation when added to state appellate court decisions, no attempt has been made to cover reported decisions of state trial courts due to the lesser precedent value of such cases.

Decisions under the Railway Labor Act (RLA), which includes airline and railway employees and which involves specialized statutory grievance-arbitration procedures, are for the most part omitted. Many of the rising number of decisions relating to employee-benefit plans and the new federal legislation protecting pension rights are also not included in this report, unless the decisions relate directly to the arbitral process. Public-employment cases involving arbitration issues are not separately treated this year since there is another report prepared on public-employment disputes, but significant decisions relating directly to arbitration are cited with similar decisions in the private sector. The number of these public-employment decisions increases greatly each year as that sector of the labor force becomes organized and is accorded collective bargaining and grievance-arbitration rights by state legislatures.

As in past years, the largest number of cases is filed by employees seeking the enforcement of labor contract rights and/or enforcing a union's duty of fair representation to the employees it represents, as established by the Supreme Court in *Vaca* v. *Sipes*[3] and similar decisions. This area of arbitral law, as noted above, was further developed by the Supreme Court in its recent decision in *Hines* v. *Anchor Motor Freight, Inc.*,[4] which will be dis-

[3] 386 U.S. 171, 64 LRRM 2369 (1967). *See also,* for example, *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650, 58 LRRM 2193 (1965); *Humphrey* v. *Moore,* 375 U.S. 335, 55 LRRM 2031 (1964); *Syres* v. *Oil Workers, Local 23,* 350 U.S. 892, 37 LRRM 2068 (1955); *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 31 LRRM 2548 (1953).

[4] _____U.S._____ 91 LRRM 2481 (1976), *rev'g in part* 506 F.2d 1153, 87 LRRM 2971 (6th Cir 1974).

cussed below along with similar or related lower court decisions. While success in these individual actions continues to be rare, the *Hines* case and other recent successful decisions indicate that the courts are beginning to hold the parties to collective bargaining agreements to a higher standard of procedural fairness in the grievance-arbitration process toward the employees affected thereby.

There is a continuing rise in the use of the injunction in labor disputes occasioned by the Supreme Court's decision in the *Boys Markets* case.[5] As predicted in last year's report, the question of employees honoring picket lines, and the use of contractual grievance-arbitration process in such cases, is now before the Court in *Buffalo Forge Co.* v. *Steelworkers*,[6] which is discussed in detail below.

Although deferral to arbitration under the *Collyer* and *Spielberg* cases of the National Labor Relations Board (NLRB) [7] is well established at this point and has been approved by various federal appellate courts, there continues to be a large number of reported decisions, especially before the NLRB itself. Finally, the central area of concern of this report is the developing case law surrounding the duty to arbitrate or the enforcement of arbitration awards. In this latter area, particular attention has been paid herein to cases where the conduct of arbitrators or the handling of the arbitration process itself is in issue.

I. Supreme Court Litigation

A. Arbitration and Fair Representation Actions

In its *Hines* decision handed down on March 3, 1976, the Supreme Court held that it was improper for the Sixth Circuit to have dismissed a wrongful discharge action by employees alleging breach of contract by the employer, where the accompanying action for breach of the duty of fair representation against the union had withstood the union's motion for summary judgment and remained to be tried. The Court held that if the employees proved an erroneous discharge because of their alleged dishonesty and the union's breach of duty which tainted the decision of a

[5] *Boys Markets Inc.*, v. *Retail Clerks*, 398 U.S. 235, 74 LRRM 2257 (1970).
[6] 517 F.2d 1207, 89 LRRM 2303 (2nd Cir. 1975), *review granted*, Oct. 20, 1975.
[7] *Collyer Insulated Wire*, 192 NLRB 837, 77 LRRM 1931 (1971); *Spielberg Mfg. Co.*, 112 NLRB 1080, 36 LRRM 1152 (1955).

joint arbitration committee upholding the discharge, the employees would be entitled to an appropriate remedy against the employer as well as the union, even though the employer may have relied in good faith on a favorable arbitral decision. In a careful opinion, the Court reviewed its prior decisions relating to employee actions, such as the *Vaca* case, and distinguished them from the instant case.

The lower court had concluded that there were sufficient facts from which the bad faith or arbitrary conduct on the part of the local union could be inferred by the trier of fact and that the employees should have been afforded an opportunity to prove their charges, which centered on the fact that the union had failed to represent them properly before the joint arbitration committee and substantiate their honesty or obtain the necessary facts to do so. The court of appeals, however, sustained the summary judgment in favor of the employer, and it was this ruling which was reversed by the Supreme Court. The Court held that just as a union's breach of its duty of fair representation relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures, so also if such breach seriously undermines the integrity of the arbitral process, the bar under the finality provision of the grievance article of the collective bargaining agreement is removed as to the employer. The Court was careful to point out, however, that employees are not entitled to relitigate their discharges merely because they offer newly discovered evidence that the charges against them were false and that they in fact were discharged without cause, as long as the contractual machinery has been found to operate within some "minimum levels of integrity." The Court stated that grievance procedures cannot be expected to be error-free and that the finality provision of contracts has sufficient force to surmount occasional instances of mistake. Thus, it reiterated that its decision applies only where the representation by the union has been "dishonest, in bad faith or discriminatory."

Justice Stewart, in a concurring opinion, held that if the employer relies in good faith on a favorable arbitration decision, any liability for the intervening wage loss between the time of the "tainted" decision by the grievance committee and a subsequent "untainted" determination that the discharges were wrongful must fall on the union. Justice Rehnquist dissented, along with Chief Justice Burger, on the ground that the union's breach of its

duty to its members cannot void an otherwise valid arbitration decision in favor of the company, holding that such a decision is contrary to the Court's long-standing policy of favoring the finality of arbitration awards. The dissenting Justices expressed the fear that the Court's decision will encourage challenges to arbitration awards by the losing party on the ground that he or she was not properly represented. The dissent notes that the majority decision has no support in the statutory provisions relating to arbitration, since nowhere is any provision made for vacation of an award due to ineffective presentation of the case by a party's attorney or representative. The dissenting Justices noted that the employees in the instant case had available all the information necessary to present their case before the arbitration committee, but failed to do so and allowed the arbitration to proceed to a decision without protest before bringing their suit against the company and the union. The dissenting Justices would distinguish the instant case from the *Vaca* decision by reason of the fact that in *Hines* there existed a final arbitration decision before a fair and neutral arbitrator.

The *Hines* decision indicates that it will be difficult for an employer to be removed from breach-of-contract, fair-representation litigation where the trial court finds a triable issue in the action against the union, especially in regard to fashioning an appropriate remedy.[8] The *Hines* decision, however, would not appear to affect the rule that an employer cannot be liable to an employee, even if a breach of contract is proven, unless the union is liable to the employee for breach of duty of fair representation.[9] The reason for this general proposition is that the employee must first exhaust his remedies under the contract before successfully maintaining a breach-of-contract suit against the employer, and this requirement of exhaustion of remedies is excused only if the employee can prove that the union breached its duty of fair

[8] *See also Crawford* v. *Pittsburgh-Des Moines Steel Co.*, 386 F.Supp. 290, 89 LRRM 2184 (D. Wyo. 1974) (punitive damages disallowed).

[9] *Maschhoff* v. *Automobile Workers*, 89 LRRM 2098 (E.D. Mich. 1975); *Chapel* v. *Southwestern Bell Tel. Co.*, 520 S.W.2d 592, 88 LRRM 3546 (Tex. Civ. App. 1975); *but see Breish* v. *Ring Screw Works*, 59 Mich. App. 464, 299 N.W.2d 806, 89 LRRM 3063 (1975), where the contract did not contain an arbitration clause; and *Markarian* v. *Roadway Express, Inc.*, 56 Mich.App. 43, 223 N.W.2d 356, 89 LRRM 2174 (1974), where the employer refused to submit the employee's grievance to arbitration; *contra Barrett* v. *Safeway Stores, Inc.*, 395 F.Supp. 161, 90 LRRM 2423 (W.D. Mo. 1975), where a jury verdict was upheld which found a breach of contract by the employer, but no breach of the duty of fair representation by the union's refusal to process a grievance.

representation in the handling of the employee's grievance.[10] The employee is also required to exhaust internal union remedies, even where a conspiracy between the employer and the union is alleged,[11] although the union has the initial burden of proving that such remedies are available and were not utilized.[12] Courts have held that employees need not exhaust contract grievance procedures where it was shown in a fair-representation action that the union allegedly told the employee he would not receive representation and failed to tell him he had a right to file a grievance,[13] or where a breach of contract was not involved, such as where the employee action was against the union for negotiating a contract provision removing the employee from an employer retirement plan and making him subject to a union retirement plan.[14]

There are numerous other pitfalls to a successful employee action under Section 301 or comparable civil rights statutes, starting with the running of the applicable local statute of limitations,[15] the lack of a valid contract covering the plaintiff,[16] or the failure of the union to be the representative of the plaintiff.[17] It is difficult to overcome a prior adverse arbitration

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[10] *Gutierez* v. *Thayer Int'l, Ltd.*, 90 LRRM 2318 (S.D.N.Y. 1975); *Kentucky Indus. Trades* v. *General Elec. Co.*, 89 LRRM 2577 (W.D. Ky. 1975); *Crowley* v. *American Airlines*, 89 LRRM 2841 (W.D.N.Y. 1974); *Merante* v. *Burns*, 365 N.Y.S.2d 27, 89 LRRM 2287 (N.Y. App. 1975); as to exhaustion of administrative remedies under the RLA, *see Mills* v. *Long Island R.R.*, 515 F.2d 181, 89 LRRM 2169 (2d Cir. 1975), and *Hill* v. *Southern Ry.*, 402 F.Supp. 414, 90 LRRM 2950 (W.D.N.C. 1975); similarly, in civil rights litigation, *Jones* v. *Pacific Intermountain Express*, 89 LRRM 2419 (N.D. Cal. 1975).

[11] *White* v. *Remsco Mgt., Inc.*, 91 LRRM 2647 (E.D. Mo. 1976); *McFadden* v. *Ford Motor Co.*, 89 LRRM 2398 (E.D. Mich. 1975); *Hardmon* v. *Allied Indus. Workers Local 854*, 88 LRRM 3433 (N.D. Ohio 1974); under the RLA, see *Provencal* v. *Allegheny Airlines, Inc.*, 363 F.Supp. 159, 90 LRRM 2221 (D.R.I. 1974).

[12] *Dorn* v. *Meyers Parking Sys.*, 395 F.Supp. 779, 89 LRRM 2619 (E.D. Pa. 1975); *cf. Manfrin* v. *Local 44, UAW*, 89 LRRM 2319 (E.D. Mich. 1975).

[13] *Browning* v. *General Motors Corp., Fisher Body Div.*, 387 F.Supp. 985, 89 LRRM 2177 (S.D. Ohio 1974).

[14] *Coleman* v. *Kroger Co.*, 399 F.Supp. 724, 90 LRRM 2203 (W.D. Va. 1975).

[15] *Read* v. *Machinists Local 1284*, 528 F.2d 823, 91 LRRM 2168 (2d Cir. 1975); *Smart* v. *Ellis Trucking Co.*, 91 LRRM 2589 (E.D. Mich. 1976); *Morin* v. *Buick Motor Div., General Motors Corp*, 91 LRRM 2578 (E.D. Mich. 1976); similarly in regard to an employee's action to vacate an adverse arbitration award, *DeLorto* v. *UPS, Inc.*, 401 F.Supp. 408, 90 LRRM 3312 (D. Mass. 1975).

[16] *Hayes* v. *Consolidated Serv. Corp.*, 517 F.2d 564, 89 LRRM 2505 (1st Cir. 1975); under the RLA, *see Thomas* v. *Illinois Central R.R.*, 521 F.2d 208, 90 LRRM 2916 (5th Cir. 1975).

[17] *Arnold* v. *Consolidated Freight Ways, Inc.*, 399 F.Supp. 76, 11 FEP Cases 569 (S.D. Tex. 1975); *Holiday* v. *Red Ball Motor Freight, Inc.*, 399 F.Supp. 81, 11 FEP Cases 567 (S.D. Tex. 1974).

award in a fair-representation, breach-of-contract action,[18] although it is established that such awards are not decisive and a *de novo* review is in effect available in civil rights cases under the Supreme Court's 1974 decision in *Alexander* v. *Gardner-Denver Co.*[19] One court held that the NLRB's dismissal of fair-representation charges regarding layoffs was entitled to considerable evidentiary weight in a subsequent breach-of-contract and fair-representation action on the same subject matter.[20]

The wording of the contract itself may establish no violation of contract or breach of fair representation. Such was the case where an employer discharged an employee for an unauthorized work stoppage, and the contract provided that the employer had sole and complete right to discipline employees during the first 24 hours of an unauthorized work stoppage and denied such employees recourse through the contract's grievance-arbitration procedure; these contract provisions were held applicable even though the employees alleged that they were actually sick on the day of the work stoppage.[21] Proper pleading of a fair-representation action with factual allegations showing malice, bad faith, or hostile or discriminatory conduct on the part of the labor organization involved is important,[22] and it is not sufficient merely to allege that the plaintiffs were treated differently than other union members.[23] In one case, a federal court held it had no jurisdiction under Section 301 of an action by the survivors of an employee for breach of the duty of fair representation where the complaint alleged negligence in enforcing the contract, a tort allegation, and the court noted that a breach of fair representation requires the showing of arbitrary, discriminatory, or bad-faith

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[18] *Grolnick* v. *Furniture Workers Local 75 A-B*, 91 LRRM 2558 (D. Md. 1976); *Newsome* v. *Chrysler Corp.*, 90 LRRM 2443 (E.D. Mich. 1975); *Vos* v. *IML Freight, Inc.*, 531 P.2d 865, 88 LRRM 3259 (Utah 1975); under the RLA, *see Kotakis* v. *Elgin, Joliet & Eastern Ry.*, 520 F.2d 570, 90 LRRM 2966 (7th Cir. 1975).

[19] 415 U.S. 36, 7 FEP Cases 81 (1974); *see also EEOC* v. *McLean Trucking Co.*, 525 F.2d 1007, 11 FEP Cases 833 (6th Cir. 1975); *Darden* v. *GTE Sylvania, Inc.*, 514 F.2d 1070, 10 FEP Cases 1175 (5th Cir. 1975), *aff'g* 10 FEP Cases 1099 (N.D. Ga. 1974); *Diaz* v. *Food Fair Stores*, 11 FEP Cases 920 (D. Colo. 1975).

[20] *Arnold* v. *Plumbers Local 449*, 388 F.Supp. 1105, 90 LRRM 2985 (W.D. Pa. 1975).

[21] *Johnson* v. *Hertz Corp.*, 387 F.Supp. 208, 89 LRRM 2180 (D.N.J. 1974).

[22] *Stefanich* v. *American Motors Corp.*, 91 LRRM 2918 (E.D. Wis. 1975); *Atkinson* v. *Owens-Illinois Glass Co.*, 10 FEP Cases 710 (N.D. Ga. 1975).

[23] *Anderson* v. *Ambac Indus., Inc.*, 48 A.D.2d 845, 369 N.Y.S.2d 170, 90 LRRM 2143 (1975); *cf. Anderson* v. *International Harvester Co.*, 510 F.2d 976, 12 FEP Cases 522 (7th Cir. 1975), *rev'g* 12 FEP Cases 466 (N.D. Ill. 1973).

conduct on the part of the union coupled with substantial evidence of fraud, deceitful action, or dishonest conduct.[24]

There is no Section 301 jurisdiction against an employer for breach of contract where its employees are not covered by the NLRA, such as TVA [25] and Railway Labor Act employees,[26] although there may still be a duty of fair representation on the part of the union representing such employees. Employees of the U.S. Postal Service are now covered by the NLRA; [27] but in one decision of the Eighth Circuit the fair-representation claim by a postal employee was dismissed on the ground that the union was not the exclusive bargaining representative for employees in the unit in question, so the union had no duty of fair representation.[28] In the same case, the wrongful-discharge action against the employer was dismissed because the employee failed to exhaust his administrative remedies before the Postal Service and the U.S. Civil Service Commission, the court noting that a denial of a hearing because of the employee's late filing of an appeal does not obviate the necessity for exhaustion of remedies.

There are numerous individual employee actions reported alleging breach of duty of fair representation or violation of civil rights statutes by reason of the improper processing of grievances or the refusal to take grievances to arbitration by labor organizations. These actions are usually unsuccessful where the union's refusal to process the grievance further was based on its good-faith belief that the grievance was without merit and the plaintiff is not able to show that the union acted arbitrarily, discriminatorily, or in bad faith.[29] It has been held that a union may even re-

[24] *Helton* v. *Hake*, 386 F.Supp. 1027, 88 LRRM 3351 (W.D. Mo. 1974); *compare* a supervisor's action for malicious interference with his employment, *Davenport* v. *Terry*, 134 N.J.Super. 88, 338 A.2d 815, 89 LRRM 2456 (1975); where employee tort action for injuries held to constitute waiver of arbitration, *see Guthrie* v. *Texaco, Inc.*, 89 LRRM 2510 (S.D.N.Y. 1975).

[25] *Coleman* v. *Tennessee Valley Labor Council*, 396 F.Supp. 671, 90 LRRM 3333 (E.D. Tenn. 1975).

