APPENDIX B

ARBITRATION AND FEDERAL RIGHTS UNDER COLLECTIVE AGREEMENTS IN 1976*

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The *Steelworkers* trilogy[1] continues to be the major catalyst for court litigation applying Section 301 of the Labor-Management Relations Act (LMRA) to the grievance-arbitration process.[2] Perhaps due to the continued willingness of the United States Supreme Court to grant certiorari and consider arbitral issues in depth, thereby settling the law in disputed areas, the number of reported appellate cases continues to level off from previous record-high numbers, with the exception being cases involving public-employment arbitration, which continues to increase as that sector of employment becomes more highly organized. The wisdom of this willingness by the Supreme Court to explicate arbitral law not only reduces the caseload of the lower and appellate courts in regard to arbitration-related problems, but also there is an increasing acceptance of the final and binding nature of an arbitration award, and the delays and bitterness that often accompany court litigation become less frequent.

This report attempts to gather in one document all appellate and federal court cases reported during the past year touching upon the arbitral process, with special emphasis accorded to those areas of law involved in Supreme Court decisions and cases dealing with the

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[1] *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 herein, it will not be footnoted if repeated, and the various statutory provisions referred to in this report will not be footnoted.

[2] 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."

conduct of arbitrators or the arbitration hearing itself. No attempt has been made to include the increasing number of cases dealing with public-sector arbitration, which is the subject of a separate report, nor to such specialized statutorily mandated arbitration proceedings, such as under the Railway Labor Act (RLA), unless the particular reported case has some general significance and application to grievance arbitration. Many areas of the law treated herein are repetitious of prior reports, but in order to maintain the survey approach of all reported cases and to give a general, but superficial, overview of arbitral law decided during the past year, the general format of prior reports is maintained, though with modifications dictated by the shifting nature and number of cases in a particular area of the law. No attempt is made to brief all of the legal points raised by each reported case, but only to cite what appears to be the most significant legal point in the case affecting arbitration.

As in past years there continues to be a heavy caseload of individual employee actions against employers for breach of contract and/or against unions for breach of the duty of fair representation. While these cases continue to be generally unsuccessful from the litigants' point of view, they do provide instruction for arbitrators in regard to possible areas of employee or court dissatisfaction with the arbitral process. There is an increasing number of cases brought under Section 301 dealing with pensions and health and welfare plans, which often have a specialized statutory base and which are not exhaustively treated herein. In regard to deferral to arbitration by the National Labor Relations Board (NLRB) under the *Collyer-Spielberg*[3] line of cases, the NLRB deferral doctrine was modified during the past year and is discussed in detail below.

As predicted in last year's report, the Supreme Court has made an important statement in regard to arbitration and sympathy strikes by the issuance of its decision in *Buffalo Forge Co.* v. *Steelworkers.*[4] Two other Supreme Court decisions affecting the arbitral process were also handed down during the past year, *Nolde Bros., Inc.* v. *Local 358, Bakery Workers,*[5] involving arbitration under an expired collective bargaining agreement, and *Electrical Workers*

[3] *Collyer Insulated Wire,* 192 NLRB 837, 77 LRRM 1931 (1971); *Spielberg Mfg. Co.,* 112 NLRB 1080, 36 LRRM 1152 (1955).
[4] 428 U.S. 397, 92 LRRM 3032 (1976), *aff'g* 517 F.2d 1207, 89 LRRM 2303 (2d Cir. 1975).
[5] 430 U.S. 243, 94 LRRM 2753 (1977), *aff'g* 530 F.2d 548, 91 LRRM 2570 (4th Cir. 1975).

Local 790 v. *Robbins & Meyers, Inc.*,[6] involving whether the filing of a grievance tolls the limitation period for filing a charge under Title VII of the Civil Rights Act of 1964. These three decisions and the areas of arbitral law affected thereby are discussed separately below.

I. Supreme Court Litigation

A. Injunctions and Sympathy Strikes

The validity of injunctive relief in labor disputes where arbitration is available has continued to be one of the most litigated areas of arbitral law, as exemplified by the previous decisions of the Supreme Court in the *Boys Markets*[7] and *Gateway Coal*[8] cases. In *Boys Markets* the Supreme Court held that as an exception to the anti-injunction provisions of the Norris-LaGuardia Act, injunctive relief may be granted against a strike over a grievance which the striking union has agreed to arbitrate. The question whether this exception may be routinely applied to situations where employees are honoring the picket line of a labor organization other than their own was answered in the negative by the Supreme Court in the *Buffalo Forge* case. In a closely contested, five-to-four decision, the Supreme Court affirmed the denial of an injunction by the district court and the court of appeals pending arbitration of the dispute, thereby resolving a split in authority among various circuit courts of appeals.

The Court noted in *Buffalo Forge* that the parties involved were bound by a collective bargaining contract containing a no-strike clause and an arbitration clause broad enough to reach not only disputes between the employer and union about other provisions of the contract, but also as to the meaning and application of the no-strike clause itself. The union represented production and maintenance employees and had gone out on strike not by reason of any dispute it or any of its members had with the employer, but in support of other local unions of the same international union representing office and technical employees of the same employer who were striking over a contract dispute. There was no dispute that the union had authorized and directed the work stoppage of the production and maintenance employees and that the strike and picket line

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[6] 429 U.S. 229, 13 FEP Cases 1813 (1976), *rev'g* 525 F.2d 124, 11 FEP Cases 641 (6th Cir. 1975).

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

[8] *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 85 LRRM 2049 (1974).

of the office and technical employees was primary and legal in every respect. The union claimed that the no-strike clause did not forbid sympathy strikes, whereas the employer asserted that the strike by the production and maintenance employees violated the no-strike clause and asked for injunctive relief pending an arbitrator's decision as to whether the strike was permissible.

The Court majority agreed that whether the sympathy strike violated the no-strike clause and the appropriate remedy if it did are ultimately issues for the arbitrator; that the employer was entitled to invoke the arbitral process to determine the legality of the strike and to obtain a court order requiring the union to arbitrate if it refused to do so; and that once arbitrated, if the strike was found illegal, an injunction could issue to enforce the arbitration award. However, on the key issue whether the employer was entitled to enjoin the sympathy strike pending arbitration, a majority of the Court held that its *Boys Markets* decision did not apply since the strike by the production and maintenance employees was "not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract." The majority held that neither the causes of the sympathy strike nor the issue underlying it were subject to the settlement procedures provided by the contract.

In view of the Norris-LaGuardia Act and the lack of a general federal antistrike policy, the Court held that the fact that the union was breaching its obligation not to strike did not in itself warrant the issuance of an injunction. The majority observed that if an injunction could issue in this case, then a court could in proper circumstances enjoin any other alleged breach of contract pending exhaustion of applicable grievance and arbitration procedures, even though the injunction would violate the express provisions of the Norris-LaGuardia Act. The majority argued that the parties had not bargained for judicial intervention in their contract dispute, and that their "agreement to adjust or to arbitrate their differences themselves would be eviscerated if the courts for all practical purposes were to try and decide contractual disputes at the preliminary injunction stage."

In regard to the arbitration process itself, and in response to the dissent's argument that injunctions should be authorized in cases where the violation, in the Court's view, is sufficiently sure that the party seeking the injunction will win before the arbitrator, the Court majority observed:

"But this would still involve hearings, findings and judicial interpretations of collective-bargaining contracts. It is incredible to believe that the courts would always view the facts and the contract as the arbitrator would; and it is difficult to believe that the arbitrator would not be heavily influenced or wholly preempted by judicial views of the facts and the meaning of contracts if this procedure is to be permitted. Injunctions against strikes, even temporary injunctions, very often permanently settle the issue; and in other contexts time and expense would be discouraging factors to the losing party in court in considering whether to relitigate the issue before the arbitrator.

"With these considerations in mind we are far from concluding that the arbitration process will be frustrated unless the courts have the power to issue interlocutory injunctions pending arbitration in cases such as this or in others in which an arbitrable dispute awaits decision." (92 LRRM at 3037-38)

The dissenting justices found it "wholly unrealistic" that granting an injunction against the union's violation of its agreement not to strike would involve the federal judiciary in a massive entry into the business of contract interpretation heretofore reserved for arbitrators, and held that the majority's literal interpretation of the Norris-LaGuardia Act was unjustified. The dissent argued that granting the injunction was based on the special status of the no-strike clause as the quid pro quo of the arbitration clause, and rejected the argument that its ruling would permit massive preliminary-injunction litigation by both employers and unions over all arbitrable disputes. Thus, the dissent held that the federal district court had jurisdiction to grant injunctive relief to the employer, if threatened with irreparable injury from a sympathy strike clearly in violation of a collective bargaining agreement, after consideration of the equity of such injunctive relief pending arbitration of the dispute.

Less than two weeks prior to the issuance of the *Buffalo Forge* decision, the Fourth Circuit held in the *Consolidation Coal* case[9] that the district court could not grant a *Boys Markets* injunction against foreign local unions and their members whose picketing was causing work stoppages among the employer's own employees, since there was no contract relationship between the employer and the foreign locals. Thus the strike in question was not over any dispute between the employer and the union that was even remotely subject to the arbitration provision of their contract. In spite of the holding in *Consolidation Coal,* the Fourth Circuit was one of those circuits

[9] *Consolidation Coal Co.* v. *Mine Workers Dist. 6,* 537 F.2d 1226, 92 LRRM 3002 (4th Cir. 1976).

whose previous decisions were in effect reversed by the *Buffalo Forge* decision.