[26] *Williams* v. *UTU*, 90 LRRM 2475 (N.D. Ohio 1975); *Wenzel* v. *C & O Ry.*, 89 LRRM 2538 (E.D. Mich. 1974); for cases also involving the Railway Passenger Service Act (AMTRAK), *see Horton* v. *UTU*, 89 LRRM 2981 (S.D. Ga. 1975), and *McLaughlin* v. *Penn Central Transp. Co.*, 384 F.Supp. 179, 90 LRRM 2662 (S.D.N.Y. 1974).

[27] *Malone* v. *U.S. Postal Service*, 526 F.2d 1099, 90 LRRM 3287 (6th Cir. 1975); *Hardwick* v. *U.S. Postal Service*, 391 F.Supp. 20, 89 LRRM 2583 (E.D. Tenn. 1974).

[28] *Kuhn* v. *Letter Carriers Branch 5*, 528 F.2d 767, 91 LRRM 2177 (8th Cir. 1976).

[29] *Whitten* v. *Anchor Motor Freight*, 521 F.2d 1335, 90 LRRM 2161 (6th Cir. 1975); *Smith* v. *South Central Bell Tel. Co.*, 518 F.2d 68, 10 FEP Cases 1095 (6th Cir. 1975); *Causey* v. *Ford Motor Co.*, 516 F.2d 412, 10 FEP Cases 1493 (5th Cir.

fuse to write a grievance for an employee where the record indicates that it had filed many grievances on behalf of the employee in the past, the union's refusal to take the grievance was based on its belief that there was no basis for the employee's claim, and the employee was treated the same as other employees.[30] A failure of the employee to cooperate with the union in the processing of a grievance will lead to the dismissal of a subsequent fair-representation action.[31] Where no discriminatory or arbitrary conduct is present, courts have held that a union can rely upon a vote of its membership for refusing to take a grievance to arbitration,[32] or upon the fact that its treasury is low and its financial condition precarious, even though the grievance may have acknowledged merit.[33] However, in regard to the economic-justification defense, a Wisconsin court has held that economic considerations for refusal to arbitrate a grievance are not self-evident justification for such refusal by the union, and the union must in good faith weigh other relevant factors before a determination of its good faith can be made, such as the monetary value of the claim, the effect of the employer's breach of contract, and the likelihood of success.[34]

In the past, courts have indicated that mere negligence, as distinguished from gross negligence implying bad faith, will not support a fair-representation claim,[35] and that the courts cannot oversee the adequacy of tactics used at grievance hearings or the level of expertise at which they are conducted.[36] Nevertheless, the courts appear to be taking a closer look at the representation of employees by their unions, and the Eighth Circuit recently held that a triable issue was presented in regard to a union's alleged failure to prepare adequately and present the grievance of a discharged employee against the employer, where the employee

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1975); *Zaleski* v. *Glendale Foods, Inc.*, 91 LRRM 2377 (E.D. Mich. 1975); *Tippett* v. *Liggett & Myers Tobacco Co.*, 11 FEP Cases 1294 (M.D.N.C. 1975); *Crawford* v. *Pittsburgh-Des Moines Steel Co.*, 90 LRRM 3104 (D. Wyo. 1975); *Lacour* v. *Rabalais, Inc.*, 90 LRRM 2046 (E.D. La. 1975).

[30] *Marlowe* v. *General Motors Corp.*, 11 FEP Cases 1357 (E.D. Mich. 1975).

[31] *Allen* v. *Butz*, 390 F.Supp. 836, 11 FEP Cases 123 (E.D. Pa. 1975); *Hardison* v. *TWA*, 375 F.Supp. 877, 10 FEP Cases 502 (W.D. Mo. 1974).

[32] *Meyers* v. *Gelman Paper Corp.*, 392 F.Supp. 413, 10 FEP Cases 220 (S.D. Ga. 1975).

[33] *Curth* v. *Faraday, Inc.*, 401 F.Supp. 678, 90 LRRM 2735 (E.D. Mich. 1975).

[34] *Mahnke* v. *Wisconsin Emp. Rel. Comm'n*, 225 N.W.2d 617, 88 LRRM 3199 (Wis. 1975).

[35] *Martin* v. *Terminal Transp. Co.*, 90 LRRM 3188 (M.D. Tenn. 1975).

[36] *Bell* v. *Mercury Freight Lines, Inc.*, 388 F.Supp. 1, 88 LRRM 3373 (S.D. Tex. 1975).

contended that the union failed to make even a minimal attempt to investigate or process the grievance which was dropped without notice to the employee.[37] Thus, breach of the duty of fair representation on the part of the union in the processing of a grievance has been found where a union negligently and in bad faith permitted a grievance to expire,[38] or where it handled the grievance in a perfunctory or improper manner.[39]

The Eighth Circuit has upheld jury verdicts finding that a labor organization violated its duty of fair representation in regard to the seniority placement of employees in the merger of bargaining units, although punitive damages were not allowed where the union's conduct was not the type of outrageous or extraordinary conduct for which extraordinary remedies were needed and where no malice was directed specifically at the employee involved.[40] The same circuit ordered a new trial in a fair-representation case where the court found that the verdict was rendered as a result of passion, prejudice, mistake, or improper reasons, holding that liability and damages were so interwoven that a new trial on damages alone would be inappropriate.[41]

None of the opinions in the *Hines* decision expressed any concern about the fact that the arbitration tribunal involved was a joint labor-management committee composed of an equal number of representatives of the union and the employer involved, and the courts have consistently upheld the decisions of such committees, which exist principally under Teamster contracts, where contract provisions are followed and there is no bad faith shown.[42] Most of these cases involve seniority problems, often caused by the merger or transfer of an employer's operations, and

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[37] *Minnis* v. *Automobile Workers*, _____F.2d_____, 91 LRRM 2081 (8th Cir. 1975).

[38] *Ruzicka* v. *General Motors Corp.*, 523 F.2d 306, 90 LRRM 2497 (6th Cir. 1975), *rehearing denied*, 91 LRRM 3054 (case remanded for arbitration); under the RLA, *see Harrison* v. *UTU*, _____F.2d_____, 90 LRRM 3265 (4th Cir. 1975) (attorneys' fees and $6,000 punitive damages awarded).

[39] *Morton* v. *Anchor Motor Freight, Inc.*, 90 LRRM 2427 (S.D.N.Y. 1975); *Gosper* v. *Fancher*, 42 A.D.2d 674, 371 N.Y.S.2d. 28, 90 LRRM 2336 (N.Y. 1975); *Davis* v. *Mason and Dixon Tank Lines, Inc.*, 90 LRRM 2213 (Tenn. App. 1975).

[40] *Bond* v. *Teamsters Local 823*, 521 F.2d 5, 89 LRRM 3153 (8th Cir. 1975); *Butler* v. *Teamsters Local 823*, 514 F.2d 442, 88 LRRM 3169 (8th Cir. 1975); *see also* under the RLA, *Deboles* v. *TWA, Inc.*, 90 LRRM 3064 (E.D. Pa. 1975), 91 LRRM 2651 (1976); *English* v. *Seaboard Coastline R.R.*, 12 FEP Cases 75 (S.D. Ga. 1975).

[41] *Richardson* v. *Communications Workers*, _____F.2d_____, 91 LRRM 2506 (8th Cir. 1976).

[42] *Patterson* v. *Teamsters*, 405 F.Supp. 980, 91 LRRM 2227 (S.D. Ill. 1976); *Walters* v. *Roadway Express, Inc.*, 91 LRRM 2184 (S.D. Miss. 1975); *Hardin* v. *Strick-*

the decisions of the committees have been upheld even if employees could not appear before the committee.[43] The courts also hold that such joint committees are not proper party defendants to a breach-of-contract or fair-representation action, since they are quasi-judicial bodies and partake of an immunity similar to other judicial entities.[44]

B. Retroactive Seniority

Due to the multitude of seniority problems faced by arbitrators, brief mention should be made of the Supreme Court's recent decision in *Franks* v. *Bowman Transp. Co.*[45] This case arose under Title VII of the Civil Rights Act of 1964, and the Court held that where a violation of Title VII has been found because an individual was not hired due to race, a remedy of retroactive seniority could be ordered by the trial court. While this decision does not bear directly on the arbitral process itself, the decision will undoubtedly have an impact on future arbitrations where civil rights and seniority issues are presented.

There is a great deal of litigation in lower courts involving seniority systems, and it is now settled that court consent decrees, Equal Employment Opportunity Commission (EEOC) conciliation agreements, and private settlement agreements may have the effect of amending such contractual seniority systems. As pointed out by one district court, seniority rights are derived solely from the collective bargaining agreement and are not vested rights, and these seniority rights can be altered by amendments to the contract, which is what the court's consent decree did.[46] A union will not be held to have breached the duty of fair representation by entering into a settlement agreement involving transfer rights or seniority of employees, where it in good faith attempts to find an equitable solution to the dispute and does not wholly support one faction of employees against another.[47] Another court has

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land Transp. Co., 90 LRRM 3159 (E.D. Mo. 1975); *Sage* v. *Complete Auto Transit*, 90 LRRM 2737 (E.D. Mich 1975).

[43] *DeBelsey* v. *Chemical Leaman Tank Lines, Inc.*, 368 F.Supp. 1159, 89 LRRM 2353 (E.D. Pa. 1973).

[44] *DeVries* v. *Interstate Motor Freight Sys.*, 91 LRRM 2765 (N.D. Ohio 1976).

[45] _____U.S._____, 12 FEP Cases 549 (1976).

[46] *Martin* v. *Republic Steel Corp.*, 88 LRRM 3522 (N.D. Ohio 1975).

[47] *Southerlan* v. *Office Employees Local 277*, 396 F.Supp. 1207, 89 LRRM 2749 (N.D. Tex. 1975); *see also Huston* v. *General Motors Corp.*, 12 FEP Cases 573 (W.D. Mo. 1976); *Masullo* v. *General Motors Corp.*, 393 F.Supp. 188, 89 LRRM 3142 (D.N.J. 1975); *Thompson* v. *Chrysler Corp.*, 11 FEP Cases 1146 (E.D. Mich. 1974).

held that an employer will not be required to arbitrate the grievances of male employees under a collective bargaining agreement who claim seniority preference over female employees in a layoff situation, where the latter employees are protected by an EEOC conciliation agreement.[48] An arbitrator's application of an EEOC guideline to a contract dispute regarding limitations on pregnancy disabilities was upheld by an Ohio court, where the contract provided that it could be modified where necessitated by "federal or state statute or regulation," the court holding that the fact the guideline did not have the force of law was not ground for reversal.[49]

In civil rights litigation where seniority rights have been altered by a consent decree, courts have provided that any future disputes over the award of seniority to individuals under the decree may be referred to the grievance-arbitration procedures under collective bargaining agreements, and any remaining disputes after exhaustion of the arbitration procedures would be referred to a special master appointed by the court.[50] In civil rights cases, it is more common than in straight Section 301 breach-of-contract, fair-representation actions for an employer to be held liable without any consequent liability on the labor organization involved.[51]

II. Enforcement of Right to Arbitration

A. Injunctions and the Honoring of Picket Lines

As predicted in last year's report, the split in authority among various federal circuit courts of appeal in regard to the propriety of granting injunctive relief under the *Boys Markets* doctrine where employees are honoring the picket line of another labor organization has reached the Supreme Court in the *Buffalo Forge* case.[52] At the outset, it should be noted that there is not only the basic question as to whether such a strike is over a grievance that

[48] *Southbridge Plastics Div., W. R. Grace Co.* v. *Local 759 Rubber Workers,* 11 FEP Cases 703 (N.D. Miss. 1975).

[49] *Goodyear Tire & Rubber Co.* v. *Local 200, Rubber Workers,* 52 Ohio St.2d 516, 330 N.E.2d 703, 10 FEP Cases 1351 (1975).

[50] *See,* for example, *United States* v. *East Texas Motor Freight Sys., Inc.,* 10 FEP Cases 971 (N.D. Tex. 1975).

[51] *See,* for example, *Ward* v. *Allegheny Ludlum Steel Corp.,* 397 F.Supp. 375, 11 FEP Cases 594 (W.D. Pa. 1975).

[52] 517 F.2d 1207, 89 LRRM 2303 (2d Cir. 1975), *aff'g* 386 F.Supp. 405, 88 LRRM 2063 (W.D.N.Y. 1974), *cert. granted,* Oct. 20, 1975.

is within the contract between the parties, but there are further complications caused by the wording of the contract itself, especially the no-strike clause, and also by the nature of the picket line and the relationship of the picketing union to the employer and employees involved. Some of these complications are evident in the case law discussed below, and they may have significant bearing on any such cases presented for arbitration.

In *Buffalo Forge,* the Second Circuit held that a federal district court may not issue a *Boys Markets* injunction restraining the defendant local unions representing its production and maintenance employees from refusing to cross the picket line set up by their sister local which represented the employer's clerical and technical employees, even though the defendant unions were signatory with the employer to contracts containing no-strike clauses and mandatory grievance-arbitration procedures. The court held that the strike was not over the defendant unions' grievance with the employer, but instead was simply a manifestation of striking workers' deference to the picket line of the other employees. The court found that the strike was not seeking to pressure the employer to yield on a disputed issue in order to avoid contractual arbitration machinery and, therefore, did no violence to the federal pro-arbitration policy. The court stated that the *Boys Markets* decision narrowly construed the exception to the anti-injunction provisions of Section 4 of the Norris-LaGuardia Act carved out by Section 301 by limiting injunctions to "strikes *over a grievance* which the union has agreed to arbitrate . . . ." The court noted that if a strike not seeking redress of any grievance is enjoinable, "then the policy of the Norris-LaGuardia Act is virtually obliterated" and any strike could be enjoined. The foregoing are the issues that will be clarified by the forthcoming decision of the Supreme Court.

During the past year, denials of injunctions similar to the Second Circuit decision in *Buffalo Forge* have been handed down by the Sixth Circuit,[53] the Seventh Circuit,[54] and two district courts.[55] The Sixth Circuit decision noted specifically that there was no clear and unmistakable language in the no-strike clause

[53] *Plain Dealer Pub. Co.* v. *Local 53, Typographical Union,* 520 F.2d 1220, 90 LRRM 2110 (6th Cir. 1975).

[54] *Hyster Co.* v. *Independent Towing & Lifting Mach. Co.,* 519 F.2d 89, 89 LRRM 2885 (7th Cir. 1975).

[55] *Transway Corp.* v. *Local 996, Teamsters,* 91 LRRM 2910 (D. Hawaii 1976); *Stokely-VanCamp* v. *Thacker,* 394 F.Supp. 715, 89 LRRM 2145 (W.D. Wash. 1975).

whereby the union waived its right to engage in sympathy strikes. On the other hand, in regard to an employer's rights where faced with such a strike, a union that instructed its members to honor the picket line of another striking union was denied a temporary restraining order against the employer's stoppage of medical and life insurance premiums due under its collective bargaining agreement.[56]

On the other hand, other federal decisions in the past year have followed the line of authority that refusals to cross stranger picket lines present arbitrable issues under collective bargaining agreements whose no-strike clauses do not differ substantially from the contrary authority cited above. Thus, in these jurisdictions the issuance of an injunction to restrain a union from honoring a picket line pending arbitration was held to be proper.[57] Even where the collective bargaining agreement contains a clause permitting employees to honor certain types of picket lines, some federal courts have found that an arbitrable dispute is presented and have granted injunctions against the strike.[58]

In addition to injunction proceedings, there are numerous employer actions against labor organizations for damages caused by the breach of no-strike clauses, some of which involve cases where stranger picket lines have been honored. Following the general policy favoring the use of arbitration in labor disputes, the courts will refer the employer's claim to the arbitral process whenever a mandatory arbitration clause is broad enough to encompass the dispute, leaving the usual equitable defenses to the arbitrator.[59]

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[56] *Typographical Union No. 10* v. *Washington Post Co.*, 90 LRRM 2995 (D.D.C. 1975).

[57] *Windsor Power House Coal Co.* v. *District 6, UMW*, _____F.2d___, 91 LRRM 2321 (4th Cir. 1975); *Latrobe Steel Co.* v. *Steelworkers*, 405 F.Supp. 787, 91 LRRM 2292 (W.D. Pa. 1975); *U.S. Pipe & Foundry Co.* v. *Mine Workers Local 1928*, 397 F.Supp. 1, 90 LRRM 2454, 2682 (N.D. Ala. 1975).

[58] *Associated Gen. Contrs. of Minnesota* v. *Local 563, Laborers*, 519 F.2d 269, 89 LRRM 3077 (8th Cir. 1975); *Valmac Ind., Inc.* v. *Local 425, Meat Cutters*, 519 F.2d 263, 89 LRRM 3073 (8th Cir. 1975); *Roofing and Sheet Metal Contrs. of Phila.* v. *Local 19, Sheet Metal Workers*, 396 F.Supp. 137, 89 LRRM 2733 (E.D. Pa. 1975); *Panella* v. *Teamsters Local 150*, 89 LRRM 2463 (E.D. Cal. 1974).

[59] *Controlled Sanitation Corp.* v. *Machinists*, 524 F.2d 1324, 90 LRRM 2892 (3d Cir. 1975); *Blake Constr. Co.* v. *Laborers Union*, 511 F.2d 324, 88 LRRM 3443 (D.C. Cir. 1975); *Reid Burton Constr., Inc.* v. *Carpenters*, 91 LRRM 2873 (D Colo. 1975); *Bechtel Corp.* v. *Local 215, Laborers*, 90 LRRM 3180 (M.D. Pa. 1975) (later national contract covering same subject matter controls over prior inconsistent local contract excluding dispute from arbitration); *Bricklayers Ass'n of Del. Valley* v. *Local 12, Bricklayers*, 89 LRRM 2736 (E.D. Pa. 1975); *Pepsico, Inc.* v. *Soft Drink Workers Local 812*, 89 LRRM 2541 (E.D.N.Y. 1975).

In such actions the employer has the burden of showing that the arbitration clause does not cover the dispute; and where a fair construction of the arbitration clause shows that the grievance procedures are employee oriented only and the parties did not intend to bind the employer to arbitrate such a grievance, then the court will find the matter not arbitrable.[60] Arbitration awards granting damages will be enforced by the courts similarly to other arbitration awards, and in one Third Circuit case each of the three judges wrote a separate opinion in upholding by a split decision an award granting damages due to the refusal of both union and nonunion employees to cross a picket line.[61]

Where the employer's damage action is properly tried by the court itself rather than referrable to arbitration, the employer must show that the union was in some active way a party to the strike in violation of the collective bargaining agreement and that both parties were covered by the no-strike clause in question.[62] It was held by the Fifth Circuit that responsibility cannot be inferred as a matter of law by the participation in the strike of three committeemen and by the union's failure to discipline the strikers, where the contract did not require such discipline and contained only an implied no-strike clause.[63] However, the courts may require a union to use every reasonable means to end an unauthorized or wildcat strike,[64] and a union was held liable for damages where 90 percent of the bargaining unit called in sick and the union failed to take effective steps to recall its members to work.[65] Damage awards in such cases can be very high, such as an Eighth Circuit decision where $5 million was awarded

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[60] *Crutcher Resources Corp.* v. *Local 780, IUE,* 515 F.2d 225, 89 LRRM 2846 (5th Cir. 1975), *rev'g* 89 LRRM 2366 (W.D. Tex. 1974); *Bliss & Laughlin Ind., Inc.* v. *Lodge 2040, Dist. 153, IAM,* 513 F.2d 987, 88 LRRM 3531 (7th Cir. 1975); *Welded Tube Co.* v. *Local 168, Electrical Workers,* 91 LRRM 2027 (E.D. Pa. 1975).

[61] *Meat Cutters Local 195* v. *Cross Bros. Meat Packers, Inc.,* 513 F.2d 1113, 89 LRRM 2594 (3d Cir. 1975).

[62] *See,* for example, *Western Pub. Co.* v. *Graphic Arts Union,* 522 F.2d 530, 90 LRRM 2257 (7th Cir. 1975); *Trap Rock Co.* v. *Teamsters Local 470,* 91 LRRM 3022 (E.D. Pa. 1976); *Compton Co.* v. *Local 320, Laborers,* 89 LRRM 2337 (D. Ore. 1975).

[63] *U.S. Steel Corp.* v. *Mine Workers,* 519 F.2d 1249, 90 LRRM 2548 (5th Cir. 1975), *rehearing denied,* 91 LRRM 2306 (1976); *but see U.S. Steel Corp.* v. *Steelworkers,* 398 F.Supp. 449, 90 LRRM 3024 (D. Minn. 1975) (contempt found).

[64] *Eazor Express, Inc.* v. *Teamsters,* 520 F.2d 951, 89 LRRM 3177 (3d Cir. 1975).

[65] *Tenneco Chems., Inc.* v. *Local 401, Teamsters,* 520 F.2d 945, 90 LRRM 2147 (3d Cir. 1975).

an employer for a work stoppage at one of its terminals on the ground that the employer's entire freight system was adversely affected by the strike.[66]

B. Other Boys Markets *Injunctions*

In addition to the situations discussed in the preceding sections, there continue to be numerous other cases reported involving alleged breaches of contract where injunctions are sought in aid of the arbitral process. Where the prerequisites for a *Boys Markets* injunction are met, such as an arbitrable grievance, equity or probability of success favoring the plaintiff, and irreparable harm if the injunction is not granted, the injunction and corresponding order to arbitrate are routinely granted by either federal [67] or state courts [68] against alleged contract violations by either a labor organization or an employer. Where irreparable harm to the plaintiff cannot be shown, an injunction will be denied.[69] The Ninth Circuit has held, in a case where a union was seeking to enjoin an employer's changes in work schedules pending resolution of the union's grievance, that the union need not show a "reasonable likelihood of success" of its grievance, but only that its claim is not "plainly without merit." [70]

For the injunction to issue, the parties involved must be within the jurisdiction of Section 301,[71] and the collective bargaining agreement in question must apply to the employer or employees involved.[72] The collective bargaining agreement must also contain a mandatory arbitration procedure with at least an implied

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[66] *Motor Carriers Council of St. Louis* v. *Local 600, Teamsters,* 516 F.2d 316, 89 LRRM 2480 (8th Cir. 1975); *see also United Aircraft Corp.* v. *Machinists,* 90 LRRM 2249 (Conn. 1975).

[67] *Fox Transp. Sys.* v. *Local 500, Teamsters,* 511 F.2d 1393, 90 LRRM 2889 (3d Cir. 1975), *aff'g* 90 LRRM 2823 (E.D. Pa. 1974); *Letter Carriers Branch 998* v. *U.S. Postal Service,* 88 LRRM 3524 (N.D. Ga. 1975); *McNichol Co.* v. *Local 500, Food Drivers,* 88 LRRM 3349 (E.D. Pa. 1975); *Parker* v. *Local 218, Laundry Workers,* 89 LRRM 2290 (N.D. Ala. 1974).

[68] *Fair Grounds Corp.* v. *Larmue,* 306 So.2d 316, 89 LRRM 2668 (La. App. 1974).

[69] *CIBA-Geigy Corp.* v. *Local 2548, Textile Workers,* 391 F.Supp. 287, 88 LRRM 3187 (D.R.I. 1975); *Gov't Employees Local 41* v. *H.E.W.,* 91 LRRM 2617 (D.D.C. 1975); *Armitage* v. *Carey,* 91 LRRM 2772 (N.Y. App. 1975).

[70] *Transit Union Div. 1384* v. *Greyhound Lines, Inc.,* _____F.2d_____, 91 LRRM 2456 (9th Cir. 1976); *but cf. Consolidation Coal Co.* v. *Local 1993, Mine Workers,* 390 F.Supp. 497, 89 LRRM 2432 (W.D. Pa. 1975).

[71] *Puerto Rico Marine Mgt., Inc.* v. *Longshoremen Local 1575,* 398 F.Supp. 118, 89 LRRM 2938 (D.P.R. 1975).

[72] *Service Employees Local 32B* v. *Sage Realty Corp.,* 524 F.2d 601, 90 LRRM 2754 (2d Cir. 1975), *aff'g* 402 F.Supp. 1153, 90 LRRM 2753 (S.D.N.Y.); *Pattern Makers* v. *Saginaw Pattern Co.,* _____ Mich.App._____, N.W.2d_____, 90 LRRM 3048 (1975); *Zbozen* v. *La. Dep't of Highways,* 393 So. 2d 901, 90 LRRM 2721 (La. App. 1974).

no-strike clause.[73] The parties may also negotiate a contract that contains a provision excluding the particular dispute from arbitration, thereby preventing the issuance of an injunction.[74] In a case involving a safety dispute, the Third Circuit held that where the employer did not comply with a contractual provision requiring it to follow the recommendations of a safety committee as to an imminently dangerous condition, then the union's refusal to work in a portion of the mine was not enjoinable.[75] The court's decision relied in great part on the foregoing contractual provision relating to safety disputes, distinguishing the 1974 Supreme Court decision in *Gateway Coal Co.* v. *Mine Workers*,[76] which held that an injunction may issue in safety disputes unless there is "ascertainable objective evidence" of abnormally dangerous conditions.

The courts are reluctant to enjoin any arbitration proceeding or the issuance of awards unless it is very clear that the dispute is not properly before the arbitrator.[77] Similarly, representation disputes are left to the NLRB and other appropriate agencies to resolve,[78] although one court refused to enjoin the arbitration of a representation dispute even though one of the unions was not a party to the arbitration, on the ground that the employer had an adequate remedy at law if it lost the arbitration proceeding and the arbitration might have a "curative effect" on the dispute.[79] The injunctive remedy has been used to compel the completion of an arbitration proceeding and permit the arbitrator to rule on the issues raised by the employer in opposition to arbitration.[80] One court held that a union's political cause, however worthy, regarding the loading of grain destined for the Soviet Union, could

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[73] *Bonanno Linen Serv.* v. *McCarthy*, _____F.2d_____, 91 LRRM 2792 (1st Cir. 1976); *Teledyne Wis. Motor* v. *Local 283, UAW*, _____F.2d_____, 91 LRRM 2313 (7th Cir. 1976).

[74] *Technical Eng'rs Local 13* v. *General Elec. Co.*, _____F.2d_____, 91 LRRM 2471 (3d Cir. 1976), *rev'g* 90 LRRM 2556 (E.D. Pa. 1975); *Pittsburgh Press Co.* v. *Local 211, Teamsters*, 90 LRRM 2050 (W.D. Pa. 1975).

[75] *Jones & Laughlin Steel Corp.* v. *Mine Workers*, 519 F.2d 1154, 89 LRRM 3118 (3d Cir. 1975).

[76] 414 U.S. 68, 85 LRRM 2049 (1974).

[77] *Compare Alsup* v. *Local 1199, Hosp. Union*, 91 LRRM 2063 (S.D.N.Y. 1975), and *Signal Delivery Serv., Inc.* v. *Local 107, Teamsters*, 68 FRD 318, 90 LRRM 2694 (E.D. Pa. 1975), with *North Shore Univ. Hosp.* v. *Levine*, 90 LRRM 2529 (E.D. N.Y. 1975), and *Costigan* v. *Local 1696, AFSCME*, 341 A.2d 456, 90 LRRM 2328 (Pa. 1975); *see also Trustees of Jr. College Dist. 508* v. *Cook County Teachers Union*, 318 N.E.2d 197, 200, 89 LRRM 2306, 2759 (Ill. App. 1975).

[78] *Chief Freight Lines Co.* v. *Local 886, Teamsters*, 514 F.2d 572, 89 LRRM 2044 (10th Cir. 1975).

[79] *Kings Harbor Health Care* v. *Local 144, Serv. Employees*, 91 LRRM 2848 (S.D.N.Y. 1975).

[80] *Automobile Workers Local 1881* v. *Kraft Foods*, 91 LRRM 2843 (E.D. Pa. 1976).

not be taken into account in its decision to issue an injunction against the union's work stoppage in violation of the contract.[81] An injunction was also granted to prevent a *threatened* strike by a union which was seeking to compel arbitration of a subcontracting dispute.[82] Disputes involving successorship and termination clauses of a collective bargaining agreement are often referred to arbitration with the aid of an injunction,[83] although in one such case arbitration was ordered but an injunction denied where the equities did not favor the union which had delayed seeking arbitration and the employer had already ceased operations.[84]

The courts frown on an overbroad use of the injunctive remedy which would grant prospective relief of future strikes or violations of a contract.[85] A union is responsible for securing the necessary action of its members to comply with an injunction, even when it is difficult to enforce, as in the case of an award against the members engaging in a slowdown, and the failure to take any such action may lead to a finding of contempt.[86] The violation of an injunction can lead to a finding of either civil or criminal contempt, depending upon the circumstances of the violation of the court order.[87] As long as a temporary restraining order is issued in conformity with the Norris-LaGuardia Act, the plaintiff will not ordinarily be liable for the defendant's attorneys' fees or other expenses, even if a preliminary injunction is later denied by the court.[88]

C. *Other Suits Compelling or Staying Arbitration*

The courts are presented with a large number of legal actions attempting to compel arbitration or stay an arbitration proceeding, with a correspondingly wide variety of issues—from the ques-

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[81] *West Gulf Maritime Ass'n* v. *ILA*, 90 LRRM 2260 (S.D. Tex. 1975).

[82] *Wagner Elec. Corp.* v. *Electrical Workers*, 91 LRRM 2785 (E.D. Mo. 1976).

[83] *Teamsters Council 37* v. *Portland Auto Delivery Co.*, 90 LRRM 2786 (D. Ore. 1975); *Mechanical Contrs. Ass'n of Madison* v. *Local 394, Plumbers*, 89 LRRM 2901 (W.D. Wis. 1975).

[84] *Distillery Workers Local 1* v. *Hiram Walker*, _____F.2d_____, 90 LRRM 2889 (2d Cir. 1975), *aff'g* 88 LRRM 3127 and 90 LRRM 2971 (S.D.N.Y. 1975).

[85] *U.S. Steel Corp.* v. *Mine Workers*, _____F.2d_____, 91 LRRM 3031 (3d Cir. 1976), *vacating and remanding* 393 F.Supp. 936, 942, 89 LRRM 3167, 3170 (W.D. Pa. 1976); *U.S. Steel Corp.* v. *Mine Workers*, 519 F.2d 1236, 90 LRRM 2539 (5th Cir. 1975), *rev'g* 383 F.Supp. 1082, 88 LRRM 3381, 3386 (N.D. Ala. 1974).

[86] *Pacific Maritime Ass'n* v. *Longshoremen Local 19*, 517 F.2d 1158, 89 LRRM 2492 (9th Cir. 1975).

[87] *United States* v. *Partin*, 524 F.2d 992, 90 LRRM 3299 (5th Cir. 1975); *Dayton Malleable Iron Co.* v. *Steelworkers*, 91 LRRM 2833 (S.D. Ohio 1976).

[88] *Celotex Corp.* v. *Oil Workers*, 516 F.2d 242, 89 LRRM 2372 (3d Cir. 1975), *rev'g* 89 LRRM 2335 (M.D. Pa. 1974).

tion of whether a valid collective bargaining agreement exists in the first place [89] to whether arbitration of a dispute over welfare-fund contributions was waived by the previous filing of criminal charges against one of the employer's officers.[90] In general, there is a presumption of arbitrability where there is a mandatory, as distinguished from a voluntary or permissive, arbitration clause in the contract.[91] For arbitration to be denied or stayed, the language of the contract must clearly rebut the strong presumption of arbitrability, and the courts will restrictively interpret any exclusionary clause.[92] In public employment, the question of arbitrability presents more difficulties in view of the various enabling statutes and alternative statutory remedies available,[93] as evidenced by the large number of cases reported involving the evaluation and/or discharge of probationary teachers prior to obtaining statutory tenure.[94] Employees acting independently of their union may not compel arbitration of a grievance, although,

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[89] *Bartenders Local 611* v. *Stevens, Inc.*, 89 LRRM 2016 (S.D.N.Y. 1975); *Sullivan County Comm. College* v. *Faculty Committee*, 366 N.Y.S.2d 683, 89 LRRM 2862 (N.Y. App. 1975); under the RLA, *see TWA, Inc.* v. *Beaty*, 402 F.Supp. 652, 91 LRRM 2087 (S.D.N.Y. 1975).

[90] *Automobile Workers Local 55* v. *Silver Creek Corp.*, 396 F.Supp. 667, 89 LRRM 2922 (W.D.N.Y. 1975); *see also* antitrust defense to arbitration of dispute over benefit payments, *Marine Eng'rs Dist. 1* v. *Commerce Tankers Corp.*, 90 LRRM 3014 (E.D.N.Y. 1975).

[91] *Gangemi* v. *General Elec. Co.*, _____F.2d_____, 91 LRRM 3081 (2d Cir. 1976).

[92] *Compare Oil Workers Local 2-124* v. *American Oil Co.*, 528 F.2d 252, 91 LRRM 2202 (10th Cir. 1976), *aff'g* 387 F.Supp. 796, 89 LRRM 2167 (D. Wyo. 1975), with *Carpenters Dist. Council of Denver* v. *Brady Corp.*, 513 F.2d 1, 88 LRRM 3281 (10th Cir. 1975), and *Mine Workers Local 1638* v. *Consolidation Coal Co.*, 396 F.Supp. 971, 90 LRRM 2984 (N.D. W.Va. 1975).

[93] *Susquehanna Valley School Dist.* v. *Susquehanna Teachers Ass'n*, 37 N.Y.2d 614, 90 LRRM 3046 (1975), *aff'g* 46 A.D.2d 104, 361 N.Y.S.2d 416, 88 LRRM 3320 (1974); *Poughkeepsie City School Dist.* v. *Poughkeepsie Teachers Ass'n*, 35 N.Y.2d 599, 364 N.Y.S.2d 492, 89 LRRM 3012 (1974); *Red Bank Bd. of Ed.* v. *Warrington*, 138 N.J.Super. 564, 351 A.2d 778, 91 LRRM 2742 (1976); *Belmont School Dist.* v. *Belmont Teachers Ass'n*, 91 LRRM 2959 (N.Y. App. 1976); *Yonkers Bd. of Ed.* v. *Yonkers Fed'n of Teachers*, 49 A.D.2d 753, 373 N.Y.S.2d 164, 90 LRRM 3051 (1975); *Auburn Bd. of Ed.* v. *Auburn Teachers Ass'n*, 49 A.D.2d 35, 371 N.Y.S. 2d 201, 90 LRRM 2352 (1975); *Somers Bd. of Ed.* v. *Somers Faculty Ass'n*, 48 A.D.2d 872, 369 N.Y.S.2d 753, 90 LRRM 2106 (1975); *North Royalton Ed. Ass'n* v. *North Royalton Bd. of Ed.*, 41 Ohio App.2d 209, 90 LRRM 2057 (1974); *Pittsburgh Collective Barg. Comm.* v. *City of Pittsburgh*, 351 A.2d 304, 91 LRRM 2914 (Pa. Comm. 1976); *Rylke* v. *Portage School Dist.*, 341 A.2d 233, 90 LRRM 2223 (Pa. Comm. 1975).