In the *Latrobe Steel* case[10] pending before the Third Circuit at the time of the issuance of *Buffalo Forge*, the court not only had to decide the propriety of the district court's injunction against the union's refusal to cross a stranger picket line, but also the propriety of a contempt order against the union for its failure to comply with the injunction. After review of the authorities, especially *Buffalo Forge,* the Third Circuit vacated both the injunction and the contempt judgment. The court held that the order of contempt did not survive the invalidation of the underlying injunction, since the contempt order was civil rather than criminal in nature.

More recently the Sixth Circuit held that a union could not be held in contempt of a prior injunction when it honored a stranger picket line.[11] The court noted that it was possible for the district court to issue a prospective injunction if the requirements of *Boys Markets* were met and if there were detailed findings regarding the pattern of past work stoppages and the likelihood of recurrence, but the injunction in this case was impermissibly vague. A district court, in refusing to issue a *Boys Markets* injunction, held that under *Buffalo Forge* it did not make any difference whether the work stoppage was a pure sympathy strike or one where the union members refused to work out of fear of reprisals by roving stranger pickets.[12] It has also been held that *Buffalo Forge* does not apply to the statutory grievance procedures arising under the RLA in regard to "minor disputes" subject to the National Railroad Adjustment Board.[13]

The *Buffalo Forge* decision has also affected the right of employers to collect damages for a union's alleged breach of a no-strike clause where the honoring of a stranger picket line is found not to be subject to the arbitration provision of the collective bargaining agreement.[14] Where the contract specifically allows employees to honor the picket line of another labor organization, no damages

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[10] *Latrobe Steel Co.* v. *Steelworkers,* 545 F.2d 1336, 93 LRRM 2898 (3d Cir. 1976).

[11] *Southern Ohio Coal Co.* v. *Local 1957, Mine Workers,* 551 F.2d 695, 94 LRRM 2609 (6th Cir. 1977).

[12] *U.S. Steel Corp.* v. *Mine Workers,* 418 F.Supp. 172, 93 LRRM 2945 (W.D.Pa. 1976).

[13] *Wein Air Alaska* v. *Teamsters,* 93 LRRM 2934 (D.Alas. 1976); *Detroit, Toledo & Ironton RR* v. *Locomotive Engineers,* 93 LRRM 2868 (E.D.Mich. 1976); *cf. Air Line Pilots* v. *Seaboard World Airlines,* 93 LRRM 2876 (E.D.N.Y. 1976).

[14] *U.S. Steel Corp.* v. *Dist.4, Mine Workers,* 548 F.2d 67, 94 LRRM 2049 (3d Cir. 1976); see the concurring opinion of Justice Garth for an excellent discussion of the three classes of contract provisions; for an action against the international union for failing to "maintain the integrity" of its contract with the employer because of sympathy strikes, see *Republic Steel Corp.* v. *Dist. 5, Mine Workers,* 94 LRRM 3192 (W.D.Pa. 1977).

can be collected, and such a contract provision is not an illegal hot-cargo clause under the NLRA.[15] On the other hand, an employer association collected substantial damages in a case where the contract specifically authorized direct legal action for breach of the no-strike clause, and the union involved was found by its conduct to have repudiated its contract and to have encouraged its sister local in its illegal strike activity.[16] Whether or not the alleged breach of the no-strike clause involves stranger picketing, the injured employer may directly maintain an action for damages if it does not have access to the grievance procedure.[17] However, where the employer may initiate a grievance, the claim may be arbitrable and preclude the breach-of-contract action in court, and in these cases such equitable defenses as waiver, estoppel, and repudiation of the contract are for the arbitrator to decide.[18]

Whether or not the honoring of a stranger picket line amounts to a contract violation on the part of the union, two courts of appeals found, contrary to the NLRB, that employees were not engaged in protected activity when honoring such a picket line and upheld the employer's disciplinary action against the employees. Thus the Fourth Circuit upheld the discharge of two union activists who refused to cross a picket line at another employer's premises allegedly because of fear of physical injury.[19] Similarly, the Seventh Circuit reversed the NLRB and upheld employer discipline of employees for honoring the picket line of another trade employed at the same plant, noting that the contract covering the disciplined employees had a broad no-strike, arbitration clause which required the union to arbitrate the question whether its members could refuse to cross the picket line.[20] The court rejected the union's contention that the court may find the dispute arbitrable only after finding an unmistakable waiver of sympathy-strike rights, since such a conclusion would preempt the role of the arbitrator and undercut the presumption in favor of the arbitrability of disputes.

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[15] *Reising's Sunrise Bakery, Inc.*, v. *Local 35, Bakery Workers*, 94 LRRM 2262 (E.D.La. 1976).

[16] *California Trucking Ass'n* v. *Local 70, Teamsters*, 94 LRRM 2981 (N.D.Cal. 1977).

[17] *Oxco Brush Div., Vistron Corp.* v. *Machinists*, 538 F.2d 329, 93 LRRM 2842 (6th Cir. 1976), *aff'g* 93 LRRM 2721 (M.D.Tenn. 1974); for a discharged employee's successful fair-representation action against the union which breached its no-strike clause, see *Wheeler* v. *Woodworkers*, 274 Or. 373, 547 P.2d 106, 92 LRRM 2332 (1976).

[18] *Reid Burton Constr.* v. *Carpenters*, 535 F.2d 598, 92 LRRM 2321 (10th Cir. 1976).

[19] *G & P Trucking Co.* v. *NLRB*, 539 F.2d 705, 92 LRRM 3652 (4th Cir. 1976).

[20] *NLRB* v. *Keller-Crescent Div., Mosler*, 538 F.2d 1291, 92 LRRM 3591 (7th Cir. 1976); see as to the arbitrability of a claim by an employee discharged for honoring a picket line, *South Colonie School Dist.* v. *Longo*, 389 N.Y.S.2d 448, 94 LRRM 2960 (1977).

B. Arbitration and Termination of Contract

Following the lead of its 1964 decision in *John Wiley & Sons* v. *Livingston,*[21] in *Nolde Bros.* the Supreme Court held that a party to a collective bargaining agreement was required to arbitrate a contractual dispute over severance pay, even though the dispute arose after the termination of the contract. The employer permanently closed its bakery operation four days after the union had terminated the collective bargaining agreement between the parties. The employer rejected the union's demand for severance pay called for in the contract, and also declined to arbitrate the severance-pay claim on the ground that its contractual obligation to arbitrate disputes terminated with the collective bargaining agreement. Whereas arbitration had been requested in *Wiley* before the expiration of the contract, the question presented in *Nolde* was whether the fact that the claim to severance pay was made shortly after termination of the contract made any difference in the outcome.

The Court first discussed the differing perceptions of the parties regarding the severance-pay provision of the contract. The union maintained that the severance wages provided for in the collective bargaining agreement were in the nature of "vested" or "accrued" rights earned by employees during the term of the contract on essentially the same basis as vacation pay but payable only upon termination of employment. Nolde, on the other hand, argued that since severance pay was a creation of the collective bargaining agreement, its substantive obligation to provide such benefits terminated upon the union's unilateral cancellation of the contract and any claim to severance pay must surface during the contract term.

It was the employer's contention that formed the basis of the dissent by two justices, who held that the duty to arbitrate cannot be presumed to survive the formal expiration of the contract. Despite no agreement to arbitrate the dispute, the dissenting justices, however, did indicate that the union had a "clear cause of action" under 301 of the NLRA for the employer's failure to meet its severance-pay obligation to the employees; and that if the lower courts had addressed their attention to the merits of the union's claim un-

[21] 376 U.S. 543, 55 LRRM 2769 (1964). *Nolde* is cited in footnote 5, *supra*. See also, as cited by the Court, *Piano Workers Local 2549* v. *Kimball Co.*, 379 U.S. 357, 57 LRRM 2628 (1964). The *Nolde* decision casts some doubt on the contrary decision in a severance-pay dispute issued four months previous in *Allied Railing Corp.* v. *Local 455, Iron Workers,* 94 LRRM 2280 (S.D.N.Y. 1976); see also, *Pennsylvania Labor Rel. Bd.* v. *Williamsport School Dist.*, 94 LRRM 3130 (Pa.Comm. 1977).

der 301 for such pay filed at the same time as the request for an order to arbitrate, the litigation would have long since been resolved. A similar recovery in a 301 action of vacation benefits due striking employees under a collective bargaining agreement that expired prior to the strike was affirmed by the Fifth Circuit at about the same time as the *Nolde* decision.[22]

The majority in *Nolde* held that the fact that the union asserted its claim to severance pay shortly after, rather than before, contract termination does not control the arbitrability of the claim. The Court noted that the contract contained a broad arbitration clause wherein the parties agreed to resolve *all* disputes by resort to the mandatory grievance-arbitration machinery established by the collective bargaining agreement, and there was nothing in the arbitration clause that expressly excluded from its operation a dispute which arises under the contract but which is based on events that occur after its termination. The Court stated:

> "But in the absence of some contrary indication, there are strong reasons to conclude that the parties did not intend their arbitration duties to terminate automatically with the contract. Any other holding would permit the employer to cut off all arbitration of severance pay claims by terminating an existing contract simultaneously with closing business operations.
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> " . . . In short, where the dispute is over a provision of the expired agreement, the presumption favoring arbitrability must be negated expressly or by clear implication." (94 LRRM at 2756-57)

Lower courts during the past year have had a number of occasions to order arbitration in disputes involving the expiration or termination of contracts or the closing of operations, and such questions as the effect of the termination of the contract or compliance with contractual provisions are left by the courts for interpretation by the arbitrator.[23] An award requiring the payment of health-and-welfare-fund contributions after expiration of a contract was enforced where the arbitrator had found that the parties continued to recognize the contract after its expiration and that contributions

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[22] *Oil Workers Local 4-447* v. *American Cyanamid Co.*, 94 LRRM 3064 (E.D.La. 1976), *aff'd*, 546 F.2d 1143, 94 LRRM 3066 (5th Cir. 1977).