[94] *Kaleva-Norman-Dickson School Dist.* v. *Kaleva Teachers Ass'n*, 393 Mich. 583, 227 N.W.2d 500, 89 LRRM 2078 (1975), *rev'g* Mich.App. 433, 217 N.W.2d 411, 86 LRRM 2673 (1974); *Philadelphia Bd. of Ed.* v. *Philadelphia Fed'n of Teachers*, 346 A.2d 35, 90 LRRM 2879 (Pa. 1975); *Fredericks* v. *Monroe Bd. of Ed.*, 307 So.2d 463, 88 LRRM 3260 (Fla. App. 1975); *Lockport Special Ed. Coop.* v. *Lockport Ed. Ass'n*, 338 N.E.2d 463, 91 LRRM 2449 (Ill. App. 1975); *Argo School Dist. No. 217* v. *Christensen*, 332 N.E.2d 482, 89 LRRM 2925 (Ill. App. 1975); *Wesclin Ed. Ass'n* v. *Wesclin Bd. of Ed.*, 331 N.E.2d 335, 90 LRRM 2342 (Ill. App. 1975);

as discussed above, they are not foreclosed from bringing a law suit against the union for breach of its duty of fair representation.[95]

The question whether the right to arbitrate survives the termination or expiration of a collective bargaining agreement is frequently presented to the courts. In one typical decision by the Fourth Circuit, the court ordered an employer to arbitrate a severance-pay dispute, even though the dispute did not arise until after the union terminated the collective bargaining agreement which contained a compulsory arbitration clause.[96] The court, in three separate opinions, held that the duty to arbitrate survives the termination or expiration of the collective bargaining agreement if it is found that the parties intended certain accruable rights to survive, and arbitration is a proper forum to ascertain whether severance pay is such an accrued right. In another case the Sixth Circuit ruled that the issue of whether a contract is terminated by a union's notice to open negotiations and to modify a collective bargaining agreement is not an arbitrable issue.[97] The court found that the contract was not terminated, holding that a notice to terminate must be clear and explicit, and that a notice to modify a contract is not a notice to terminate it. A court's determination that a grievance either is or is not arbitrable because it arose before the expiration or termination of a particular contract must be distinguished from procedural questions, such as the timeliness of the demand for arbitration, which issues are for the arbitrator to determine.[98] Disputes surrounding the employer's closing of its business and terminating employees are arbitra-

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Spencerport School Dist. v. *Spencerport Teachers Ass'n*, 374 N.Y.S.2d 488, 91 LRRM 2061 (N.Y. App. 1975); *New York Inst. of Tech.* v. *AAUP*, 47 A.D.2d 659, 364 N.Y.S.2d 190, 89 LRRM 2428 (N.Y. App. 1975); *see also Cook County Jr. College Dist. 508* v. *Cook County Teachers Union*, 318 N.E.2d 193, 88 LRRM 3559 (Ill. App. 1974); *Hanover School Comm.* v. *Curry*, 88 LRRM 3463 (Mass. App. 1975); *Franklin County* v. *AFSCME*, 346 A.2d 845, 90 LRRM 2940 (Pa. Comm. 1975).

[95] *Norton* v. *Mass. Bay Transp. Auth.*, 336 N.E.2d 854, 90 LRRM 3054 (Mass. 1975); *Quinby* v. *TWA*, 401 F.Supp. 137, 90 LRRM 2987 (E.D. Pa. 1975); *Wells* v. *Delta Air Lines, Inc.*, 398 F.Supp. 384, 90 LRRM 2225 (E.D. Pa. 1975).

[96] *Bakery Workers Local 353* v. *Nolde Bros., Inc.*, _____F.2d_____, 91 LRRM 2570, *rev'g* 87 LRRM 2646 (E.D. Va. 1974).

[97] *Office Employees Local 42* v. *Local 174, UAW*, 524 F.2d 1316, 90 LRRM 3121 (6th Cir. 1975).

[98] *Compare Teamsters Local 636* v. *Joseph Horne, Co.*, 527 F.2d 745, 91 LRRM 2029 (3d Cir. 1975); *Teamsters Local 100* v. *Klawitter*, 90 LRRM 2847 (S.D. Ohio 1975); *Wautauga Rayon Workers Local 220* v. *Beaunit Fibers*, 391 F.Supp. 548, 89 LRRM 2858 (E.D. Tenn. 1974); with *Glaziers Local 1152, Painters* v. *Great Lakes Glass Co.*, 89 LRRM 2063 (N.D. Ind. 1975).

ble as long as the contract had not expired before the grievance arose.[99] Also, in one plant-closing case, where a vacation-pay grievance was found not to be arbitrable because the grievance arose after the contract had expired and the union took no steps to institute the grievance procedure during the life of the contract, the court held that the employees were still entitled to recover pro rata vacation pay under a straight breach-of-contract theory.[100]

A contract barring rearbitration of questions that were previously subject to arbitration did not foreclose arbitration of the question whether a new grievance was the subject of such prior arbitration.[101] Another court found a discharge grievance arbitrable, despite the employer's contention that the grievance was settled and incorporated into the collective bargaining agreement, since the question whether there was a waiver of arbitration or breach of the settlement agreement was itself an arbitrable issue.[102] Similarly, another court ordered arbitration of a dispute over an employer's refusal to recall strikers pursuant to a strike-settlement agreement, despite the employer's contention that the settlement agreement resolved the dispute, since neither the contract nor the settlement agreement expressly or impliedly excluded from arbitration the rights of laid-off employees.[103] In another case, a union's claim that the employer fraudulently induced it to enter into a settlement agreement regarding performance of work by outside shops was held arbitrable, since the settlement agreement was inextricably linked to an underlying association-wide contract which had a broad arbitration clause.[104] The latter case also denied the employer's contention that the arbitration panel chairman under the association contract was potentially biased because of the employer's withdrawal from the association and its operation as a nonunion shop.

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[99] *Bressette* v. *International Talc Co.*, 527 F.2d 211, 91 LRRM 2077 (7th Cir. 1975).

[100] *Machinists Lodge 2369* v. *Oxco Brush Div., Vistron Corp.*, 517 F.2d 239, 89 LRRM 2341 (6th Cir. 1975).

[101] *Electrical Workers Local 103* v. *RCA Corp.*, 516 F.2d 1336, 89 LRRM 2487 (3d Cir. 1975).

[102] *Office Employees Local 9* v. *Allied Indus. Workers*, 397 F.Supp. 688, 90 LRRM 2129 (E.D. Wis. 1975).

[103] *Meat Cutters Local 295* v. *Servomation Corp.*, 402 F.Supp. 1058, 90 LRRM 3028 (M.D. Pa. 1975).

[104] *Makress Lingerie, Inc.* v. *Local 601, ILGWU*, 395 F.Supp. 110, 89 LRRM 2552 (S.D.N.Y. 1975).

In a dispute involving the subcontracting of work only to union contractors, the Seventh Circuit ordered arbitration and refused reformation of the contract as requested by the employer, which reformation would have eliminated the dispute, referring all such issues to the arbitrator as intended by the parties to the contract.[105] As previously noted with reference to breaches of no-strike clauses, a court will in breach-of-contract or other legal actions order the dispute to arbitration if it finds that an ordinary labor dispute within the meaning of the contract is presented.[106] It is settled that defenses to the arbitration of disputes, such as procedural irregularities, laches, and waiver, are for the arbitrator rather than the courts to decide.[107] In a local union's suit to compel arbitration, it was held that the international union was not an indispensable part to the action, where the employer failed to show it faced substantial risk of a multiplicity of suits resulting in inconsistent obligations.[108]

Even in the private sector of employment, contracts providing for interest arbitration of new contract terms appear to be becoming more common, especially in the printing industry. The Sixth Circuit has found such a contractual obligation to be within the scope and purpose of national policy and has ordered employers to arbitrate the terms of a future contract pursuant to the clause of the old contract providing for such arbitration.[109] In enforcing the arbitration of the terms of a new contract, the court found no difficulty with the fact that there may be no clear-cut provision in the old contract for its termination. Compulsory arbitration of new contract terms is more common in the public sector and has generally met with approval.[110] However, some

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[105] *Operating Eng'rs Local 139* v. *Carl A. Morse, Inc.*, _____F.2d_____, 91 LRRM 2415 (7th Cir. 1976).

[106] *Carpenters* v. *AGC of Calif., Inc.*, 404 F.Supp. 1067, 1072, 90 LRRM 2511, 3279 (N.D. Cal. 1975).

[107] *Oil Workers Local 7–346* v. *Toledo Solvent & Chem. Co.*, 89 LRRM 2350 (N.D. Ohio 1975); *Printing Specialties Union No. 716* v. *Standard Register Co.*, 387 F.Supp. 1249, 89 LRRM 2224 (M.D. Pa. 1974); *Poughkeepsie School Dist.* v. *Poughkeepsie Teachers Ass'n*, 35 N.Y.2d 599, 364 N.Y.S.2d 492, 89 LRRM 2422 (1974); *Willink* v. *Howard*, 49 A.D.2d 683, 370 N.Y.S.2d 747, 90 LRRM 2495 (N.Y. App. 1975); *Firefighters Local 463* v. *City of Johnstown*, 344 A.2d 754, 90 LRRM 3035 (Pa. Comm. 1975).

[108] *Local 498, IUE* v. *Sonotone Corp.*, 88 LRRM 3520 (S.D.N.Y. 1975).

[109] *Mailers Union Local 92* v. *Chattanooga News-Free Press Co.*, 524 F.2d 1305, 90 LRRM 3000 (6th Cir. 1975); *Printing Pressmen Local 50* v. *Newspaper Printing Corp.*, 518 F.2d 351, 89 LRRM 2861 (6th Cir. 1975).

[110] *Fire Fighters Local 412* v. *City of Dearborn*, _____Mich._____, 231 N.W.2d 226, 90 LRRM 2002 (1975); *City of Alpena* v. *Local 623, Fire Fighters*, 35 Mich.App. 568, 224 N.W.2d 672, 88 LRRM 3304 (1974); *City of Amsterdam* v. *Helsby*, 37

state courts continue to disapprove of such legislation, usually finding that the compulsory arbitration of disputes constitutes an unconstitutional delegation of legislative authority.[111] During the past year, a Michigan appellate court enforced an arbitration award under a collective bargaining agreement and held that the compulsory arbitration statute of the state covering the same employees does not preempt contractual grievance arbitration.[112]

III. Conduct of Arbitration and Enforcement of Award

A. Conduct of Arbitration Hearings

The conduct of the arbitration proceeding itself often presents some interesting problems for the courts, which issues are of more than passing interest to arbitrators in the conduct of their own hearings. The voluntary arbitration rules of the American Arbitration Association (AAA) have become the subject of dispute in a few cases. For example, a union was held to be precluded from enforcing the contract provision that the AAA will choose an arbitrator in the event the parties are unable to do so within 30 days of the demand for arbitration, where for almost four years the union had not enforced the 30-day provision but had acquiesced in another procedure involving the submission of multiple AAA lists.[113] The court found, however, that the 30-day provision was not necessarily meaningless and might be invoked by the union if the employer subsequently refused its duty to return the lists. The court also held that the AAA's voluntary labor arbitration rules were not applicable to the selection of arbitrators where the contract in question provided that only the hearing and posthearing activities were to be conducted in accordance with such rules, since the selection of arbitrators is not a hearing or a posthearing activity. In another case where the contract language specified that the parties "may" use an AAA list for the appointment of a neutral fact finder and where the parties

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N.Y.2d 19, 322 N.E.2d 290, 371 N.Y.S.2d 404, 89 LRRM 2871 (1975); *Antinore* v. *New York*, 49 A.D.2d 6; 371 N.Y.S.2d 213, 90 LRRM 2127 (1975); *In re Ross Twp.*, 346 A.2d 836, 90 LRRM 3053 (Pa. Comm. 1975) (award modified where contrary to statute).

[111] *City of Sioux Falls* v. *Local 814, Firefighters*, 90 LRRM 2945 (S.D. 1975); *cf.*, *Midwest City* v. *Cravens*, 532 P.2d 829, 88 LRRM 3367 (Okla. 1975).

[112] *Council 55, AFSCME* v. *McKervey*, 62 Mich.App. 689, 233 N.W.2d 839, 90 LRRM 2954 (1975).

[113] *New England Tel. Co.* v. *IBEW*, 402 F.Supp. 1032, 91 LRRM 2537 (D. Mass. 1975).

could not agree on such appointment, the court held that the contract should read as "must" use such procedure.[114]

In an employee's action to vacate an arbitration award sustaining his discharge for refusing overtime, the award was upheld against the employee's contention that the arbitrator erred by failing to require the plant physician to testify at the arbitration hearing.[115] The court found that the employer did not dispute the employee's physical condition, and the right to a fair hearing was not affected by the failure of the doctor to appear. Another court found no impermissible burden of proof imposed upon the employer where the arbitration panel held that the employer bore a heavy burden of proof after the union made a convincing presentation of a contract violation, since the panel was found to have carefully considered the employer's contentions.[116]

The Fourth Circuit, in denying judicial review of an arbitration award upholding an employee's discharge, held that the fact that there was an unemployment compensation decision to the contrary did not affect the final and binding nature of the arbitration award.[117] The court held that the parties did not contract for a decision of the unemployment board and such a board does not have the same expertise in regard to the issue at hand as does an arbitrator. In another case, a New York court held that an arbitration award reinstating an employee with back pay was not affected by the fact that the employee had prior to his discharge admitted his violation of the departmental rule involved in his discharge.[118] The court in the latter decision noted that even though the employer believed that it had just and sufficient cause to discharge the employee, the contracting parties had bargained for and agreed to accept the arbitrator's decision on the merits as final and binding, and they were bound by their contract and the arbitrator's award unless the award was based on a "completely irrational" construction of the agreement or violated an express contractual limitation. A Wisconsin court held that an

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[114] *Oklahoma Teachers Ass'n* v. *Oklahoma School Dist. No. 89,* 540 P.2d 1171, 91 LRRM 2046 (Okla. 1975).

[115] *Lucas* v. *Philco-Ford Corp.,* 399 F.Supp. 1184, 90 LRRM 2122 (E.D. Pa. 1975).

[116] *Western Elec. Co.* v. *Communication Equip. Workers,* 91 LRRM 2621 (D. Md. 1976) (union denied interest on award and attorneys' fees; *see* cases at notes 123 and 124 *infra*).

[117] *Collins* v. *Belva Coal Co.,* 526 F.2d 588, 90 LRRM 2535 (4th Cir. 1975), aff'g 90 LRRM 2532 (S.D. W.Va. 1974).

[118] *Civil Serv. Employees Ass'n* v. *Lombard,* 50 A.D.2d 708, 91 LRRM 2399 (N.Y. App. 1975).

arbitrator did not err by refusing to consider new evidence, even though a statute authorized such consideration, where the evidence was submitted ex parte without notice to the other party and there was no motion made to reopen the record.[119]

The Tenth Circuit found that an arbitrator exceeded his authority when he consolidated two overtime grievances for hearing, where one of the two grievances was not submitted in accordance with the grievance-arbitration procedure, despite previous consideration of both grievances in the preliminary steps.[120] However, the court held that the award on the grievance that was properly submitted to arbitration was valid and enforceable. Another court held that an arbitrator did not abuse his discretion when he denied the employer a one-day continuance to obtain additional witnesses, where there were several previous delays caused by the employer, the evidence failed to establish that the testimony of the absent witnesses was crucial to a fair hearing, and the employer did not justify its neglect during the long prehearing delays to take sufficient precautions to ensure the appearance of witnesses it considered so important.[121]

B. Contractual Authority of Arbitrator

It is clear that an arbitrator receives his authority pursuant to the terms of the collective bargaining agreement, and arbitration awards that do not exceed such authority and draw their essence from the contract will be routinely upheld by the courts without review on the merits.[122] The arbitrator interprets the language of the contract as a whole, but may not bring in or add anything from outside the contract.[123] The Third Circuit has held that the ambiguity of the arbitrator's opinion is no defense to the enforcement of an award; and though no explicit finding may have been made by the arbitrator in his opinion, the evidence was be-

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[119] *City of Manitowoc* v. *Manitowoc Police,* 236 N.W.2d 231, 91 LRRM 2890 (Wis. 1975).

[120] *Oil Workers Local 2–477* v. *Continental Oil Co.,* 524 F.2d 1048, 90 LRRM 3040 (10th Cir. 1975).

[121] *Warehouse Union Local 210* v. *Greater Living Enterprise, Inc.,* 90 LRRM 2767 (S.D.N.Y. 1975).