[23] *Food Workers Dist. 626* v. *Allied Supermarkets, Inc.*, 94 LRRM 2725 (N.D.Ohio 1976); *Scholz Homes, Inc.* v. *Local 20, Teamsters*, 92 LRRM 2823 (N.D.Ohio 1976); *Allen* v. *Grand Island School Dist.*, 94 LRRM 2946 (N.Y.App.Div. 1977); *Samson Window Corp.* v. *Colavito*, 54 A.D.2d 857, 388 N.Y.S.2d 300, 94 LRRM 2202 (1976); *Malone School Dist.* v. *Malone Teachers Ass'n*, 53 A.D.2d 6, 93 LRRM 2830 (1976).

had continued to be made on behalf of employees in accordance with the contract.[24]

Another court ordered the assets of a discontinued business sold and paid into the court pending disposition of an appeal of an award directing the employer to make payments to employees after their layoff.[25] An arbitration-award finding that the discharges of four striking employees allegedly guilty of picket-line misconduct were arbitrable was vacated, however, where a court found that under the new contract executed by the parties, which contained a "release clause," the discharges were not to be considered arbitrable.[26]

The expiration of a contract, or the lack of a contract, however, can mean there is no remedy in certain disputes for an aggrieved party under Section 301. For example, an employer had no cause of action under 301 for breach of contract against a musicians union for refusing to allow its members to play at the employer's club, where there was no contract in existence after the individual contracts of members had expired.[27] Similarly, employees failed in their attempt to invoke 301 jurisdiction to force a successor employer, who took over the employees from a predecessor employer, to arbitrate their grievances under the contract with their predecessor employer which went out of business.[28] The failure of employees to exhaust contractual grievance-arbitration procedures may also preclude court consideration of their severance-pay or other contract claims upon the closure of a business in a breach-of-contract action under 301.[29]

C. Grievance Procedures and EEOC Charges

Relying on its 1974 decision in *Alexander* v. *Gardner-Denver Co.*,[30] the Supreme Court held in the *Robbins & Meyers* case that

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[24] *Garment Workers Local 501* v. *Barmon Bros. Co.*, 418 F.Supp. 267, 93 LRRM 2045 (S.D.N.Y. 1976).

[25] *Printing Pressmen* v. *Cuneo Eastern Press, Inc. of Pa.*, 72 F.R.D. 588, 93 LRRM 2948 (E.D.Pa. 1976).

[26] *Garlick Funeral Homes, Inc.* v. *Local 100, Service Employees*, 413 F.Supp. 130, 92 LRRM 2482 (S.D.N.Y. 1976).

[27] *K.R.W., Inc.* v. *Musicians*, 92 LRRM 3487 (D.Ore. 1976); see as to the invalidity of a contract clause continuing terms and conditions of employment after expiration of a contract until a new contract is reached, *Niagara Wheatfield School Adm'rs Ass'n* v. *Niagara School Dist.*, 54 A.D.2d 498, 389 N.Y.S.2d 667, 94 LRRM 2682 (1976).

[28] *Russom* v. *Sears, Roebuck & Co.*, 415 F.Supp. 792, 94 LRRM 2882 (E.D.Mo. 1976).

[29] *Reese* v. *Mead Corp.*, 92 LRRM 2856 (N.D.Ala. 1975); see also *Jackson* v. *Local 470, Teamsters*, 92 LRRM 2820 (E.D.Pa. 1975).

[30] 415 U.S. 36, 7 FEP Cases 81 (1974). The *Robbins* case is cited in footnote 6 *supra*. The Court also relied on *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 10 FEP Cases 817

the existence and utilization of grievance procedures does not toll the running of the 180-day limitation period within which an employee is required to file a charge with the Equal Employment Opportunity Commission (EEOC) to initiate an employment-discrimination claim under Title VII of the Civil Rights Act of 1964. The Court also held that absent a contrary indication by the parties, the existence and utilization of such procedures does not postpone the date on which the alleged discrimination took place, so the limitation period began from the date of discharge of the employee, not from the date the grievance-arbitration process terminated. In addition the Court held that the 1972 amendment adding the 180-day limitation period applied to the employees' cases herein, rather than the previous 90-day period that was changed at the time the employees' charge was pending before the EEOC.

In its *Alexander* decision the Court held that an arbitration award under a collective bargaining agreement was not binding on an individual seeking to pursue his or her Title VII remedies, on the theory that contractual rights and Title VII statutory rights "have legally independent origins and are equally available to the aggrieved employee." The *Robbins* decision reinforces the policy set forth in *Alexander* that in civil rights matters the grievance-arbitration process does not have superiority or preeminence over Title VII proceedings. Thus the aggrieved employee need not exhaust his or her contractual grievance-arbitration procedures before pursuing Title VII rights,[31] although the failure to exhaust such remedies may preclude the court from thereafter entertaining or finding a breach of fair representation by the union.[32]

The courts have held that where arbitration has been conducted, the employee has received a full remedy, and the discrimination has been rectified, then the employee's Title VII claim may be dismissed.[33] Even where the arbitration decision is adverse to the employee, it may be considered decisive in a Title VII court case if the

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(1975). Similar rulings by lower courts during the past year were *Gray* v. *ITT Blackburn Co.*, 14 FEP Cases 941 (E.D.Mo. 1977); *Woods* v. *Safeway Stores, Inc.*, 420 F.Supp. 35, 13 FEP Cases 114 (E.D.Va. 1976); *Sled* v. *General Motors Corp.*, 405 F.Supp. 987, 13 FEP Cases 125 (E.D.Mich. 1976); *Margiotta* v. *So. Cent. Bell Tel. Co.*, 13 FEP Cases 127 (E.D.La. 1975); *cf. Walker* v. *World Tire Corp.*, 13 FEP Cases 1819 (E.D. Mo. 1976).

[31] *McAleer* v. *A.T.& T. Co.*, 416 F.Supp. 435, 12 FEP Cases 1473 (D.D.C. 1976); *Cook* v. *Mountain States T. & T. Co.*, 397 F.Supp. 1217, 12 FEP Cases 979 (D.Ariz. 1975).

[32] *Ruckel* v. *Essex Int'l, Inc.*, 14 FEP Cases 403 (N.D.Ind. 1976); *Collier* v. *Hunt & Wesson Foods, Inc.*, 13 FEP Cases 88 (S.D.Ga. 1976); *Franklin* v. *Crosby Typesetting Co.*, 411 F.Supp. 1167, 13 FEP Cases 42 (N.D.Tex. 1976).

[33] *Pearson* v. *Western Elec. Co.*, 542 F.2d 1150, 13 FEP Cases 1202 (10th Cir. 1976), *aff'g* 13 FEP Cases 1200 (D.Kan.)

discrimination claim was well developed before the arbitration tribunal.[34] However, courts are reluctant to grant summary judgment of the discrimination claim based on an adverse arbitration award without a factual hearing, even though the arbitration hearing may have been conducted with a high degree of procedural fairness, the arbitrator was thoroughly competent, the record on the discrimination issue was adequate, and the basic issues were specifically passed on.[35]

Employees frequently combine their Title VII claims with a claim of breach of duty of fair representation by the union representing them. In regard to the processing of grievances, the courts hold that where the union has a good-faith belief that it will not prevail and its decision is not motivated by reasons prohibited by the civil rights laws, there is sufficient justification for a refusal to arbitrate a grievance.[36] Therefore, unless a party can show that the union's actions in handling a grievance or in representing the employee were arbitrary, discriminatory, or in bad faith within the meaning of the Supreme Court's *Vaca* v. *Sipes* decision,[37] no breach of the duty of fair representation is made out in the civil rights action. Thus it is held that improper representation by a union does not, standing alone, constitute discrimination within the meaning of Title VII.[38]

II. Enforcement of Right to Arbitration

A. Use of Injunctions

As evidenced by the *Buffalo Forge* decision of the U.S. Supreme Court treated above, the use of injunctions to enforce arbitration and other rights arising under a collective bargaining agreement continues to be a major source of court litigation under Section 301. A large majority of the injunction proceedings arise under the Supreme Court's *Boys Markets* doctrine where employees of an em-

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[34] *Fort* v. *Trans World Airlines, Inc.*, 14 FEP Cases 208 (N.D.Cal. 1976).

[35] *Kornbluh* v. *Stearns & Foster, Inc.*, 14 FEP Cases 847 (S.D.Ohio 1976).

[36] *Stewart* v. *Marquette Tool & Die Co.*, 527 F.2d 127, 13 FEP Cases 803 (8th Cir. 1975), *aff'g* 420 F.Supp. 478, 13 FEP Cases 801 (E.D.Mo.); *Kearney* v. *Safeway Stores, Inc.*, 14 FEP Cases 55 (W.D.Wash. 1975). See also the cases cited *infra* at footnotes 165, 167, and 172.

[37] 386 U.S. 171, 64 LRRM 2369 (1967). See *Lewis* v. *Philip Morris, Inc.*, 419 F.Supp. 345, 13 FEP Cases 104 (E.D.Va. 1976); *Henry* v. *Radio Station KSAN*, 374 F.Supp. 260, 12 FEP Cases 1117 (N.D.Cal. 1974); see also *Beavers* v. *Strickland Transp. Co.*, 94 LRRM 2684 (E.D. Mo. 1976).

[38] *Mills* v. *Cox*, 421 F.Supp. 519, 13 FEP Cases 1009 (E.D.N.Y. 1976).

ployer, which is subject to the NLRA,[39] engage in a strike in violation of a no-strike clause over a dispute that is at least arguably arbitrable under the collective bargaining agreement, and which is causing irreparable injury to the party seeking the injunction.[40]

The injunction remedy may be utilized in wildcat-strike situations as well as in situations where the union's responsibility for the illegal strike is more firmly grounded on the conduct of union officers.[41] The Sixth Circuit held, however, that a union could not be held in civil contempt because of the "mass action" of its members in the absence of a finding that the union or its officers induced, persuaded, or encouraged work stoppages in violation of the court's order.[42] The injunction in the usual case must be limited to the particular dispute and generally cannot be extended to all the many and varied disputes of an entirely different nature that may in the future arise between the parties.[43] Further, the issuance of an arbitration award may render the injunction proceeding moot and may purge any previous finding of contempt of the injunction.[44]

There must be an obligation under the collective bargaining agreement to arbitrate the particular dispute before the union's resort to a strike or other economic recourse will be enjoined pending arbitration.[45] It has been held that a mandatory arbitration procedure will not be implied by a court where the contract contains a no-strike clause, even though in the reverse situation a no-strike clause will be implied as the quid pro quo of a mandatory arbitration provision.[46] An injunction against a union's strike in support of its demands at the third-year wage reopener of its contract was

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[39] *Puerto Rico Marine Mgt., Inc.* v. *Longshoremen Local 1575*, 540 F.2d 24, 93 LRRM 2046 (1st Cir. 1976), *rev'g* 398 F.Supp. 119, 89 LRRM 2938 (D.P.R. 1973), found the plaintiff corporation to be an "employer" within the meaning of the LMRA, rather than a "political subdivision" not subject to its jurisdiction.

[40] For a thorough and comprehensive analysis of *Boys Markets* injunctions, see *Jacksonville Maritime Ass'n* v. *Local 1408-A, Longshoremen*, 424 F.Supp 58, 94 LRRM 2911 (M.D.Fla. 1976); see also *Valley Ind. Services* v. *Local 3, Laundry Workers*, 92 LRRM 2650 (N.D.Cal. 1976).

[41] Compare *F.J. Schindler Co.* v. *Local 724, Machinists*, 93 LRRM 3085 (E.D.Pa. 1976), with *Peabody Coal Co.* v. *Local 1670, Mine Workers*, 416 F.Supp. 485, 93 LRRM 2532 (E.D.Ill. 1976).

[42] *Peabody Coal Co.* v. *Dist. 23, Mine Workers*, 543 F.2d 10, 93 LRRM 2677 (6th Cir. 1976).

[43] See *Alyeska Pipeline Service Co.* v. *Local 959, Teamsters*, 535 F.2d 1144, 92 LRRM 2445 (9th Cir. 1976), in which the proceeding was dismissed as moot, but a subsequent arbitration award prohibiting picketing in violation of the no-strike clause was enforced, 557 F.2d 1263, 94 LRRM 3252 (9th Cir. 1977). See also case cited at note 11, *supra*.

[44] *Borden, Inc., Old London Foods Div.* v. *Local 138, Teamsters*, 93 LRRM 2960 (S.D.N.Y. 1976).

[45] *Blount Bros. Corp.* v. *Local 455, Teamsters*, 92 LRRM 2414 (N.D.Ill. 1976).

[46] *Operating Engineers Local 675* v. *Trumbull Corp.*, 93 LRRM 2337 and 2338 (S.D.Fla. 1976).

denied, since the arbitration clause could no longer be applied to interpret the terms of an agreement where there was no agreement as to those terms once the contract was reopened.[47] A court also has no jurisdiction to enjoin a strike against a bankrupt employer until the bankruptcy judge allows arbitration of the underlying dispute, and any award rendered without such permission is not enforceable.[48]

In one recent case where the contract contained a broad mandatory arbitration clause and a clause expressly reserving the union's right to strike, a court of appeals disagreed with the district court's holding that these clauses were mutually exclusive methods of settlement and that the union was not obliged to process a grievance filed by the company in regard to the union's right to strike over an arbitrable dispute.[49] The appeals court, in directing arbitration as requested by the company, held that it was for the arbitrator to determine whether the union had a right to strike with respect to a dispute which is subject to resolution under the grievance-arbitration clause of the contract.

In another unusual case, a *Boys Markets* injunction against individual employees and the union was denied, where the employees were directing the strike against the union rather than the employer, because of the union's alleged failure to provide the strikers with proper representation at the bargaining table and at grievance proceedings.[50] The court held that such a dispute between the strikers and the union concerning terms and conditions of employment under a proposed contract is a labor dispute within the meaning of the Norris-LaGuardia Act, and that the collective bargaining agreement did not provide for arbitration of internal union disputes nor for interest arbitration. Another court denied a *Boys Markets* injunction against a slowdown by a union which had an implied no-strike clause in its contract, but no clause in the contract prohibiting the union or its members from engaging in a slowdown.[51] The court held that a no-slowdown agreement may not be implied merely because the contract contains an implied no-strike clause.

Once an arbitration award has issued and the employer refuses to comply with an adverse award, there is then no issue ripe for arbi-

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[47] *Best Cranes, Inc.* v. *Local 139, Operating Engineers,* 93 LRRM 2994 (E.D.Wis. 1976).

[48] *Teamsters Local 807* v. *Bohack Corp.*, 541 F.2d 312, 93 LRRM 2001 (2d Cir. 1976).

[49] *Kentucky W. Va. Gas Co.* v. *Local 3-510, Oil Workers,* 549 F.2d 407, 94 LRRM 2652 (6th Cir. 1977).

[50] *Automobile Transport, Inc.* v. *Ferdnance,* 420 F.Supp. 75, 92 LRRM 3610 (E.D.Mich. 1976).

[51] *Jessop Steel Co.* v. *Local 1141, Steelworkers,* 94 LRRM 3089 (W.D.Pa. 1977).

tration and the courts will not grant a *Boys Markets* injunction against a strike by the union.[52] Moreover, it has been held that a union could not obtain an injunction to prevent supervisors from performing bargaining-unit production work which was the subject of a prior arbitration award, since the union's complaints were exclusively within the contractual grievance procedure and must be presented to an arbitrator.[53] This court held that where there was no evidence that the employer was attempting to avoid its contractual duty to consider grievances and arbitrate, and where the employer had settled most grievances at early stages in the procedure, the fact that the union incurred substantial expense in carrying its grievances to arbitration did not constitute irreparable injury justifying intervention by the court in the instant dispute.

Injunctions in non-*Boys Markets* situations are difficult to obtain, especially where a party is seeking an injunction preventing arbitration and the dispute on its face is governed by the collective bargaining agreement, even where severe financial exigencies led to the breach of contract.[54] Where it is not shown that the employer is insolvent or an award of damages would be an inadequate remedy, then interim injunctive relief is held to be inappropriate.[55] A multilocation employer did receive an injunction against the arbitration of the discharge of a Washington, D.C., employee, where its contract covered only its New York employees, the court holding that the employer had no adequate remedy at law.[56] Also, an injunction may occasionally be obtained to preserve the status quo while a dispute is being arbitrated, such as a dispute over the transfer of operations.[57]

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[52] *Metropolitan N.Y. Nursing Home Ass'n* v. *Ottley,* 92 LRRM 2810 (S.D.N.Y. 1976); *New York* v. *Local 144, Service Employees,* 410 F.Supp. 225, 92 LRRM 2357 (S.D.N.Y. 1976).

[53] *Mine Workers Dist. 2* v. *Rochester & Pittsburgh Coal Co.,* 416 F.Supp. 74, 94 LRRM 2409 (W.D.Pa. 1976).

[54] *Levittown Bd. of Ed.* v. *Levittown United Teachers,* 386 N.Y.S.2d 440, 93 LRRM 2604 (N.Y.App.Div. 1976); see also *Westvaco Corp.* v. *Local 1388, Paperworkers,* 94 LRRM 2332 (S.D.N.Y. 1976); *Ferris State College* v. *Ferris Faculty Ass'n,* 72 Mich.App. 244, 249 N.W.2d 375, 94 LRRM 2567 (1976); *cf. Burke* v. *Bowen,* 40 N.Y.2d 264, 353 N.E.2d 567, 92 LRRM 3331 (1976).

[55] *Teamsters Local 480* v. *Southern Forwarding Co.,* 424 F.Supp. 11, 94 LRRM 2909 (M.D.Tenn. 1976).

[56] *American Broadcasting Co.* v. *AFTRA,* 412 F.Supp. 1077, 92 LRRM 2599 (S.D.N.Y. 1976).

[57] *Lever Bros. Co.* v. *Local 217, Chemical Workers,* 93 LRRM 2961 (4th Cir. 1976).

B. Other Suits Compelling or Staying Arbitration

The health of the arbitration process is graphically illustrated by the large number of cases wherein the courts hold in favor of a party who is seeking to compel arbitration or who is resisting a stay of arbitration, compared with the small number of decisions where arbitration is denied. In the federal courts failure to obtain an order requiring arbitration is most often predicated on the court's lack of jurisdiction under Section 301 to grant relief, for example, where the employer is not engaged in interstate commerce,[58] since virtually all other problems are left for the arbitrator to decide in the first instance. Thus, the general rule is that unless the contract expressly and explicitly excludes the subject matter of the dispute from arbitration, or some statute, controlling case law, or other source of public policy prohibits arbitration of the dispute, the dispute is referred to an arbitrator for initial resolution.[59]

While under the *Steelworkers* trilogy the courts will determine whether the contractual arbitration clause excludes a particular type of claim from arbitration, they will strictly refrain from interpreting the substantive clause of the contract upon which the merits of the dispute depend. Some of the disputes presented to courts in the past year, which were found to be clearly excluded from contract coverage and which were referred back to an arbitrator to resolve any doubts about such coverage, were: subcontracting of work claimed by the union;[60] extension of the contract to new facilities;[61] whether a resigned grievant is an "employee" under the con-

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[58] *Pari-Mutual Employees of Fla.* v. *Gulfstream Park, Inc.*, 402 F.Supp. 855, 92 LRRM 2680 (S.D.Fla. 1976); see also *Administration & Finance Dept.* v. *Labor Relations Comm'n*, 346 N.E.2d 852, 92 LRRM 2753 (Mass.S.J.Ct. 1976); *cf. Bass* v. *Elliot*, 71 F.R.D. 693, 92 LRRM 3705 (E.D.N.Y. 1976).