[122] *Ahoha Motors, Inc.* v. *Local 142, Longshoremen,* _____F.2d_____, 91 LRRM 2751 (9th Cir. 1976); *Seatrain Shipbuilding Corp.* v. *Shoreside Supervisors Union Dist. 2,* 89 LRRM 2857 (S.D.N.Y. 1975); *Television & Radio Artists* v. *NBC,* 89 LRRM 2191 (S.D.N.Y. 1975); *Cape Cod Gas Co* v.. *Steelworkers Local 13507,* 327 N.E.2d 748, 89 LRRM 2499 (Mass. App. 1975).

[123] *Automobile Workers Local 537* v. *Wickes Corp.,* 88 LRRM 3064 (E.D. Mich. 1975).

fore him from which he could conclude in favor of the union's position.[124] The same case held that the union was not entitled to attorneys' fees where the employer made a good-faith resort to the courts to contest the arbitration award, and that interest on the award would also be denied where the arbitrator did not authorize such payment. The courts will not overrule an arbitration award simply because they might have reached a different interpretation of the contract or because they find themselves in disagreement with the facts as found by the arbitrator.[125]

The Fourth Circuit held that an arbitrator exceeded his authority in changing penalties imposed by an employer on employees who engaged in a strike in violation of the no-strike clause of the contract.[126] The court found that the contract gave the employer the "unqualified right to discharge or discipline" violators of the no-strike clause, and the arbitrator had no discretion to change or violate a specific provision of the contract, since he drew his authority from the contract. Another interesting claim involving the breach of a no-strike clause involved a case where the arbitrator found that the union was not liable for any strike damages, but did assess damages against the union in the amount of $5,000 for its abuse of the arbitration procedure in willfully delaying the arbitration process by persistent attempts to frustrate arbitration of the employer's claim.[127] The court held that the question whether the award exceeded the authority of the arbitrator must, under the terms of the contract, be submitted to the arbitrator who made the award. The court therefore remanded the case to the arbitrator, who decided that the previous award had not exceeded his authority, and on appeal the court held that this award drew its essence from the contract.

The Ninth Circuit also found that an arbitrator exceeded his authority when he decided that no travel or boarding expenses were due certain employees under a collective bargaining agreement, but ordered the contract modified to give the employees a

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[124] *N F & M Corp.* v. *Steelworkers Local 8148*, 524 F.2d 756, 90 LRRM 2948 (3d Cir. 1975), *aff'g* 390 F.Supp. 266, 88 LRRM 3345 (W.D. Pa.); *but compare* the granting of attorneys' fees in *Local 554, Teamsters* v. *Young & Hay Transp. Co.*, 522 F.2d 562, 90 LRRM 2363 (8th Cir. 1975), and *Olin Corp.* v. *Chem. Workers Local 4*, 89 LRRM 2378 (N.D. Ill. 1974).

[125] *See*, for example, *Clothing Workers* v. *Winfield Mfg. Co.*, 89 LRRM 2206 (N.D. Ala. 1974).

[126] *Monongahela Power Co.* v. *Local 2332, IBEW*, _____F.2d_____, 91 LRRM 2583 (4th Cir. 1976).

[127] *Litton Sys., Inc.* v. *Shopmen's Local 522*, 90 LRRM 2964, 3176 (S.D. Ohio 1975).

travel allowance that other employers on the construction job site had agreed to pay.[128] The court found that the travel allowance was not payable pursuant to either the contract or an established practice of the parties. Where the contract is clear, an arbitrator may not rely on or infer from past practice.[129] An arbitrator is not free to ignore the express terms of the contract; consequently, where an arbitrator found no contract violation in regard to an employee's suspension, but awarded back pay on the ground that the employer's policy of denying back pay was unreasonable and unfair, the arbitration award was denied court enforcement.[130]

In a split decision, the Tenth Circuit held that an arbitrator exceeded his authority in awarding back pay where the issue presented did not encompass a back-pay remedy but related to the fairness in disallowing an employee to displace a less senior employee.[131] The majority held that the arbitrator misconstrued the narrow issue presented to him and that the entire purpose of the submission agreement must be looked at when construing the validity of the award. The court ordered that the back-pay issue be submitted to a new arbitrator. The contract may specifically exclude a dispute from arbitration or not contemplate that the dispute in question be arbitrated, and in such cases where an arbitrator exceeds such authority, the award will not be enforced by the courts.[132]

C. Miscellaneous Enforcement Problems

An endless variety of issues is presented in legal actions either to set aside (vacate) or to enforce (confirm) arbitration awards. Defenses not raised in the arbitration hearing cannot be raised in a subsequent court proceeding attacking the award.[133] Both state and federal courts may be utilized to enforce arbitration awards.[134] Unless the arbitration award directly violates some

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[128] *City Elec., Inc.* v. *Local 77, Elec. Workers,* 517 F.2d 616, 89 LRRM 2535 (9th Cir. 1975).

[129] *Civil Serv. Employees Ass'n* v. *Steuben County,* 377 N.Y.S.2d 849, 91 LRRM 2917 (N.Y. App. 1976).

[130] *Communications Workers* v. *Western Elec. Co.,* 397 F.Supp. 1318, 90 LRRM 2418 (N.D. Ga. 1975).

[131] *Retail Store Employees Local 782* v. *Sav-On Groceries,* 508 F.2d 500, 88 LRRM 3205 (10th Cir. 1975).

[132] *Telephone Workers* v. *Pennsylvania Bell Tel. Co.,* 91 LRRM 2714 (E.D. Pa. 1975); *Allegheny County* v. *Allegheny County Prison Employees,* 341 A.2d 578, 90 LRRM 2140 (Pa. Comm. 1975).

[133] *Musicians Local 336* v. *Bonatz,* 90 LRRM 2956 (D.N.J. 1974).

[134] See *Teamsters Local 100* v. *Imoco-Gateway Corp.,* 91 LRRM 2180 (S.D. Ohio 1975); *Harris* v. *Stroudsburg Fur Dressing Corp.,* 389 F.Supp. 226, 88 LRRM 3233 (S.D.N.Y. 1975).

state statute,[135] public-employment arbitration awards are routinely enforced in the appropriate state court, despite the usual contentions that such awards violate the statutory discretion of the public body or official involved, or that the award allegedly conflicts with other legislation.[136] In an action to set aside an award regarding the application of the contract wage scale to an employer's newly acquired store, the Eighth Circuit held that there was no justifiable controversy presented where the award was already complied with and the parties had negotiated a new collective bargaining agreement.[137]

A successor employer may be bound by its predecessor's contract and any outstanding arbitration award, if the succcessor had appropriate notice of the contract and award and there is between the two employers a "continuity of operations across the change in ownership" within the meaning of the Supreme Court's doctrine set forth in *Wiley & Sons* v. *Livingston*.[138] Awards relating to an employer's newly acquired operation or extension of its existing operation may be denied enforcement or their enforcement stayed where NLRB proceedings or findings may conflict with such awards.[139] The Eighth Circuit granted enforcement of an arbitration award extending a union's contract to a second terminal of the employer, even though the NLRB found that the bargaining unit was not an accretion to the union's existing unit, but where the employees had voted for the union in an NLRB election.[140]

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[135] *Montgomery Twp. Police Dept.*, 91 LRRM 2815 (Pa. Comm. 1976); *Cook County Jr. College Dist. 508* v. *Local 1600, Cook County Teachers Union*, 318 N.E.2d 200, 89 LRRM 2759 (Ill. App. 1974).

[136] *Waterbury Bd. of Ed.* v. *Waterbury Teachers Ass'n*, 88 LRRM 3467 (Conn. 1975); *Cambridge School Comm.* v. *Lachance*, 323 N.E.2d 775, 88 LRRM 3376 (Mass. App. 1975); *Chippewa Valley Schools* v. *Hill.*, _____Mich.App._____, 233 N.W.2d 208, 90 LRRM 2976 (1975); *Rockville Center Teachers* v. *Rockville Center Bd. of Ed.*, 48 A.D.2d 694, 368 N.Y.S.2d 240, 89 LRRM 3151 (N.Y. App. 1975); *Ossining Police Ass'n* v. *Village of Ossining*, 358 N.Y.S.2d 554, 555, 365 N.Y.S.2d 889, 47 A.D.2d 223, 89 LRRM 2490, 2491, 2507 (N.Y. App. 1975) (three awards); *Firemen & Oilers Local 1201* v. *Philadelphia School Dist.*, 350 A.2d 804, 91 LRRM 2710 (Pa. 1976); *see* regarding payment of arbitrators, *Commonwealth* v. *Teamsters Local 77*, 342 A.2d 158, 89 LRRM 3047 (Pa. Comm. 1975).

[137] *Roswil, Inc.* v. *Local 322, Retail Clerks*, _____F.2d_____, 89 LRRM 2958 (8th Cir. 1975).

[138] 376 U.S. 543, 551, 55 LRRM 2769 (1964), cited in *Lathers Local 104* v. *McGlynn Plastering, Inc.*, 91 LRRM 3000 (W.D. Wash. 1976); *see also Automobile Workers Local 6* v. *Saga Foods, Inc.*, 91 LRRM 2946 (N.D. Ill. 1976).

[139] *See Teamsters Local 639* v. *Jacobs Transfer Co.*, 91 LRRM 2379 (D.D.C. 1976); *In re Automobile Workers Local 259* (Kellogg Pontiac Sales Corp.), 392 F.Supp. 1044, 88 LRRM 3457 (S.D.N.Y. 1975).

[140] *Local 554, Teamsters* v. *Young & Hay Transp. Co., supra* note 124.

An employer may also be bound by an award issued pursuant to an employer-association contract and successor agreements thereto, absent a showing of formal withdrawal from the association and the communication of an intent not to be bound by the association contract.[141] The refusal of a member-employer of an association to participate in the arbitration proceeding does not affect the validity of an award against that employer.[142] In a New York case, the employer association enforced an arbitration award obtained by it against one of its own members which breached the contract with the association by negotiating a separate collective bargaining agreement with the union.[143] The court also enforced against the offending member-employer an award of treble damages provided for under the agreement, holding that such a penalty, rather than merely liquidated damages, was not against public policy and was a reasonable means for the association to deter withdrawals.

D. Modification and Vacation of Awards

Generally speaking, the courts are reluctant to modify or alter in any way an arbitration award, but must remand to the arbitrator for such modification, on the ground that an award cannot be modified without affecting its merits.[144] The Fifth Circuit reversed a district court's modification of an award which had granted a union damages for wrongful assignment of work in the amount of wages for one year rather than merely granting lost dues, the appellate court holding that the broad arbitration clause of the contract supported the arbitrator's choice of remedies.[145] However, the case was remanded to the district court for consideration of whether to award the union attorneys' fees in the enforcement proceeding.

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[141] *College Hall Fashions, Inc.* v. *Clothing Workers*, 91 LRRM 2608 (E.D. Pa. 1976).

[142] *State Ass'n of Homes for Adults, Inc.* v. *Local 1115, Nursing Home Employees*, 90 LRRM 2908 (S.D.N.Y. 1975).

[143] *In re AGC, N.Y. State Chap.* (Savin Bros., Inc.), 36 N.Y.2d 956, 373 N.Y.S.2d 555, 335 N.E.2d 859, 90 LRRM 2229 (1975), *aff'g* 45 A.D.2d 136, 356 N.Y.S.2d 374, 89 LRRM 3083 (1974) (*compare*, however, in regard to damages case cited in note 141 *supra*).

[144] *See Electrical Workers Local 1140* v. *Portec, Inc.*, 228 N.W.2d 239, 89 LRRM 2288 (Minn. 1975); *Cohoes School Dist.* v. *Cohoes Teachers Ass'n*, 50 A.D.2d 24, 91 LRRM 2397 (N.Y. App. 1975); for a remand under the RLA, *see United Transp. Union* v. *Southern Pac. Transp. Co.*, _____F.2d_____, 91 LRRM 3057 (5th Cir. 1976).

[145] *Bakery Workers Local 369* v. *Cotton Baking Co.*, 514 F.2d 1235, 89 LRRM 2665 (5th Cir. 1975).

A district court in New York highlighted the distinction between modification and enforcement of an award where it confirmed and refused to modify an award dealing with subcontracting, while at the same time it denied enforcement of the award regarding the reinstatement of the discharged employee.[146] The court held that the alleged change in circumstances due to the employer's loss of contracts after issuance of the award was itself a proper subject of arbitration. The Sixth Circuit enforced an award granting a pension to an employee who was totally and permanently disabled, where in the settlement of a compensation claim by the same employee a release and waiver of his seniority rights was executed.[147] The court held that the settlement in the compensation case said nothing about the waiver of pension rights, and that the arbitrator had authority to interpret separately the employee's eligibility to pension benefits under the pension plan.

Awards will not be enforced or will be vacated where there is an undisputed mistake of fact causing the arbitrable issue to be removed from arbitration, such as the lack of an agreement or contract coverage of the dispute,[148] or the failure of the arbitrator to follow the time limits or other procedures prescribed by the contract.[149] An award against a bankrupt employer was not enforced on the ground that upon the filing of the bankruptcy petition the debtor became a new entity with its rights and duties subject to the supervision of the Bankruptcy Act, which act also fixed the rights of the employees involved.[150]

As noted in greater detail above, employees frequently attempt to attack or modify the results of arbitration awards, although with very little success. Thus, a discharged employee may not obtain *de novo* review of an adverse arbitration award unless there is a breach of the duty of fair representation by the union, and such awards are final and binding even though the arbitration clause does not use those actual terms.[151] The Seventh Circuit

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[146] *Hellman* v. *Program Printing, Inc.*, 400 F.Supp. 915, 90 LRRM 2727 (S.D.N.Y. 1975).

[147] *Cadillac Gage Co.* v. *UAW*, 516 F.2d 169, 89 LRRM 2369 (6th Cir. 1975).

[148] *See Northwest Airlines, Inc.* v. *Air Line Pilots Ass'n*, _____F.2d_____, 91 LRRM 2304 (D.C. Cir. 1976); *Portland School Comm.* v. *Portland Teachers Ass'n*, 338 A.2d 155, 90 LRRM 2597 (Me. 1975).

[149] *Brown* v. *Holton Pub. Schools*, _____Mich.App._____, 233 N.W.2d 274, 90 LRRM 2990 (1975).

[150] *Teamsters Local 807* v. *Bohack Corp.*, 91 LRRM 2164 (E.D.N.Y. 1975).

[151] *Kirby* v. *Spartan Stores, Inc.*, 88 LRRM 3072 (W.D. Mich. 1975); *see also Warren* v. *Teamsters*, 90 LRRM 2241 (E.D. Mo. 1975).

held that the district court exceeded its authority in reviewing an arbitration award on the merits concerning the discharge of an employee for failure to take a sobriety test after an accident, where no breach of the union's duty of fair representation was found.[152] The appellate court held that the failure of the union to raise in the arbitration hearing the defense that the employer's sobriety rule was improperly promulgated was not itself a breach of the duty of fair representation, where the union made a good-faith defense of the employee in the grievance proceeding and was not arbitrary or discriminatory. Where it was held that a union breached its duty of fair representation in a promotion dispute in regard to the promoted employee, the arbitration award was nevertheless upheld where the court found that the position of the promoted employee had been forcefully argued by the employer whose position at the arbitration was coextensive with the promoted employee.[153]

Another court found that an employee who was reinstated without back pay under an arbitration award had no action for breach of fair representation because of the union's alleged failure to prosecute his claim promptly.[154] The court held that the arbitrator's finding in the award that the union was guilty of unusual delay in seeking arbitration was without factual basis and that the union's bad faith in processing the grievance was not an issue before the arbitrator. The employee may not join the arbitrator as a party to an action wherein the employee is seeking to set aside the arbitration award, since the arbitrator is not a necessary party to such action.[155]

IV. Specialized Court Actions Relating to Arbitration

A. Actions Between or Against Labor Organizations

There continues to be a split among various circuit courts of appeal as to whether Section 301 gives the courts jurisdiction of actions between labor organizations, on the theory that union constitutions or charters constitute "contracts" within the meaning of Section 301. The major decision in this area of controversy

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[152] *Cannon* v. *Consol. Freightways Corp.*, 524 F.2d 290, 90 LRRM 2996 (7th Cir. 1975).

[153] *Belanger* v. *Matteson*, 346 A.2d 124, 91 LRRM 2003 (R.I. 1975).

[154] *Nagel* v. *Local 732, Teamsters*, 396 F.Supp. 391, 89 LRRM 2916 (E.D.N.Y. 1975).

[155] *Franklin* v. *Greer Real Estate, Inc.*, 89 LRRM 2575 (S.D.N.Y. 1975).

during the past year was handed down by the District of Columbia Circuit in the *Hospital Employees Union* case.[156] The case avoided taking a clear stand on the issue and distinguished on the facts the leading decision of *Parks* v. *Electrical Workers,* wherein it was held by the Fourth Circuit that there was jurisdiction in such cases where the dispute has "traumatic industrial and economic repercussions." [157]

In the *Hospital Employees* case, a local sued its international union under the union constitution, attacking its merger into another sister local. The court held that the union constitution was not a contract within the meaning of Section 301 in the absence of an allegation that the employer was confronted with any actual threats to industrial peace or with the dilemma of choosing between competing factions of the same union. Therefore, the court held that the allegation revealed only an intra-union conflict, so there was no jurisdiction under Section 301. However, the court did find that the local union properly alleged a breach of fair representation on the part of the defendant international within the meaning of Section 301 by reason of the failure of the international to prosecute grievances under the collective bargaining agreement. Another claim upheld by the court as a possible violation was the allegation that the international violated the bill-of-rights provisions of the Labor Management Reporting and Disclosure Act (LMRDA).