[59] See, for example, *Musicians Local 369* v. *Summa Corp.*, 93 LRRM 2412 (D.Nev. 1976) (attorney fees granted union because employer's refusal to arbitrate was unjustified and in bad faith); *Detroit Fed. of Teachers, Local 231* v. *Detroit School Dist.*, 396 Mich. 220, 240 N.W.2d 225, 92 LRRM 2282 (1976); *Napoleon School Dist.* v. *Anderson*, 67 Mich.App. 52, 240 N.W.2d 262, 92 LRRM 2681 (1976); *Port Washington School Dist.* v. *Port Washington Teachers Ass'n*, 54 A.D.2d 984, 389 N.Y.S.2d 113, 94 LRRM 2386 (1976); *Lakeland Bd. of Ed.* v. *Lakeland Fed. of Teachers, Local 1760*, 54 A.D.2d 571, 387 N.Y.S.2d 441, 94 LRRM 2496 (1976); *Fort Ann School Dist.* v. *Fort Ann Teachers Ass'n*, 386 N.Y.S.2d 129, 93 LRRM 2560 (1976); *Lakeland School Dist.* v. *Lakeland Fed. of Teachers*, 51 A.D.2d 1033, 381 N.Y.S.2d 515, 92 LRRM 2652 (1976).

[60] *Automobile Workers Local 1007* v. *Western Pub. Co.*, 422 F.Supp. 583, 93 LRRM 3019 (E.D.Wis. 1976); *S.M. Rose Co.* v. *Meyers*, 390 N.Y.S.2d 81, 94 LRRM 2892 (1976).

[61] Compare *Haig Berberian, Inc.* v. *Warehousemen*, 535 F.2d 496, 92 LRRM 2407 (9th Cir. 1976), with *Plumbers Local 91* v. *Kimberly-Clark Corp.*, 93 LRRM 2702 (N.D.Ala. 1976) (contract held not to apply to construction of new facilities).

tract;[62] and whether the union was guilty of laches in processing its grievance or the statute of limitations applied.[63]

In suits to compel arbitration, the courts may decide or dispose of certain preliminary issues, such as the existence of the contract itself. In one case, a contract between a musical group and the promoter of concerts, which contract was supplied but not signed by the union, was held to be a contract between an employer and a labor organization within the meaning of Section 301, and not a mere contract of employment.[64] The court further held that the fact that the promoter could not have promoted the concert tour unless it signed the contract does not render the contract unconscionable and unenforceable. The court also rejected the promoter's argument that the arbitrators and the rules of arbitration are biased in favor of the musical group, holding that such a general claim of bias is waived when the agreement to arbitrate is entered. However, the court noted that should a more specific claim of bias develop at arbitration, it can be raised at that time.

In another case the court held that a medical-insurance plan was not separate from the contract since it was referred to in the contract, so a dispute regarding the extent of medical insurance was arbitrable.[65] Using NLRB principles, a court determined that an employer's attempt to withdraw from an employer association was ineffective and denied the employer's requested stay of arbitration.[66] However, the court held that whether the union failed to follow required prearbitration procedures is a question for the arbitrator.

A dispute as to whether retirees are entitled to pro-rata vacation pay was held to be arbitrable and an alleged prior understanding regarding future negotiations between the parties on this issue was not binding.[67] The court held that only the most forceful evidence of a purpose to exclude a claim from arbitration can prevail in the absence of an express provision in the contract excluding a particular grievance from coverage by a broad arbitration provision. The same case also held that the arbitrator was not bound by a previous arbitration award in which the allegedly identical issue was decided

[62] *Little* v. *Willis*, 390 N.Y.S.2d 347, 94 LRRM 2973 (1976); see also *Aro, Inc.* v. *Machinists*, 414 F.Supp. 173, 93 LRRM 2033 (E.D.Tenn. 1976).

[63] *Marine Engineers Dist. 1* v. *Noank Navigation, Inc.*, 94 LRRM 2887 (S.D.N.Y. 1977); *Firefighters Local 785* v. *City of Lewiston*, 354 A.2d 154, 92 LRRM 2029 (Me.S.J.Ct. 1976).

[64] *Joy Corp.* v. *GCS, Inc.*, 94 LRRM 2038 (E.D.Pa. 1976).

[65] *Target Rock Corp.* v. *Local 431, IUE*, 94 LRRM 3148 (E.D.N.Y. 1977).

[66] *Sunrise Undergarment Co.* v. *Local 62, Garment Workers*, 93 LRRM 2481 (S.D.N.Y. 1976).

[67] *Machinists Local 1617* v. *Associated Transp., Inc.*, 92 LRRM 2342 (M.D.N.C. 1976).

in favor of a different employee of the same employer, since the applicability of the doctrine of stare decisis is left to the sound judgment of the arbitrator; and that the arbitrator decides each case on its own facts and merits, but previous well-considered decisions, if presented, will be persuasive though not binding. The same court held that the doctrine of res judicata, even if extended to arbitration proceedings, did not bind the arbitrator, since that doctrine applies only where the same controversy between the same litigants, including the grievant, has been previously adjudicated.[68]

While public-employment arbitration is not treated as such in this report, brief mention should be made of the large number of teacher-evaluation, tenure, and job-security cases that are reaching the courts. Perhaps due in part to the shrinking job market in the teaching profession, it is clear that a large number of problems involving teachers are being presented to arbitrators. Such public-employment cases present special problems for arbitrators, since in addition to the usual arbitral expertise required, there are particular statutory and public-policy concepts that have to be taken into consideration. By far the largest number of cases involve teacher probation, evaluation, and tenure status, with varying results depending upon the jurisdiction involved.[69] The next largest category of concern is the abolition of positions or the layoff, discharge, or reduction in status of teachers.[70] The expanding nature

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[68] See also in an employee fair-representation action, *Newsome* v. *Smith,* 94 LRRM 2426 (E.D.Mich. 1976); compare *City of Rochester* v. *Local 1635, AFSCME,* 54 A.D.2d 257, 388 N.Y.S.2d 489, 93 LRRM 2991 (1976).

[69] Compare *Milberry* v. *Philadelphia School Dist.,* 354 A.2d 559, 92 LRRM 2455 (Pa.S.Ct. 1976); and *Lincoln Univ.* v. *AAUP,* 354 A.2d 576, 92 LRRM 2522 (Pa.S.Ct. 1976); and *Ferndale Ed. Ass'n* v. *Ferndale School Dist.,* 67 Mich.App. 645, 242 N.W.2d 478, 92 LRRM 3543 (1976); with *Chassie* v. *School Dist. No. 36,* 356 A.2d 708, 92 LRRM 3359 (Me.S.J.Ct. 1976); and *Maine School Dist. No. 75* v. *Merrymeeting Ed. Ass'n,* 354 A.2d 169, 92 LRRM 2268 (Me.S.J.Ct. 1976); and with *Simon* v. *Boyer,* 41 N.Y.S.2d 822, 94 LRRM 2751 (1977), *aff'g* 51 A.D.2d 379, 380 N.Y.S.2d 178, 92 LRRM 3054 (1976); and *Bellmore-Merrick School Dist.* v. *Bellmore-Merrick Secondary Teachers,* 39 N.Y.2d 167, 347 N.E.2d 603, 92 LRRM 2244 (1976); see also *Darien Ed. Ass'n* v. *Darien Bd. of Ed.,* 94 LRRM 2895 (Conn. 1977); *Brookhaven School Dist.* v. *Port Jefferson Teachers Ass'n,* 389 N.Y.S.2d 402, 94 LRRM 2975 (1976); *Liverpool School Dist.* v. *United Liverpool Faculty Ass'n,* 53 A.D.2d 238, 385 N.Y.S.2d 879, 93 LRRM 2472 (1976); *Candor School Dist.* v. *Candor Teachers Ass'n,* 52 A.D.2d 400, 384 N.Y.S.2d 217, 92 LRRM 3588 (1976); *Pavilion School Dist.* v. *Pavilion Faculty Ass'n,* 51 A.D.2d 119, 380 N.Y.S.2d 387, 92 LRRM 2717 (1976); *cf. Fayetteville School Dist.* v. *Fayetteville Teachers Ass'n,* 51 A.D.2d 91, 380 N.Y.S.2d 376, 92 LRRM 2237 (1976), *rev'd,* 94 LRRM 3198 (1977).

[70] See, for example, *Braintree School Committee* v. *Raymond,* 343 A.2d 145, 92 LRRM 2339 (Mass.S.J.Ct. 1976); *Hanover School Committee* v. *Curry,* 343 A.2d 144, 92 LRRM 2338 (Mass.S.J.Ct. 1976); *Yonkers School Dist.* v. *Yonkers Fed. of Teachers,* 40 N.Y.2d 268, 353 N.E.2d 569, 92 LRRM 3329 (1976), *rev'g* 51 A.D.2d 568, 379 N.Y.S.2d 109, 92 LRRM 2459; *Yonkers School Crossing Guard Union* v. *City of Yonkers,* 39 N.Y.2d 964, 387 N.Y.S.2d 105, 92 LRRM 3333 (1976), *aff'g* 51 A.D.2d 594, 379 N.Y.S.2d 113, 92 LRRM 2460; *Whitney Pointe Central School* v. *Whitney Pointe Teachers Ass'n,* 391 N.Y.S.2d 26, 94

of public-employment arbitration requires the continuing and increasing attention of arbitrators with special emphasis on the public policies of the situs of the dispute.