The District of Columbia Circuit, therefore, avoided a direct confrontation with the *Parks* decision by its narrow construction of the holding in *Parks.* Whether this construction of Section 301 is valid will be answered only as the case law develops, and most probably the issue will ultimately reach the Supreme Court due to the disagreement among the various circuits in the federal system. The only decision directly following *Parks* during the past year was that of an Ohio district court which held that it had jurisdiction under 301 of a suit by a local union against its international to prevent its merger with another local.[158] The court

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[156] *Hospital Employees Local 1199 D.C.* v. *Natl. Union of Hosp. & Health Care Employees,* _____F.2d_____, 91 LRRM 2817 (D.C. Cir. 1976), *rev'g in part* 394 F.Supp. 189, 89 LRRM 2322 (D.D.C. 1975).

[157] 314 F.2d 886, 52 LRRM 2281, 2577 (4th Cir. 1963); *accord, Local 1219, Carpenters* v. *Brotherhood of Carpenters,* 493 F.2d 93, 85 LRRM 2933 (1st Cir. 1974); *contra Smith* v. *Mine Workers,* 493 F.2d 1241, 85 LRRM 2941 (10th Cir. 1974); *Hotel & Restaurant Employees Local 400* v. *Svacek,* 431 F.2d 705, 75 LRRM 2427 (9th Cir. 1970).

[158] *Local 11, Bricklayers* v. *Bricklayers Union,* 89 LRRM 2475 (S.D. Ohio 1975).

held that the merger was valid under the union constitution and that the local had not exhausted its internal union remedies, even though utilization of such remedies would not delay the merger. In a similar suit brought by a local union under the international constitution and under the trusteeship provisions of the LMRDA, the Second Circuit denied an injunction restraining an international from merging four local unions, without discussing the question of 301 jurisdiction, on the ground that the plaintiff had an adequate legal remedy.[159]

In two California cases brought by members against their international unions, the district court refused to find violations of the duty of fair representation by reason of the merger of locals,[160] or the chartering of a new local for a specialized branch of the trade.[161] An action by part-time waiters against their union for loss of compensation due to the amendment of the union's hiring-hall rules was dismissed by a district court on the ground that there was no 301 jurisdiction, since there was no violation of the collective bargaining agreement or any other contract.[162] Membership or employee actions for violation of a union's constitution have been successful in regard to improper fines for crossing a picket line during a strike,[163] or in regard to the use of union dues and agency-shop fees for certain noncollective-bargaining purposes.[164]

In one interesting case, the Sixth Circuit reversed the dismissal of a breach-of-contract action by a nonmember against a local union for interference with his right to work in the trade and the denial of certain pension rights, the court holding that there was a Section 301 jurisdiction because of contract provisions guaranteeing "equal employment opportunity . . . to all workmen based on qualifications alone." [165] The district court had found that the plaintiff, as an applicant for employment, was not a third-party beneficiary under the collective bargaining agreement and was not in the same class or category as the members of the

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[159] *Filippo* v. *Carpenters,* 525 F.2d 508, 90 LRRM 3017 (2d Cir. 1975); *compare* under the RLA, *Jasinski* v. *Machinists,* 517 F.2d 478, 90 LRRM 3074 (5th Cir. 1975), *aff'g* 90 LRRM 3021 (N.D. Ga.).

[160] *Strong* v. *Sheet Metal Workers Local 75,* 90 LRRM 2795 (N.D. Cal. 1974).

[161] *Booth* v. *Carlough,* 90 LRRM 2508 (C.D. Cal. 1975).

[162] *Papadopoulos* v. *Kenney,* 89 LRRM 2761 (D.D.C. 1974).

[163] *Posner* v. *Utility Workers,* 47 Cal.App.3d 970, 90 LRRM 2515 (1975).

[164] *Ellis* v. *Railway Clerks,* 91 LRRM 2339 (S.D.Cal. 1976); *see also* regarding initiation fees, *Hubert* v. *Fox,* 291 So.2d 514, 90 LRRM 2992 (La. App. 1974).

[165] *Hill* v. *Iron Workers Local 25,* 520 F.2d 40, 90 LRRM 2113 (6th Cir. 1975).

defendant union whom the parties to the contract intended to benefit when they negotiated the agreement. While it is not clear whether plaintiff will succeed in his allegations upon trial of the case, the holding of the Sixth Circuit could have implications for further fair-representation suits and arbitration proceedings under contracts with similar equal employment opportunity provisions.

In another case brought under the LMRDA, a New York district court refused to grant summary judgment of an action brought by a former union officer against the union on the ground that it had prevented him from obtaining employment in union shops in order to avoid his participation in union politics.[166] A state court, however, held that an employee's damage action for expulsion from the union and harassment causing him to quit his job was preempted under the LMRA and was under the exclusive jurisdiction of the NLRB, since the action was not strictly an internal union dispute, but allegedly part of a prevailing pattern.[167]

The courts continue to recognize and enforce the no-raid provision of the AFL-CIO constitution, and the determinations of impartial umpires thereunder will be enforced.[168] Where the dispute between two labor organizations constitutes a jurisdictional dispute within the meaning of the LMRA, the courts will enjoin a strike or threatened strike in violation of that statute.[169] Where a jurisdictional dispute is pending before the NLRB, the courts will not enjoin such proceedings on the ground that the plaintiff has an arbitration award in its favor.[170] In such jurisdictional-dispute proceedings before the NLRB, an arbitration award in favor of one union is not dispositive, especially where both unions were not a party to the arbitration proceeding.[171]

The Ninth Circuit was presented with an unusual problem revolving around a jurisdictional dispute between Local 701 of the

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[166] *Altman* v. *Clothing Workers,* 90 LRRM 2777 (S.D.N.Y. 1975).

[167] *Hinchman* v. *Local 130, Elec. Workers,* 299 So.2d 818, 89 LRRM 2522, 3104 (La. App. 1974).

[168] *Davis* v. *Howard,* 404 F.Supp. 678, 90 LRRM 3326 (N.D. Ga. 1975); *Sevey* v. *AFSCME,* 48 Cal.App.3d 64, 89 LRRM 3049 (1975).

[169] *Morio* v. *N.Y. Mailers Union No. 6,* 89 LRRM 2571 (S.D.N.Y. 1975).

[170] *Machinists* v. *Anaconda Co,* 91 LRRM 2557 (W.D. Ky. 1975).

[171] *Aluminum Workers Local 130* (Anaconda Co.), 222 NLRB No. 120, 91 LRRM 1245 (1976); *but compare* under the RLA, *Denver & Rio Grande R.R.* v. *Blackett,* 398 F.Supp. 1205, 90 LRRM 2347 (D. Colo. 1975).

Operating Engineers and the Teamsters Union.[172] Local 701 had a collective bargaining agreement with Associated General Contractors, an employer association, which prohibited the subcontracting of certain work by any employer-member to any nonsignatory subcontractor. An AGC employer subcontracted such work to an employer who was a member of a second association whose members had a similar contract with the Teamsters union, and a dispute arose between the two unions as to which contract would prevail. The NLRB determined in a jurisdictional-dispute proceeding that the work in question belonged to the Teamsters whenever employer members of the second association performed such work for AGC contractors. Faced with grievances from Local 701 directed at the subcontracting of the work to nonsignatory subcontractors, the AGC, contending that arbitration would be fruitless, filed an action for declaratory and injunctive relief against Local 701, and the union counterclaimed for damages for breach of the contract. The district court held that the NLRB order required it to dismiss the Local 701 counterclaim and to reform the AGC-Local 701 contract by eliminating the provision which prevented the subcontracting with members of the second employer association. The Ninth Circuit reversed, holding that the NLRB order does not render the contract provision invalid for all purposes, there is no legal obligation on an AGC member to subcontract with a member of the second association, and by refusing to do so no breach of contract would be involved. Thus, the NLRB order does not prevent the AGC from complying with its contract, and if there is such a breach, Local 701 may be able to receive damages for the breach, even though it cannot under the NLRB order force the employment of its members on jobs subcontracted to an employer bound by the Teamster contract.

B. Breach of Contract and Damage Actions

Numerous situations arise where, despite the existence of a contractual arbitration procedure, the parties to a collective bargaining agreement resort directly to the courts to redress an alleged breach of contract. Many of these actions are discussed above in connection with fair-representation and civil rights cases

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[172] *AGC-Oregon-Columbia Chap.* v. *Operating Eng'rs Local 701*, ___F.2d_____, 91 LRRM 2426 (9th Cir. 1976).

by individual employees. As a general proposition, the courts will not consider the merits of a claimed breach where there is a failure to exhaust grievance-arbitration procedures under the collective bargaining agreement.[173] Submission to arbitration and the issuance of a "final and binding" arbitration award forecloses a damage action for breach of contract and also constitutes an election of remedy barring a collateral attack on the arbitration award. Thus, in one case a California court held that an employee's breach-of-contract and defamation action arising out of his termination for theft was barred by an arbitration award of partial back pay following voluntary reinstatement by the employer.[174] The court held that the employer's alleged libelous termination notices to employees who were arrested on charges of theft and the employer's subsequent alleged slanderous statements during the contractual grievance-arbitration procedures are absolutely privileged and may not be the basis for any tort action, since federal labor policy favoring collective bargaining supersedes applicable state tort law.

The Seventh Circuit was presented with a case where a union sought to bypass its contractual duty to arbitrate grievances relating to the assignment of work to employees outside the bargaining unit on the ground that the employer had failed to comply with the meaning of four previous arbitration awards.[175] The union alleged in its complaint that there had been more than 100 grievances protesting the employer's violation of the recognition clause and that the employer had been guilty of a massive, pervasive, willful, and deliberate nullifcation of the recognition and arbitration clauses of the contract. The union sought declaratory and injunctive relief, including the lifting of the implied no-strike prohibition, and asked that the employer be required to follow certain contractual provisions concerning the assignment of work outside the bargaining unit without prior approval of the union, plus substantial damages and attorneys' fees. While the court conceded that there might exist "particularly egregious circumstances" which might state a cause of action for relief

[173] *Papadapoulos* v. *Sheraton Park Hotel*, 91 LRRM 2922 (D.D.C. 1976); *Postal Workers, Dallas Local* v. *U.S. Postal Service*, 396 F.Supp. 608, 90 LRRM 2526 (N.D. Tex. 1975); *Rieder* v. *State Univ. of N.Y.*, 47 A.D.2d 865, 366 N.Y.S.2d 37, 89 LRRM 3103 (N.Y. App. 1975); *cf. Peltzman* v. *Central Gulf Lines, Inc.*, 523 F.2d 96, 89 LRRM 3149 (2d Cir. 1975).

[174] *Marsh* v. *Pacific Motor Trucking Co.*, 89 LRRM 2518 (C.D. Cal. 1975).

[175] *Electrical Workers* v. *Honeywell, Inc.*, 522 F.2d 1221, 90 LRRM 2193 (7th Cir. 1975).

from a party's contractual duty to arbitrate, it held that the union's allegations in the instant case were insufficient to state such a claim. In reaching this conclusion the court held that the union had not sought to aggregate its grievances into a single arbitration proceeding challenging the employer's course of conduct in subcontracting unit work; that it had failed to request from an arbitrator the declaratory and injunctive relief it had asked of the court, so that it was barred from alleging that such relief was unavailable in arbitration; that it had failed to allege that the factual bases of the four previous arbitration awards were substantially identical to the facts in the grievances not yet presented for arbitration; and that there was no merit to the union's contention that the four previous awards constituted an interpretation of the contract with a *res judicata* or collateral estoppel effect, since the present subcontracting dispute arose out of different facts. In summarizing its holding, the court noted that an employer would hardly be expected to continue in effect an employment practice that routinely results in adverse arbitration decisions, and continued:

> "Should the occasion arise when an employer defies such expectations and deliberately persists in conduct in clear violation of a prior arbitration award, which leaves a union without an appropriate remedy, we will have to face squarely the question of whether such circumstances may constitute an exception to the holding of the Steelworkers trilogy. The Union here, however, has not alleged facts sufficient to entitle it to be relieved of its duty to arbitrate." (90 LRRM at 2199)

In many of the reported cases, the initial issue for the court centers on whether there is a contract in existence which can be breached or whether the defendant is bound by the alleged contract.[176] Since oral contracts of employment are considered to be without sufficient consideration and terminable at will by either party, no breach-of-contract action is allowed thereon.[177] One federal district court found an employer liable under Section 301 to an employee for a discharge in violation of the terms of an employer's written guidelines known as "General Information on

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[176] *See,* for example, *U.S. Steel Corp.* v. *Mine Workers,* 394 F.Supp. 345. 90 LRRM 2067 (W.D. Pa. 1975); *compare* in public employment, *Reese* v. *Lombard,* 47 A.D.2d 327, 366 N.Y.S.2d 493, 89 LRRM 2955 (N.Y. App. 1975).

[177] *See,* for example, *Simmons* v. *Westinghouse Elec. Corp.,* 311 So.2d 28, 90 LRRM 2740 (La. App. 1975); similarly as to tentative contracts or memoranda of understanding, *Glendale City Employees Ass'n* v. *City of Glendale.* 39 Cal.App.3d 303, 88 LRRM 3361 (1974).

Working Conditions and Regulations for Hourly-Paid Employees," which guidelines were a summary of various contracts arrived at in annual bargaining processes between the employer and a shop committee representing the employees.[178] A Michigan court held that it had jurisdiction to enjoin the termination of an equipment-lease contract by an employer, and that the employees need not exhaust grievance procedures under a collective bargaining agreement, since the collective bargaining agreement did not cover the dispute in question.[179] The court held that the lease contract between the owner-operators and the carrier was independent of the contractual relationship between the carrier and the drivers. Jurisdiction under Section 301 was also found in a union's breach-of-contract action under a strike settlement agreement providing for the reinstatement of strikers.[180]

It is generally held that where a collective bargaining agreement has expired and no grievance has been initiated prior to its expiration, the union may still have a right to enforce the payment of certain benefits, such as vacation pay, that have accrued under the collective bargaining agreement.[181] In deciding that a contract had been terminated rather than automatically renewed, a district court held that when two parts of a contract are inconsistent, the portions that are handwritten prevail over those portions that are printed.[182]

Under federal labor policy, a bankruptcy court may relieve the debtor from the obligation to abide by the terms of the collective bargaining agreement, and after rejection of the agreement, the arbitration provision in the agreement is no longer binding. Thus, one court held that breaches of individual employment contracts pursuant to a collective bargaining agreement that had been rejected by the bankruptcy judge were not arbitrable.[183] The Ninth Circuit held that an employer who purchased the

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[178] *Morway* v. *Maghielse Tool & Die Co.*, 88 LRRM 3101 (W.D. Mich. 1974).

[179] *Evans* v. *Boutell Driveaway Co.*, 48 Mich. App. 411, 210 N.W.2d 489, 88 LRRM 3311 (1973).

[180] *Machinists Lodges 743 & 1746* v. *United Aircraft Corp.*, _____F.2d_____, 90 LRRM 2272 (2d Cir. 1975).

[181] *Local 58, Rubber Workers* v. *Sun Prods. Corp.*, 521 F.2d 1286, 90 LRRM 2001 (6th Cir. 1975).

[182] *Plumbers Local 350* v. *Slayden Plumbing*, 91 LRRM 2272 (N.D. Cal. 1975).

[183] *Designers Guild Local 30, ILGWU* v. *Hers Apparel Indus., Inc.*, 88 LRRM 3254 (S.D.N.Y. 1975); for an employee action against the pension committee and the union of bankrupt employer regarding pension benefits, *see Williams* v. *Council 30, Distributive Workers*, 529 F.2d 509, 91 LRRM 3077 (6th Cir. 1976), *aff'g* 91 LRRM 3073 (E.D. Mich. 1974).

plant and equipment of a bankrupt employer and who became signatory to the same association contract as the bankrupt employer was not required to give seniority preference to the employees of the bankrupt employer over its own employees.[184] While the court found that the new employer was bound by the association contract, it held that it was not a successor employer under applicable state law and, therefore, was not bound to protect the bankrupt employer's employees rather than its own.

A union's action for breach of contract was dismissed on the merits by the Second Circuit wherein the union claimed that the employer had forced the union to strike and thereafter closed its plant and broke its contractual commitments to make payments to union members under their existing welfare agreement.[185] Employers have been held liable for breach of contract regarding their failure to check off dues properly where the appropriate authorizations by employees are still in force.[186] Thus, an employer was held liable for the full amount of dues due the union under a contractual check-off clause where in drafting up the new contract after expiration of the old contract the employer had changed the wording in the clause without the knowledge of the union and to its detriment.[187] An employer may also be held liable for damages caused by the unilateral change in the terms of a compulsory arbitration award.[188]

The Tenth Circuit found that an employer breaches its contract by failing to make pension and welfare-fund payments due under the terms of a contract and by its failure to observe the union-shop and hiring-hall provisions of the contract when it hired nonunion employees after the union withdrew its members from the employer following the employer's delinquency in payments to various welfare funds.[189] The court held that the damages due to the union by reason of such a breach should extend to the end

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[184] *Acheson* v. *Falstaff Brewing Corp.*, 523 F.2d 1327, 90 LRRM 2333 (9th Cir. 1975).