III. Conduct of Arbitration and Enforcement of Awards

A. Representation of Grievants at Arbitration Hearings

It is important for arbitrators to be aware of the thinking of the courts on issues relating to the conduct of the arbitration hearing itself and the process of issuing the decision and award. Increasing awareness on the part of employees and union members of their rights has led to increased litigation questioning the conduct of the arbitral process, generally in the process of enforcement of the award. For example, attempts by grievants to have their own counsel at arbitration hearings and to chart the course of the hearing are frequently arising. This has led to some difficult situations for arbitrators, as evidenced by some of the following cases.

As a general rule, the courts hold that the employee or grievant is not entitled to his or her own counsel where the contract does not provide for such representation and the employer or the union objects. Thus one court refused to enjoin an arbitration proceeding at the employee's request because she was denied representation by counsel of her own choice.[71] The court held that at the arbitration level only the employer and the union were the parties, and that the employee's complaint of inadequate representation by the union was premature. In another case the court found no breach of the duty of fair representation on the part of the union, holding that the union represented the grievant as effectively as the case permitted, even though the employee was allegedly not allowed to collaborate with and consult with the union representatives during the grievance steps and at the arbitration hearing.[72] The court held that an attorney for the employee was not necessary where the contract provided for representation by a "duly accredited union representative."

In a wide-ranging opinion, the Ninth Circuit Court of Appeals attempted to untangle the procedural logjam caused when an em-

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LRRM 2875 (1977); *Niagara School Dist.* v. *Niagara Wheatfield Teachers Ass'n*, 54 A.D.2d 281, 388 N.Y.S.2d 459, 94 LRRM 2123 (1976); *Rylke* v. *Portage Area School Dist.*, 94 LRRM 3136 (Pa.S.Ct. 1977); *Scranton School Bd.* v. *Local 1147, Fed. of Teachers*, 365 A.2d 1339, 94 LRRM 2287 (Pa. Comm. 1976).

[71] *Blake* v. *USM Corp.*, 94 LRRM 2509 (D.N.H. 1977).

[72] *Maddaloni* v. *Local 808, Teamsters*, 92 LRRM 2467 (E.D.Pa. 1976).

ployee with a pay-shortage grievance appeared at an arbitration hearing with his own counsel and accused the union of conspiring with the employer to deny him and other similarly situated employees the compensation due them.[73] The arbitrator attempted to untangle the resulting conflicting positions by issuing an interim arbitration award, which was enforced in part by the appellate court. The court held that the arbitrator exceeded his authority under the collective bargaining agreement when he ordered arbitration of the employee's fair-representation claim against the union, since there was no agreement between the employee and the union to arbitrate such disputes, where the contract was between the union as agent for the employees and the employer. The court held that the duty of fair representation is created by the relationship of the union to its members rather than by contract. The arbitrator also erred when he held that he could award punitive damages, costs, and attorney fees against either the union or the employer since such remedies are not available unless they have been put in issue from the beginning of the arbitration procedure. The arbitrator was also not permitted to allow any other employees similarly situated to join in the proceeding since the only dispute that the parties were required to arbitrate was the employee's individual grievance against the employer; however, the arbitrator may designate the grievant as a party to the arbitration procedure and the award will bind the employee, absent exceptional circumstances such as fraud or breach of the union's duty of fair representation, even if the employee objects or declines to participate in the proceedings. Finally, the court held that the employee could not maintain his court action alleging conspiracy between the employer and the union regarding the denial of wages due under the collective bargaining agreement without first allowing the union an opportunity to submit the employee's claim to arbitration. An adverse arbitration award, however, may itself preclude the employee from later pursuing his conspiracy claim.[74]

A number of cases were handed down during the past year where the grievants attempted to attack an adverse arbitration award by filing a wrongful-discharge or breach-of-fair-representation action against the employer or union. These actions were unsuccessful unless the employee can show that the union's actions undermined the integrity of the arbitration proceeding or that the arbitrator acted

[73] *Hotel & Restaurant Employees* v. *Michelson's Food Services, Inc.*, 545 F.2d 1248, 94 LRRM 2014 (9th Cir. 1976).

[74] See *Shelton* v. *Bowman Transp., Inc.*, 94 LRRM 3149 (Ga.App. 1976).

outside of the scope of the contract.[75] It has been held that an allegation of lack of consultation with the employee in the grievance procedure does not present a triable issue, and that the employee's consent to the union's actions in fulfilling its duty as the exclusive bargaining agent is not necessary.[76] Also, there is no breach of fair representation by the union's failure to inform the employee that his grievance was being presented to the arbitration committee and to invite him to attend, in the absence of any bad faith or showing of prejudice to the employee.[77] Thus the usual standard applied in such fair-representation actions is that the employee must allege something more than the fact that the representation was merely incompetent, lax, or negligent, or reflected poor judgment by the union representatives.[78]

B. The Arbitration Hearing and Award

A host of issues are raised relating directly to the conduct of the arbitration hearing or the issuance of an award in attempts to vacate an adverse award. A contract entered into between an employer association and an international union "for and on behalf of its affiliated local unions" makes the local union a party to the collective bargaining agreement and bound by the procedure for selecting arbitrators, even though the local union has no voice in the selection procedure.[79] The decision of a joint labor-management committee was upheld even though the union president was a member, although not of the panel that heard the seniority dispute, and took an adverse position against the grievance, the court holding that "mere partisan influence in the decision making process is not itself grounds for relief."[80]

The Fifth Circuit held that an arbitration award could not be attacked by an employee's alleged suspicions of improper influence by the presence of company representatives in the room with the arbitrators, without objection by the union, while the arbitrators were deliberating over the propriety of the employee's discharge.[81] An-

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[75] See, for example, *Warren* v. *Teamsters,* 544 F.2d 334, 93 LRRM 2734 (8th Cir. 1976); *Barbarino* v. *Anchor Motor Freight, Inc.,* 421 F.Supp. 1003, 94 LRRM 2369 (W.D.N.Y. 1976); *Lewis* v. *Greyhound Lines East,* 411 F.Supp. 368, 92 LRRM 2312 (D.D.C. 1976).

[76] *Marietta* v. *Cities Service Oil Co.,* 414 F.Supp. 1029, 92 LRRM 2867 (D.N.J. 1976).

[77] *Siskey* v. *Local 261, Teamsters,* 93 LRRM 2200 (W.D.Pa. 1976).

[78] *Mangiaguerra* v. *D & L Trans., Inc.,* 410 F.Supp. 1022, 92 LRRM 2426 (N.D.Ill. 1976).

[79] *Nat'l Elevator Ind., Inc.* v. *Local 5, Elevator Constructors,* 94 LRRM 2822 (E.D.Pa. 1977).

[80] *Keane* v. *Eastern Freightways, Inc.,* 92 LRRM 3092 (D.N.J. 1976).

[81] *Oglesby* v. *Terminal Transp. Co.,* 543 F.2d 1111, 94 LRRM 2252 (5th Cir. 1976).

other panel award in favor of the union was confirmed even though the panel did not meet in executive session.[82] The court held that it was proper for the chairman, after notification to the employer and union representatives, to prepare his opinion without a meeting and to mail it to the employer's representative, who was to sign it or dissent and then forward it to the union's representative. The court noted that the contract did not provide a particular method by which the panel was to make its award, the employer representative did not request a meeting, and there was no evidence that the hearing was unfair or that the award would have been different if an executive session had been held.

The courts do not hold arbitrators to the technical rules of evidence, and consideration of probative hearsay is no basis for setting aside an award as long as the hearing was fair.[83] In a union's suit to vacate that part of an arbitration award that denied back pay to a reinstated employee, the court in enforcing the award approved of the arbitrator's use of the principles of equity to find a solution where both parties were not in full compliance with the contract.[84] In the absence of a specific contractual provision to the contrary, an arbitrator may rely on evidence of past practice and usage to resolve the contract dispute, since collective bargaining agreements reflect the influence of the parties' past practices and the customs of the industry.[85] In one case the court enforced an arbitration award upholding the employer's call-in practice even though the practice was in direct violation of the collective bargaining agreement, since the practice had been followed by the employer for many years and the union had consistently condoned the practice.[86] An arbitrator also respected a written policy of confidentiality of certain discussions and rejected evidence thereof, where it was found that the collective bargaining agreement embraced such a policy.[87]

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[82] *Davey Tree Surgery Co.* v. *Local 1245, Electrical Workers,* 65 Cal.App.3d 440, 94 LRRM 2905 (1976).

[83] *United Transp. Union Local 1594* v. *SEPTA,* 368 A.2d 834, 94 LRRM 2582 (Pa.Comm. 1977); see also *Hart* v. *Overseas Nat'l Airways, Inc.,* 94 LRRM 3133 (E.D.Pa. 1977); *Allentown School Dist.* v. *Allentown Ed. Ass'n,* 351 A.2d 292, 92 LRRM 2488 (Pa.Comm. 1976).

[84] *Teamsters Local 636* v. *Graybar Elec. Co.,* 93 LRRM 2444 (W.D.Pa. 1976).

[85] *Celmer* v. *Luden's, Inc.,* 94 LRRM 2967 (E.D.Pa. 1977); *Bowman Transp., Inc.* v. *Steelworkers,* 94 LRRM 3146 (N.D.Ga. 1976); *Office Employees Local 153* v. *ILGWU,* 92 LRRM 2412 (S.D.N.Y. 1976); *Journal Times* v. *Typographical Union No. 23,* 409 F.Supp. 24, 92 LRRM 2818 (E.D.Wis. 1976); *Brownsville School Dist.* v. *Brownsville Ed. Ass'n,* 363 A.2d 860, 93 LRRM 2561 (Pa.Comm. 1976); *Ringgold School Dist.* v. *Ringgold Ed. Ass'n,* 356 A.2d 842, 92 LRRM 2684 (Pa.Comm. 1976).

[86] *Teamsters Local 249* v. *Potter-McCune Co.,* 412 F.Supp 8, 92 LRRM 2701 (W.D.Pa. 1976).

[87] *Professional Staff Congress, CUNY* v. *N.Y.C. Bd. of Higher Ed.,* 39 N.Y.2d 319, 347 N.E.2d 918, 92 LRRM 2834 (1976).

The arbitrator may articulate the standard of proof required of a party in meeting a particular issue, such as requiring the employer to prove by clear and convincing evidence that two employees who applied for a job were not "substantially equal" in terms of ability to perform a job under the seniority clause of the contract.[88] The arbitrator may also decide which party has the burden of proof on a particular issue.[89] Allegations of bias or partiality on the part of an arbitrator or arbitration panel are not infrequently raised in court litigation by the party against whom the award was rendered, and they usually are summarily denied by the courts. In one case the evidence showed that an employee had driven the neutral arbitrator to the airport and had drinks with him, but did not discuss the arbitration proceeding.[90] The court held that this conduct violated the "appearance of fairness" doctrine, but that it did not affect the validity of the arbitration proceeding, and enforced the award.

It has been held that an arbitrator has no authority to decide issues beyond the scope of the submission agreement, even though a party may brief and argue the issues before the arbitrator.[91] One area that is frequently litigated in court action is the power of the arbitrator to fashion an appropriate remedy to fit the finding of the breach of contract. Generally an arbitrator is given great leeway in fashioning a remedy,[92] except in situations where contracts or statutes expressly control or where the award is too uncertain and indefinite to be enforced.[93] In one case an arbitrator found just cause for the discharge at the time the employee was found in unauthorized possession of company property, but ultimately held that at the conclusion of the arbitration hearing the employer did not have such just cause.[94] The Seventh Circuit enforced the resulting award

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[88] *Teamsters Local 120* v. *Sears, Roebuck & Co.*, 535 F.2d 1072, 92 LRRM 2980 (8th Cir. 1976).

[89] *Garment Workers Local 32* v. *Melody Brassiere Co.*, 92 LRRM 2659 (S.D.N.Y. 1976).

[90] *Firefighters Local 1296* v. *City of Kennewick*, 542 P.2d 1252, 92 LRRM 2118 (Wash.S.Ct. 1975).

[91] *Delta Lines, Inc.* v. *Local 85, Teamsters*, 409 F.Supp. 873, 93 LRRM 2037 (N.D.Cal. 1976).

[92] See, for example, *Painters Local 1179* v. *Welco Mfg. Co.*, 542 F.2d 1029, 93 LRRM 2589 (8th Cir. 1976); *Retail Clerks Local 57* v. *Western Drug of Great Falls*, 409 F.Supp. 1052, 93 LRRM 2060 (D.Mont. 1976); *Bellmore-Merrick Secondary Teachers, Inc.* v. *Bellmore-Merrick High School Dist.*, 51 A.D.2d 762, 379 N.Y.S.2d 513, 92 LRRM 2509 (1976).

[93] *Hart* v. *Overseas Nat'l Airways, Inc.*, 541 F.2d 386, 93 LRRM 2103 (3d Cir. 1976); *Durabond Prod., Inc.* v. *Steelworkers*, 421 F.Supp. 76, 93 LRRM 2631 (N.D.Ill. 1976); compare *Falls Stamping & Welding Co.* v. *Automobile Workers*, 416 F.Supp. 574, 93 LRRM 2546 (N.D.Ohio 1976); with *Victor Cable Co.* v. *IBEW Local 2014*, 411 F.Supp. 338, 92 LRRM 2293 (D.R.I. 1976); see also *Boston Teachers Union Local 66* v. *Boston School Committee*, 350 N.E.2d 707, 93 LRRM 2205 (Mass. S.J.Ct. 1976).

[94] *Amoco Oil Co.* v. *Local 7-1, Oil Workers*, 548 F.2d 1288, 94 LRRM 2518 (7th Cir. 1977).

and held that despite a contract clause requiring back pay for employees found discharged without just cause, it was proper for the arbitrator to reinstate the employee without back pay on the theory that the denial of back pay was analogous to a suspension pending satisfactory explanation of the possession of the property in question.

An award was held not void for untimeliness under a contract requiring that it be made within 30 days after the last hearing, where awards under the contract were customarily made more than 30 days after the last hearing and the delay was not unreasonable or prejudicial.[95] In one case where a transcript of the arbitration hearing had been made, the court held that a union's refusal to pay its share of court-reporter costs did not render an award in favor of the union null and void or deprive the court of jurisdiction, where the collective bargaining agreement provided that the parties would share the costs of the "arbitrator" rather than the costs of "arbitration."[96] In one case where the court vacated an arbitration award because it contradicted the factual findings and went beyond the submission of the parties, the court ordered both the employer and the union to share equally the compensation and expenses of the arbitrator pursuant to a provision of the collective bargaining agreement.[97]

C. Miscellaneous Enforcement Cases

Every year there is a multitude of routine cases involving the enforcement or vacation of arbitration awards, somewhat similar to the litigation enforcing the duty to arbitrate treated above. In general, if the arbitration award is not manifest disregard of the contract and draws its essence from the contract, it will be enforced by the courts in routine fashion.[98] Except in the public-employment

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[95] *Hotel & Restaurant Employees* v. *Fontainebleau Hotel Corp.*, 423 F.Supp. 83, 93 LRRM 2983 (S.D.Fla. 1976).

[96] *Electrical Workers Local 1000* v. *Markle Mfg. Co.*, 94 LRRM 2766 (W.D.Tex. 1975), *aff'd*, 536 F.2d 388, 94 LRRM 2781 (5th Cir. 1976); see also *Firefighters Local 2007* v. *Corning*, 51 A.D.2d 386, 38 N.Y.S.2d 699, 92 LRRM 2409 (1976).

[97] *Wright-Austin Co.* v. *UAW*, 422 F.Supp 1364, 94 LRRM 2714 (E.D.Mich. 1976).

[98] See, for example, *Campo Machinery Co.* v. *Local 1926, Machinists*, 536 F.2d 330, 92 LRRM 2513 (10th Cir. 1976); *Sun Oil Co.* v. *Local 8-901, Oil Workers*, 421 F.Supp. 1376, 93 LRRM 2848 (E.D.Pa. 1976); see under the RLA, *Denver & Rio Grande RR* v. *Blackett*, 538 F.2d 291, 92 LRRM 3289 (10th Cir. 1976); see in public employment, *Leominster School Committee* v. *Gallagher*, 344 N.E.2d 203, 92 LRRM 2271 (Mass.App. 1976); *Greenburgh School Dist. No. 7* v. *Greenburgh Teachers Fed., Local 1788*, 51 A.D.2d 1039, 381 N.Y.S.2d 517, 92 LRRM 2816 (1976); *Firefighters Local 735* v. *City of Bethlehem*, 367 A.2d 409, 94 LRRM 2055 (Pa.Comm. 1976); *City of Cranston* v. *Hall*, 354 A.2d 415, 92 LRRM 2765 (R.I. 1976).

sector where statutory and policy considerations become more influential,[99] relatively few arbitration awards are vacated by the courts, and any such attempt must be requested in timely fashion because of the finality accorded to such awards by the courts.[100]

A Texas court, at the request of the affected employee, vacated an arbitration award which had upheld the employee's discharge for pursuing criminal prosecution of a supervisor for assault, contrary to a contractual provision forbidding recourse to the courts prior to exhaustion of the grievance procedure.[101] The court held that public policy favoring effective enforcement of criminal laws took precedence over the national policy favoring arbitration to settle labor disputes. In another case, the court vacated an award on the ground that the grievance was untimely filed, although most courts would leave such determinations for the arbitrator.[102]

Failure to abide by an arbitration award without justification may lead to the assessment of attorney fees and costs against the guilty party, although the courts are not in complete agreement as to their power to grant attorney fees.[103] Occasionally the courts will be asked to pass on the question of whether an award has been properly complied with, such questions most frequently arising in regard to reinstatement by an employer of a discharged employee.[104] Issues or defenses not raised before the arbitrator may not be raised in court to vacate the arbitration award,[105] and even the question of newly discovered or withheld evidence will be reluctantly consid-

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[99] See, for example, *Firefighters Local 798* v. *San Francisco,* 57 Cal.App.3d 173, 92 LRRM 3388, 2351 (1976); *Junior College Dist. 508* v. *Cook County College Teachers Local 1600,* 343 N.E.2d 473, 92 LRRM 2380 (Ill. 1976); *City of Worcester* v. *Johnson,* 345 N.E.2d 913, 92 LRRM 2781 (Mass.App. 1976); *Sedita* v. *Buffalo Bd. of Ed.,* 53 A.D. 300, 385 N.Y.S.2d 647, 93 LRRM 2467 (1976); *Northern Tioga School Dist.* v. *N. Tioga Service Personnel,* 365 A.2d 167, 93 LRRM 2563 (Pa.Comm. 1976).

[100] *Automobile Workers Local 1452* v. *LaCrosse Cooler Co.,* 406 F.Supp. 1213, 92 LRRM 2490 (W.D.Wis. 1976); *cf. Carpenters Local 964* v. *Nesmith Constr. Co.,* 93 LRRM 2504 (S.D.N.Y. 1976); see also *Hartford* v. *Local 308, Police Officers,* 93 LRRM 2321 (Conn. 1976).

[101] *Goodyear Tire & Rubber Co.* v. *Sanford,* 540 S.W.2d 478, 92 LRRM 3492 (Tex.Civ.App. 1976).