[185] *Rubber Workers* v. *Lee Nat'l Corp.*, 513 F.2d 899, 89 LRRM 2175 (2d Cir. 1975).

[186] *Meat Cutters Local 593* v. *Shen-Mar Food Prods., Inc.*, 405 F.Supp. 1122, 91 LRRM 2907 (W.D. Va. 1975); but in public employment, *see Hollinger* v. *Pa. Dep't of Pub. Welfare*, 348 A.2d 161, 91 LRRM 2956 (Pa. Comm. 1975).

[187] *Meat Cutters Local 425* v. *Valmac Indus., Inc.*, 528 F.2d 217, 91 LRRM 2059 (8th Cir. 1975).

[188] *City of Pittsburgh* v. *Cavanaugh*, 338 A.2d 695, 89 LRRM 2927 (Pa. Comm. 1975).

[189] *Electrical Workers Local 12* v. *A-1 Elec. Serv., Inc.*, _____F.2d_____, 91 LRRM 2747 (10th Cir. 1976).

of the contractual year in which the breach occurred and not just until the union withdrew its members, since the employer is liable for all damages that reasonably and fairly could be contemplated at the time of the execution of the contract for the duration of its term. Also, the contract contained no definite expiration date but was renewable from year to year unless a party gave 90-days written notice prior to the commencement of the new contractual year, which notice was not given in the instant case, and the court held that it was appropriate to limit the employer's damages to the end of the contractual year in which the breach occurred, since the employer's intent to terminate the agreement was adequately manifested by its noncompliance with the contract.

C. Employee Benefit Plans

There is a great deal of litigation involving employee benefit plans under various federal statutes, especially in regard to pensions that now come under the newly enacted federal Employee Retirement Income Security Act of 1974, effective January 1, 1975. Much of this litigation has no direct bearing on arbitral law, but many of the cases are based upon benefit plans referred to in collective bargaining agreements and, thus, are contracts subject to jurisdiction under Section 301.[190] Most of these cases involve employee actions, often against only the welfare fund trustees, to overturn the denial of a pension, and the issue for the courts in such cases is whether such denial constituted a breach of trust and was arbitrary or capricious in nature.[191] However, the employee must first attempt to exhaust any contractual grievance-arbitration remedies or show a breach of fair representation by the union before maintaining a court action,[192] although this requirement does not apply to one who has never been an employee and to whom the union does not owe a duty of fair representation, such as the widow of a deceased employee.[193]

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[190] *See,* for example, *Alveres* v. *Erickson,* 514 F.2d 156, 89 LRRM 3001 (9th Cir. 1975); *Leonardis* v. *Local 282 Pension Trust Fund,* 391 F.Supp. 554, 88 LRRM 3389 (E.D.N.Y. 1975).

[191] In addition to the cases cited in the foregoing footnote, *compare Maness* v. *Williams,* 513 F.2d 1264, 88 LRRM 3499 (8th Cir. 1975), with *Wells* v. *Central States Pension Fund,* 90 LRRM 2387 (N.D. Ohio 1975).

[192] *Justice* v. *Union Carbide Corp.,* 405 F.Supp. 920, 91 LRRM 3063 (E.D. Tenn. 1975).

[193] *Hazen* v. *Western Union Tel. Co.,* 518 F.2d 766, 89 LRRM 2894 (6th Cir. 1975).

The person seeking a pension must be found to be an employee covered by the plan, rather than a self-employed or an independent contractor, for example.[194] In one case the Fifth Circuit found that a retired supervisor, who had been unlawfully discharged in 1945 under the War Labor Disputes Act, had been improperly denied a pension.[195] The court based its jurisdiction upon diversity of citizenship, since Section 301 would not apply to a supervisor who was not an employee and not covered by the collective bargaining agreement. This case discussed in some detail the jurisdictional requirements for such actions and the defenses of the trustees thereto, such as NLRB preemption, the state law applicable to the action, laches, and the statute of limitations.

In an Oregon case, an employer was held liable for a pension benefit to nonunion employees upon the termination of the employer's mass-transit franchise, where for 22 years the employer had paid benefits to nonunion employees on the same basis as the union employees, the employer thereby creating a unilateral contract by its practice.[196] In another case, a federal court found no breach of fair representation in the union's negotiation of a plant-closing agreement covering the termination of the pension plan, which agreement modified the "expectations" for early retirement of certain employees.[197] The court noted in its finding that the agreement had been ratified by a majority of the employees, and assuming that certain members' expectations of early-retirement benefits could be considered "vested" rights, these rights were properly modified by the plant-closing agreement in which the union had an interest in seeking optimum benefits for a maximum number of its members, rather than permitting a small minority to take a disproportionate share of the limited funds in the plan. The court found that the agreement accomplished a logical modification of the plan and affected no "rights" of the members, but merely extinguished their "expectations."

The Tenth Circuit denied survivor's benefits to a widow who contended that she had relied on the vague general description of the plan set forth in the introductory pages of a booklet her hus-

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[194] *Mendise* v. *Central States Pension Fund*, 90 LRRM 3208 (N.D. Ohio 1975); *cf. Mayhew* v. *Teamsters*, 90 LRRM 3213 (N.H. 1975).

[195] *Connell* v. *U.S. Steel Corp.*, 516 F.2d 401, 89 LRRM 3089 (5th Cir. 1975).

[196] *Rose City Transit Co.* v. *City of Portland*, 89 LRRM 2503 (Ore. 1975).

[197] *Bosi* v. *USM Corp.*, 90 LRRM 2867 (D.N.J. 1975).

band had received at the inception of the plan.[198] The court held that the plan and its description was less than perfect, and in fact unsatisfactory, but it was not positively deceptive, so no recovery was allowable. In another case, the trustees were held to be estopped to deny a 30-year employee a pension, where it was found that the employee had reasonably relied upon promises made by a union business agent that the employee would be eligible if the employer made the requisite contributions on the employee's behalf.[199]

Unions or trustees frequently bring actions for unpaid or delinquent contributions, and the courts may order an audit and allow a reasonable amount as liquidated damages or attorneys' fees in order to give just compensation for the harm caused to the fund by the breach of contract.[200] A union was denied recovery of payments by a Fifth Circuit decision where no trust agreement establishing the pension fund had been executed by the employer, so such payments would have violated Section 302 (c) (5) of the LMRA.[201] The court held that a collective bargaining agreement that anticipates creation of a trust fund cannot incorporate by reference instruments that have not been executed, and partial payments by the employer was no defense. On the other hand, where an employer under contract with a union formed an alter ego to bid on nonunion projects, the court found both companies jointly liable for fringe-benefit contributions under the collective bargaining agreement with the first company.[202]

Where an employer shut down its plant and terminated the pension plan, a union successfully recovered contributions sufficient to bring such contributions up to the maximum deductible pension-plan contribution allowed by the Internal Revenue Code, the court holding that it was proper to rely on parol evidence to determine what the parties intended by the contract provision requiring the employer to make payments sufficient to

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[198] *Johnson* v. *Central States Pension Fund,* 513 F.2d 1173, 88 LRRM 3496 (10th Cir. 1975).

[199] *Scheuer* v. *Central States Pension Fund,* 394 F.Supp. 193, 89 LRRM 2477 (E.D. Pa. 1975).

[200] *Bricklayers Local 21* v. *Thorleif Larson & Son, Inc.,* 519 F.2d 331, 89 LRRM 3113 (7th Cir. 1975); *Bugher* v. *Ohio Pipe Line Constr. Co.,* 392 F.Supp. 687, 89 LRRM 2294 (S.D. Ohio 1975).

[201] *Bricklayers Local 15* v. *Stuart Plastering Co.,* 512 F.2d 1017, 89 LRRM 2389 (5th Cir. 1975), *aff'g* 89 LRRM 2389 (M.D. Fla. 1974).

[202] *Plumbers Local 519* v. *Service Plumbing Co.,* 401 F.Supp. 1008, 90 LRRM 3127 (S.D. Fla. 1975).

"fund benefits on a sound actuarial basis." [203] In an Oregon case, the trustees were permitted to recover the difference in contributions between 15 and 20 cents per hour, where the contract clearly provided for the higher amount, but the form supplied to the employer for sending in contributions erroneously stated the lower figure.[204] The court followed the federal rule that trustees of union pension funds are not subject to defenses of waiver or estoppel because of their fiduciary duties to the employees who are the beneficiaries of such trusts. A Michigan court held that a union has no standing to sue a dental plan insurer for breach of contract where the union was not a party or a third-party beneficiary to the insurance contract between the employer and the insurance company, even though the collective bargaining agreement contained a dental insurance clause.[205]

V. Arbitration and the NLRB

A. Deferral to Arbitration

The NLRB's *Collyer*-case policy of deferring disputes under its jurisdiction which are contractual in nature to an existing grievance-arbitration procedure, and its prior policy in the *Spielberg* decision of honoring arbitrators' awards under certain specified conditions, continue to be approved by federal courts of appeal. Not surprisingly, there has been a sharp increase in postarbitration *Spielberg*-type cases as the pre-arbitration deferral under *Collyer* becomes more common and routine. A study of the deferral decisions is helpful in order to ascertain what factors are considered by the courts and the NLRB in either accepting or rejecting arbitration of a dispute or the resulting award.

The Ninth Circuit recently found no abuse of discretion by reason of the NLRB's deferral to an arbitrator's award which held that the collective bargaining agreement permitted an employer's unilateral recision of a wage-incentive plan.[206] In another Ninth Circuit decision, the court similarly found no abuse

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[203] *Machinists Lodge 1194* v. *Sargent Ind., Inc.*, 522 F.2d 280, 89 LRRM 3080 (6th Cir. 1975) (following general rule in United States, union was denied attorneys' fees).

[204] *Shaw* v. *Northwest Repair, Inc.*, 541 P.2d 1277, 91 LRRM 2051 (Ore. 1975).

[205] *Southfield Ed. Ass'n* v. *Prudential Ins. Co.*, _____Mich.App._____, 90 LRRM 3075 (1975).

[206] *Machinists Dist. 87, Lodge 1309* v. *NLRB*, _____F.2d_____, 91 LRRM 2832 (9th Cir. 1976).

of discretion by reason of the NLRB's refusal to defer to an arbitration award which upheld a union's deregistration of an employee as a longshoreman, where the NLRB found a conflict of interest between the employee and the union representing him.[207]

In regard to the *Collyer* doctrine, the Second Circuit found no abuse of discretion by the NLRB's deferral of a union's charges to arbitration, despite the union's contention that deferral was inappropriate because the incidents underlying the charges were so similar to those found in the past to have evidenced a pattern of anti-union activity that they represented a continuation of that pattern.[208] The court found that deferral was furthering the fundamental aims of the NLRA, since the record revealed that the voluntary machinery of the parties for resolving disputes was functioning effectively and fairly and this fact was sufficient to overcome the employer's anti-union history for deferral purposes, especially where the NLRB found that, despite such history, there was positive evidence of the maturation of the parties' collective bargaining relationship. The court also rejected the contention of the union that the NLRB should have adopted the findings of the arbitrators with respect to the contract violations, and that it then should have used such factual determinations as a basis for finding statutory violations in order to fashion its own appropriate remedy in addition to the arbitration award. The court cited with approval the *Spielberg* holding that the NLRB will defer to both the arbitration award and the remedy thereunder where the proceedings appear to have been fair and regular, all parties had agreed to be bound by the arbitrator's decision, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. The court noted that the honoring of such arbitration awards is granted regardless of whether the court would have made a similar award or granted relief had the matters been presented to it *de novo*.

In appropriate cases, the NLRB has refused to defer to arbitration in cases where the employer's conduct amounts to a complete breakdown in negotiations, rather than routine contract violations arising in the course of the bargaining relationship stabi-

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[207] *NLRB* v. *Longshoremen Local 27*, 514 F.2d 481, 89 LRRM 2133 (9th Cir. 1975).

[208] *Machinists Lodges 700, 743, 1746* v. *NLRB*, 525 F.2d 237, 90 LRRM 2922 (2d Cir. 1975).

lized by an existing contract of fixed duration;[209] or where the employer is attempting to repudiate the contract, such as by widespread unilateral changes, while at the same time seeking to resort to the grievance-arbitration machinery to resolve grievances.[210] The NLRB also refused to defer where there is an allegation that the employer has failed to comply with a previous NLRB order, such as a case involving an issue regarding the reinstatement of an employee pursuant to a previous Board order.[211] On the other hand, where an employee has been reinstated pursuant to an arbitration award with a lump-sum payment which is claimed by the employee to be inadequate, the NLRB will not consider the charge solely for purposes of reassessing and adjusting the amount of the monetary award.[212]

For deferral, there must first be a collective bargaining agreement binding the parties to mandatory, not just voluntary, arbitration.[213] Further, both parties must be willing to arbitrate the dispute and waive any procedural irregularities, such as timeliness.[214] The motion to defer must be timely raised at the beginning of the NLRB proceeding and not, for example, for the first time in a brief to an administrative law judge, and the motion to defer cannot be withdrawn or the NLRB will consider the charge on its merits.[215] Where there has been deferral, but the respondent has not complied with reasonable promptness with the provisions of the deferral order, then the NLRB complaint will be reinstated and considered on its merits.[216] Where there has been deferral, but the arbitrator has indicated that he would not resolve the unfair-labor-practice issues, then any subsequent award would not be consistent with the *Spielberg* standards and the NLRB must decide the case.[217] Also, where the

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[209] *AMF, Inc., Union Mach. Div.*, 219 NLRB No. 109, 90 LRRM 1271 (1975).

[210] *Capitol Roof & Supply Co.*, 217 NLRB No. 173, 89 LRRM 1191 (1975).

[211] *Ernst Steel Corp.*, 217 NLRB No. 179, 89 LRRM 1233 (1975).

[212] *Fikse Bros., Inc.*, 220 NLRB No. 199, 90 LRRM 1354 (1975).

[213] *Wheeler Constr. Co.*, 219 NLRB No. 104, 90 LRRM 1173 (1975); *Vantron Elec. Corp.*, 218 NLRB No. 13, 89 LRRM 1336 (1975).

[214] *Firestone Steel Prod. Co.*, 216 NLRB No. 74, 89 LRRM 1673 (1975); *General Motors Corp.*, 218 NLRB No. 82, 89 LRRM 1891 (1975); *Raymond Int'l, Inc.*, 218 NLRB No. 39, 89 LRRM 1461 (1975); *Keller-Crescent Co.*, 217 NLRB No. 100, 89 LRRM 1201 (1975).

[215] *Cutten Supermarket*, 220 NLRB No. 64, 90 LRRM 1250 (1975); *Duchess Furniture, Nat'l Serv. Indus., Inc.*, 220 NLRB No. 6, 90 LRRM 1160 (1975).

[216] *Typographers Local 101* (Wash. Post Co.), 220 NLRB No. 144 and 166, 90 LRRM 1523, 1567 (1975); *Typographers Local 101* (Byron S. Adams Printing, Inc.), 219 NLRB No. 18, 90 LRRM 1008 (1975).

[217] *Elevator Constructors Local 1* (N.Y. Elev. Mfrs. Ass'n), 214 NLRB No. 51, 88 LRRM 1470 (1974).

contract contains a provision that the dispute in question is not subject to arbitration, such as a clause giving the employees the right to refuse to perform struck work, then no deferral is possible.[218]

The NLRB has a general policy of not deferring in any case involving bargaining-unit or representation issues, such as the accretion of employees to an existing unit or the inclusion of professional employees in a broader unit.[219] Nor will the NLRB defer to arbitration where the subject matter of the dispute is a nonmandatory subject of bargaining, such as a union's insistence that an interest arbitration clause providing for the arbitration of new contract terms be included in a new collective bargaining agreement, since the insistence upon such a nonmandatory subject of bargaining is in itself a refusal to bargain in good faith.[220] Similarly, the NLRB will not defer to arbitration where the contract clause in question is illegal, such as a hot-cargo clause which involves other parties who have an important interest in the subject matter of the case, but who are not parties to the contract in question and would not be represented in the arbitration proceeding.[221] In one such case, the Second Circuit upheld an injunction against the enforcement of the hot-cargo clause and also enjoined the arbitration of the alleged contract violation pending the NLRB determination of the dispute.[222] The court noted that the arbitrator may not be able to disregard the plain language of the contract and that the NLRB possessed the greater expertise regarding the validity of the contract provision in question.

Generally speaking, the NLRB will refuse to defer to arbitration in cases involving a union's request to discharge employees

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[218] *Graphic Arts Union Local 277* (S & M Rotogravure), 222 NLRB No. 57, 91 LRRM 1139 (1976); *Electrical Workers Local 901* (Breaux Elec. Co.), 220 NLRB No. 207, 90 LRRM 1439 (1975); *Graphic Arts Union Local 277* (S & M Rotogravure), 219 NLRB No. 171, 90 LRRM 1081 (1975).

[219] *Local 814, Teamsters* (Morgan Storage Co.), 223 NLRB No. 71, 91 LRRM 1592 (1976); *St. Luke's Hosp. Center*, 221 NLRB No. 217, 91 LRRM 1150 (1976); *Automobile Workers Local 259* (Stamford Motors, Inc.), 221 NLRB No. 97, 90 LRRM 1729 (1975); *Commonwealth Gas Co.*, 218 NLRB No. 151, 89 LRRM 1613 (1975).

[220] *Columbus Printing Pressmen No. 252* (R. W. Page Corp.), 219 NLRB No. 54, 89 LRRM 1553 (1975); *see also Printing Pressmen No. 319* (Greensboro News Co.), 222 NLRB No. 144, 91 LRRM 1308 (1976).

[221] *Masters, Mates & Pilots* (Seatrain Lines, Inc.), 220 NLRB No. 52, 90 LRRM 1691 (1975) (*Collyer*-type case); *Retail Clerks Local 770* (Hughes Mkts., Inc.), 218 NLRB No. 84, 89 LRRM 1407 (1975) (*Spielberg*-type case).

[222] *Danielson* v. *Masters, Mates & Pilots*, 521 F.2d 747, 89 LRRM 2564 (2d Cir. 1975).

for failure to pay dues under a union-security clause, since the union is generally considered to be in an adverse position to the delinquent employees and could not be relied on to represent them fairly at an arbitration hearing, and it is usually uncertain as to the employer's vigor in representing such employees, thus causing any resulting award to be repugnant to the purposes and policies of the NLRA.[223] However, an employer's refusal to honor the check-off provision of a contract in retaliation for a consumer boycott on the part of the union will be deferred to the arbitration procedure, where it does not appear that the use of the grievance procedure would be futile, on the basis of the past history and relationship of the parties.[224]

The NLRB will refuse to defer to an arbitration award upholding the discharge of an employee who was allegedly discharged for filing charges with the NLRB, since the right of access to the Board's processes are within its exclusive jurisdiction.[225] There is also no deferral in cases involving activity on behalf of a rival union or on behalf of dissident union members in view of the probable antagonism between the grievants and the incumbent union and the inability to show that the interests of the employees and the incumbent union are in such substantial harmony as to ensure adequate representation of the employees in the arbitral process.[226] The NLRB refused to defer to an arbitration award where the arbitrator held that an employee was lawfully discharged for passing a petition against his supervisor, thereby bypassing impermissibly the contractual grievance procedure, the NLRB finding that the discharge was for protected concerted activity and the arbitrator's contrary finding repugnant to the purposes and policies of the LMRA.[227] Thus, unless the arbitrator reaches the discrimination issue involved under the NLRA, the NLRB is not likely to defer on the ground that the award is repugnant to the Act.[228]

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[223] *Coast Valley Typographical Union Local 650* (Daily Breeze), 221 NLRB No. 166, 91 LRRM 1078 (1975); *Machinists Lodge 1192* (Sunbeam Corp.), 219 NLRB No. 127, 90 LRRM 1040 (1975); *Automobile Workers Local 1384* (Ex-Cell-O Corp.), 219 NLRB No. 123, 90 LRRM 1152 (1975).

[224] *Packerland Packing Co.*, 218 NLRB No. 81 and 216 NLRB No. 128, 89 LRRM 1448 and 88 LRRM 1488 (1975).

[225] *McKinley Transp., Ltd.*, 219 NLRB No. 184, 90 LRRM 1195 (1975).

[226] *Medicine Bow Coal Co.*, 217 NLRB No. 152, 89 LRRM 1462 (1975); *U.S. Steel Corp., Lorain Works*, 216 NLRB No. 162, 88 LRRM 1649 (1975).

[227] *Dreis & Krump Mfg., Inc.*, 221 NLRB No. 46, 90 LRRM 1647 (1975).

[228] *Versi Craft Corp.*, 221 NLRB No. 190, 91 LRRM 1108 (1975); *Trinity Trucking & Materials Corp.*, 221 NLRB No. 64, 90 LRRM 1499 (1975); *Cessna Aircraft Corp.*, 220 NLRB No. 142, 90 LRRM 1312 (1975).

There is also no deferral where the alleged employer discrimination involves interference with the grievance procedure or the participation of employees in the grievance-arbitration process, since the NLRB holds that such cases attack the heart of arbitration and grievance mechanisms upon which the Board relied in formulating the *Collyer* doctrine.[229] Accordingly, there was no deferral to an arbitration award upholding the discharge of an employee for questioning the veracity of the employer during a grievance session, the NLRB holding that such an award would preclude the questioning of the credibility of management witnesses during the grievance-arbitration process.[230] There was also no deferral to an award upholding an employer's discharges and layoffs where most of the grievants did not show up for the arbitration hearing, there was no evidence that they had received notice of the hearing, and the union did not make any attempt to rebut the evidence offered by the employer at the arbitration hearing.[231]

One NLRB decision gave the Board an opportunity to apply the Supreme Court decisions in the *Weingarten* and *Quality Mfg.* cases handed down in early 1975 regarding the right of employees to have union representation when interrogated by the employer in disciplinary situations.[232] The NLRB declined to defer to an arbitration award involving the discharge of an employee who refused to be interrogated by a security representative without union representation being present, the NLRB finding the award repugnant to the policies and purposes of the LMRA since the employee had reasonable grounds to fear disciplinary action. Some states with statutes regulating public employees with collective bargaining rights follow the NLRB's deferral doctrine, and in some cases hold that the refusal to arbitrate is itself a refusal to bargain within the meaning of the state statute.[233]

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[229] *El Dorado Club*, 220 NLRB No. 152, 90 LRRM 1373 (1975); *see also U.S. Postal Service*, 221 NLRB No. 133, 90 LRRM 1679 (1975).

[230] *Hawaiian Hauling Serv., Ltd.*, 219 NLRB No. 126, 90 LRRM 1011 (1975).

[231] *General Iron Corp.*, 218 NLRB No. 109, 89 LRRM 1788 (1975).

[232] *Illinois Bell Tel. Co.*, 221 NLRB No. 159, 91 LRRM 1116 (1975), in which the NLRB relied on *ILGWU, Upper South Dep't* v. *Quality Mfg. Co.*, 420 U.S. 276, 88 LRRM 2698 (1975); and *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 88 LRRM 2689 (1975), which cases were discussed in last year's report; *cf. Keystone Consol. Indus., Inc.*, 217 NLRB No. 167, 89 LRRM 1192 (1975).

[233] *See Fire Fighters Local 838* v. *City of Mt. Clemens*, _____Mich.App._____, 89 LRRM 2481 (1975).

B. Other NLRA Decisions Affecting Arbitration

There are numerous cases decided each year under various provisions of the NLRA which affect or have a bearing on the arbitral process. In one such case, the Second Circuit reversed an NLRB determination that a union violated the NLRA by disciplining a supervisor-member for violating the union constitution by recommending action against employee-members without consulting the union.[234] The court held that the Act does not preclude discipline of a supervisor-member who lacks the authority to adjust grievances or bargain collectively. The Second Circuit also reversed an NLRB determination that a union which represented two plants, the first of which acquired the second plant, was guilty of unfair representation when it endtailed rather than dovetailed the seniority of the minority of employees at the second plant with the majority employed at the first plant, allegedly because of the political ambitions of a union official.[235] The court remanded the case for hearing on whether the union could show some objective justification for its conduct beyond placating the majority of the bargaining unit at the expense of the minority, since the court held that the union was not necessarily chargeable with the conduct of the individual union officer whose actions were not undertaken in his capacity as a union officer.

Issues disposed of by an NLRB settlement agreement may not be relitigated in a breach-of-contract action, as where a union was found not to have breached its contract by a strike where the employer had previously signed a settlement agreement acknowledging that the strike was lawful.[236] An employer violated the NLRA by discharging strikers who struck to protest the signing of a valid and legal contract with a no-strike clause and in support of timely filed representation petitions.[237] The Board noted that the employees' dispute with the incumbent union was not arbitrable, that they were engaged in protected concerted activity, and that the incumbent union could not waive the rights of the employees to change their bargaining representative.

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[234] *NLRB* v. *Rochester Musicians Local 66,* 514 F.2d 988, 89 LRRM 2193 (2d Cir. 1975).

[235] *Barton Brands, Ltd.* v. *NLRB,* 529 F.2d 793, 91 LRRM 2241 (7th Cir. 1976).

[236] *Power Test Petroleum Corp.* v. *Teamsters Local 456,* 89 LRRM 2253 (E.D. N.Y. 1974).

[237] *Suburban Transit Corp.,* 218 NLRB No. 185, 89 LRRM 1471 (1975).

A union was held to have violated the Act by discriminating against nonmembers when it told an employee that it would not process his grievance beyond the first step of the contractual grievance-arbitration procedure unless he paid the cost of such processing.[238] The NLRB held that grievance representation was due nonmembers as well as members as a matter of right. However, no violation of the NLRA was found where a union sought by arbitration under a contract to represent nonunion employees of a related employer, where the union employed no threats or pressure against the related employer.[239] The NLRB held that a favorable arbitration award against the employer under contract could not be deemed to restrain or coerce the related employer or its employees.

Most of the decisions in this area have to do with the processing of grievances, and the Sixth Circuit upheld an NLRB determination that a union violated the LMRA by maintaining sex-segregated locals, by processing the grievances of male and female members separately, and by refusing to process grievances because of the sex and union membership of the employees.[240] The requirement that the union merge the two locals was included as part of the remedy. However, no violation of a union's representative duties was found by its good-faith refusal to arbitrate a grievance,[241] or by the union's alleged lack of vigorous representation of the grievance at an arbitration hearing where the union supplied counsel and took the case to arbitration, despite a contrary recommendation of its business agent, and not only adequately but with energy represented the grievant.[242] An employer did not violate the LMRA by merely refusing to discuss a grievance, since this refusal was at most a breach of contract.[243] The expiration of the contract, however, does not necessarily relieve an employer of its bargaining obligation to process griev-

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[238] *Machinists Local 697* (Canfield Rubber Co.), 223 NLRB No. 119, 91 LRRM 1529 (1976).

[239] *Teamsters Local 208* (DeAnza Deliv. Sys., Inc.), 219 NLRB No. 150, 90 LRRM 1030 (1975).

[240] *NLRB* v. *Local 106, Glass Bottle Blowers*, 520 F.2d 693, 89 LRRM 3020, 10 FEP Cases 1426 (6th Cir. 1975).

[241] *Boilermakers Local 132* (Kelso Marine Inc.), 220 NLRB No. 22, 90 LRRM 1240 (1975).

[242] *Teamsters Local 542* (Golden Hill Conval. Hosp.), 223 NLRB No. 72, 91 LRRM 1556 (1976).

[243] *Chatham Mfg. Co.*, 221 NLRB No. 114, 90 LRRM 1577 (1975).

ances, if the grievance procedure of the contract is not in serious dispute in the negotiations.[244]

A union will be found to have violated the LMRA by its failure to pursue grievances or the improper handling of grievances, where it does so because of the protected activities of the grievants.[245] A union was held to have failed to represent an employee in a fair and impartial manner by its affirmative actions to deprive the employee of a contractual right to reassignment recognized by the employer, and by submitting that right to a referendum of the membership whose jobs would be affected by the reassignment.[246] In another case a union violated the NLRA by bringing a union member to trial before the union executive board and engaging in other harassment because the member appeared as a witness for the employer and gave testimony adverse to the union's grievance at an arbitration hearing.[247] The remedy for improper processing of a grievance may include any back pay lost until a proper decision or settlement of the grievance on the merits in the grievance-arbitration procedure is rendered, and/or the providing of an attorney of the grievant's choice at the union's expense.[248]

VI. Conclusions

The tendency of national labor policy to favor arbitration or other alternative peaceful conflict resolutions over the "tooth and claw of industrial warfare" was graphically set forth in a well-written and comprehensive opinion by Judge Aldisert of the Third Circuit in *Steelworkers* v. *NLRB*,[249] which case involved a long and bitter strike at the Dow Chemical Company. The

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[244] *Newspaper Printing Corp.*, 221 NLRB No. 139, 91 LRRM 1077 (1975); *Times Herald Printing Co.*, 221 NLRB No. 38, 90 LRRM 1626 (1975); *Lucas County Farm Bureau*, 218 NLRB No. 174 and 174A, 89 LRRM 1510, 91 LRRM 1367 (1976).

[245] *King Soopers, Inc.*, 222 NLRB No. 80, 91 LRRM 1292 (1976); *Newspaper Guild Local 26* (Buffalo Courier-Express), 220 NLRB No. 17, 90 LRRM 1462 (1975).

[246] *Teamsters Local 315* (Rhodes & Jamieson, Ltd.), 217 NLRB No. 95, 89 LRRM 1049 (1975).

[247] *Teamsters Local 557* (Liberty Transfer Co.), 218 NLRB No. 170, 89 LRRM 1734 (1975).

[248] *Teamsters Local 396* (United Parcel Serv.), 220 NLRB No. 3, 90 LRRM 1227 (1975); *Electrical Workers Local 2088* (Federal Elec. Co.), 218 NLRB No. 48, 89 LRRM 1590 (1975).

[249] _____F.2d_____, 91 LRRM 2275 (3d Cir. 1976).

union had called the strike in violation of its collective bargaining agreement to protest the employer's unlawful unilateral action in changing the work schedules of employees. The employer thereupon cancelled the collective bargaining agreement, terminated the employees, and withdrew recognition of the union. These actions were upheld by a two-to-one decision of the NLRB, which noted that the union failed to exhaust the grievance procedure and did not file a written request for arbitration, so the strike was not one authorized by the contract's limited reservation of a right to strike. The majority of the NLRB relied on its *Arlan's* rule that only strikes and protests against *serious* unfair labor practices should be immune from general no-strike clauses, applying the Supreme Court decision in the *Mastro Plastics* case which held that a strike to protest unfair labor practices is protected activity.[250]

The Third Circuit decision, in remanding the case for reconsideration by the NLRB, held that the employer's poststrike actions were not permissible in light of more recent developments in federal labor law, such as the *Boys Markets* case, and that it was the company's reluctance to arbitrate which precluded a peaceful resolution of the underlying dispute and its unfair labor practices which precipitated the strike. The court noted that the employer had both legal and contractual remedies available to it short of contract termination, such as compelling completion of the grievance procedure or filing a Section 301 damage suit. In summary, the court held:

> "The contract between the union and the company prohibited strikes unless and until a grievance and arbitration hearing had been exhausted. The union struck prematurely. The company then joined the union in resort to the tooth and claw of industrial warfare when it might as easily have turned the other cheek and taken affirmative steps to get the dispute back in the available arbitral forum. The Board reasoned that the strike was an unprotected, material breach of the contract because the company's initial unfair labor practice was 'nonserious'; it overlooked the company's failure to resort to available, peaceful alternatives. In light of recent trends in labor policy, we find error in this oversight." (91 LRRM at 2386)

Thus, the court held that the employer's failure to take positive steps to have the dispute resolved peacefully prevented it from

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[250] *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 37 LRRM 2587 (1956); *Arlan's Dep't Store of Mich., Inc.*, 133 NLRB No. 802, 807, 48 LRRM 1731 (1961).

building "a sanctuary for subsequent actions in derogation of its previously harmonious relationship with the union."

The summary of the "basic tenets of contemporary labor policy" from recent Supreme Court teachings set forth by Judge Aldisert in the *Steelworkers* opinion bears repetition herein, omitting case citations, due to the strong emphasis on arbitration:

> "(a) Today's interdependent and technologically advanced economy dictates that labor-management relations be as peaceful as possible. . . .
> "(b) Where labor and management agree on a forum for the peaceful resolution of disputes, the agreement should be honored and may be enforced by an injunction, mandating resort to that forum. . . .
> "(c) Arbitration is a favored alternative forum for dispute resolution. . . .
> "(d) Congressional emphasis in labor legislation has shifted from 'the protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes.' *Gateway Coal Co.* v. *UMW,* 414 U.S. 368, at 381, 35 LRRM 2049 (1974)." (91 LRRM at 2231)

That arbitration is still and will continue to be a favored means for labor-dispute resolution is also illustrated by a decision of the California State Court of Appeal, which reiterated the strong public policy requiring the use of arbitration wherever available, even where other state administrative remedies may also be available.[251] The California court held that arbitration clauses in collective bargaining agreements precluded action by the state labor commissioner to assume jurisdiction and hear claims regarding payment of wage rates falling under the California Payment of Wages Act. The court held that the disputes in such cases involved interpretations of the contracts and public policy favored the promotion of industrial stability through the medium of collective bargaining agreements. The strong statement of the court in favor of the use of arbitration over other administrative or legal remedies is a fitting finale to this outline on the continuing emphasis on the use of arbitration for dispute resolution:

> ". . . There is a strong policy on both the national and state levels favoring collective bargaining agreements and the resolution of

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[251] *Plumbing, Heating & Piping Council of N. Calif.* v. *Howard,* 53 Cal. App.3d 828, 91 LRRM 2724 (1975).

labor disputes via grievance-arbitration procedures. It has been recognized that 'arbitration under collective bargaining agreements [is] one of the most potent factors in establishing and maintaining peace and protection in industry'; hence, 'it can be safely stated that it is a fundamental part of both federal and California public policy to promote industrial stabilization through the medium of collective agreements.' . . . This policy can be effectuated only if the means chosen by the parties for settlement of their differences is given full play. . . . Thus, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress. . . . 'A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. . . . [It] would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances.' " (91 LRRM at 2726)