[102] *Bakery Workers Local 111* v. *Bridgford Foods Corp.,* 423 F.Supp 125, 94 LRRM 2732 (N.D.Tex. 1976); *Duquesne School Dist.* v. *Duquesne Ed. Ass'n,* 93 LRRM 2020 (Pa.Comm. 1976); but see *Farino* v. *New York,* 389 N.Y.S.2d 956, 94 LRRM 2733 (1976); *Brown* v. *Holton Public Schools,* 397 Mich. 583, 243 N.W.2d 255, 92 LRRM 3617 (1976).

[103] *Machinists Dist. 776* v. *Texas Steel Co.,* 538 F.2d 1116, 93 LRRM 2285 (5th Cir. 1976), *aff'g in part* 92 LRRM 3687 (N.D.Tex. 1974); *Meat Cutters Local 248* v. *Packerland Packing Co.,* 411 F.Supp. 1280, 92 LRRM 2774 (E.D.Wis. 1976); but see *Kellogg Co.* v. *Printing Pressmen,* 410 F.Supp. 207, 92 LRRM 2365 (W.D.Mich. 1976).

[104] *Service Employees Local 144* v. *Metropolitan Jewish Geriatric Center,* 94 LRRM 3151 (S.D.N.Y. 1977); *Staffman's Org. Committee* v. *Steelworkers,* 399 F.Supp. 102, 92 LRRM 2007 (W.D.Mich. 1975).

[105] *Daisey* v. *Lindy's Coffee Shop, Inc.,* 397 F.Supp. 767, 94 LRRM 2579 (C.D.Cal. 1975).

ered by the courts.[106] Where an award is not clear in some respect, the courts will remand the proceeding to the arbitrator or to a new arbitrator for clarification.[107]

An award regarding a minimum-staff provision of a contract was enforced by the Sixth Circuit despite the deteriorating financial conditions of the employer, where the company had specifically surrendered the right to lay off in the contract, the court holding that the antifeatherbedding provision of the NLRA did not apply.[108] Another court enforced an award in favor of a union for money owed the union's welfare-and-vacation fund, the court rejecting the employer's argument that the union was not the real and proper party in interest to enforce the award.[109] The court stated that even though individual employees may sue to enforce collective bargaining rights, the duty of fair representation includes not only the union's prosecution of grievances through arbitration, but also enforcement of arbitration decisions by legal action.

In one unusual case, a union was able to obtain enforcement of an award against a second company which was not a party to the collective bargaining agreement but which had ordered the employer of the employee involved to discharge the grievant.[110] The arbitrator found that the employee had been unlawfully discharged by the employer which had a service contract with the company in question. This latter company refused to permit the employer to comply with the arbitration award by allowing the employee to work on its premises. The court held it had jurisdiction under 301 to require the second company to abide by the arbitration award and to order it to permit the employee to work on its premises, on the ground that the second company may be considered to be a "co-employer" under the facts in this case.

IV. Specialized Court Actions Relating to Arbitration

A. Actions Involving Labor Organizations

Every year there are a number of interesting uses of Section 301 jurisdiction directed at labor organizations by either members, non-

[106] *Teamsters Local 11* v. *Abad*, 144 N.J.Super 239, 365 A.2d 209, 93 LRRM 2791 (1976).

[107] *Nash* v. *System Fed. No. 96*, 92 LRRM 3286 (E.D.Pa. 1976); *W.M. Girvan, Inc.* v. *Local 294, Teamsters*, 389 N.Y.S.2d 445, 94 LRRM 2962 (1976); *City of York* v. *Reihart*, 365 A.2d 693, 93 LRRM 2866 (Pa.Comm. 1976).

[108] *Jefferson Concrete Co.* v. *Local 89, Teamsters*, 535 F.2d 355, 92 LRRM 2728 (6th Cir. 1976), *aff'g* 92 LRRM 2726 (W.D.Ky. 1975).

[109] *Railway Clerks Local 1902* v. *Safety Cabs, Inc.*, 414 F.Supp. 64, 93 LRRM 2520 (M.D.Fla. 1976).

[110] *Automobile Workers Local 6* v. *Saga Foods, Inc.*, 92 LRRM 2561 (N.D.Ill. 1976).

members, other labor organizations, or constituent parts of the same labor organization. Such lawsuits usually allege that the defendant union's constitution or bylaws constitute a contract which forms the alleged basis for finding 301 jurisdiction, although, as pointed out in prior reports, the courts are not in complete agreement in regard to extending 301 jurisdiction to all such cases.

The split in authority is illustrated by two decisions issued during the past year where local unions were suing their internationals for breach of the union constitution in order to prevent an unwanted merger or affiliation of the local with another local or council of the international. In the first case a Wisconsin district court refused to enjoin the affiliation of the plaintiff local with a district council, holding that such an action would unduly require the court to intervene in internal union affairs.[111] The court found that the dispute concerned intra-union autonomy rather than a significant threat to industrial peace, the implication being that there would be no problem with 301 jurisdiction if such peace were at stake. A Pennsylvania district court, on the other hand, held that it had jurisdiction under 301 of a local's actions to prevent its merger into another local of the same international on the ground that the union's constitution and bylaws were contracts within the meaning of 301.[112] However, the court then found no violation of contract since, under the union constitution, the international executive board had the power to order such a merger without a referendum of the members, and there was no evidence of an invidious motive.

Several cases were filed by members seeking unsuccessfully to challenge the union's procedure in ratifying collective bargaining agreements. The Sixth Circuit held that no cause of action was stated by the allegation of members of a violation of the union constitution for the failure of the union to provide the membership with an opportunity to ratify a rider to the contract.[113] The decision noted that courts are reluctant to authorize judicial intervention in internal union affairs and that other remedies were available. However, the court held that a cause of action for breach of the duty of fair representation was stated by the allegation that the union deliberately served employer interests by negotiating wages below the national contractual level. In a second decision, the members' suit for failure to permit a ratification vote on a new contract was denied on the ground that the union constitution was not a contract for the

[111] *Carpenters Local 657* v. *Sidell,* 92 LRRM 3128 (E.D.Wis. 1976).
[112] *Teamsters Local 1* v. *Teamsters,* 419 F.Supp. 263, 94 LRRM 2089 (E.D.Pa. 1976).
[113] *Trail* v. *Teamsters,* 542 F.2d 961, 93 LRRM 3076 (6th Cir. 1976).

purpose of 301 jurisdiction when members sue the union, as distinguished from a dispute between a local union and its parent union.[114] The court noted that the collective bargaining agreement did not require a ratification vote by the membership, and it found that the defendant union's application of its internal union policy did not amount to a breach of the duty of fair representation. In a third case, the court found no 301 jurisdiction of a challenge by members to the union's use of a package contract-ratification procedure in a national bargaining unit, and that the plaintiffs' challenge to the unit was under the jurisdiction of the NLRB.[115]

Another court held that it had jurisdiction of a fair-representation action by retired members alleging that the union violated its constitution regarding their participation in collective bargaining deliberations and by the concealment of its plans in the negotiations.[116] Differing results on the merits were obtained in two cases where members were seeking to maintain their traveler status in a local union,[117] or to transfer their membership to another local.[118] In an action by nonunion employees for a rebate of agency-shop fees paid for alleged political purposes, the Ninth Circuit reversed a summary judgment granted on the ground that the plaintiffs had failed to exhaust internal union remedies.[119] The court held that a full hearing should be held by the district court on whether the exhaustion requirement would place an intolerable burden on the employees because of the question whether the union would act fairly and honestly over the merits of the dispute. A district court held it had no 301 jurisdiction of a suit by a local union against an employer and the international union representative, challenging the settlement of a grievance filed by the local against the employer, on the ground that no breach of contract was alleged.[120]

B. Work-Assignment Disputes

The increasing number of work-assignment or jurisdictional-type disputes that frequently involve the application of collective bargaining agreements and the grievance-arbitration procedures thereunder make a separate discussion of these cases desirable. Due

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[114] *Werk* v. *Armco Steel Corp.*, 92 LRRM 3393 (S.D.Ohio 1976).
[115] *Davey* v. *Fitzsimmons*, 413 F.Supp. 670, 92 LRRM 2130 (D.D.C. 1976).
[116] *Thomas* v. *Mine Workers*, 422 F.Supp. 1111, 94 LRRM 2033 (D.D.C. 1976).
[117] *Dean* v. *Local 164, Electrical Workers*, 94 LRRM 2143 (S.D.N.Y. 1976).
[118] *Turco* v. *McCarthy*, 385 N.Y.S.2d 296, 93 LRRM 2153 (1976).
[119] *Seay* v. *McDonnell-Douglas Corp.*, 533 F.2d 1126, 92 LRRM 2063 (9th Cir. 1976).
[120] *Steelworkers Local 8024* v. *Jarl Extrusions, Inc.*, 405 F.Supp. 302, 92 LRRM 3703 (E.D.Tenn. 1975).

to the multiple parties involved, including in some cases the employees themselves, and due to the different timing of recourse to the courts under Section 301, these cases make for a wide variety of factual situations.

In one unusual case the Second Circuit held that members of the painters union had standing under 301 to sue the carpenters union for failure to comply with an umpire award issued pursuant to internal jurisdictional-dispute provisions of the AFL-CIO constitution.[121] The court held that even though a breach of fair representation on the part of the painters union was not alleged, such breach could be inferred from its half-hearted action on its members' behalf, and that such wrongful conduct on the part of the painters union could not serve as a shield protecting the carpenters union from its breach of the AFL-CIO constitution.

The Second Circuit refused a *Boys Market*-type injunction to restrain union members from refusing to perform a work assignment and to compel arbitration of a dispute, which the court termed "unfortunate" because the employer found itself in the middle of competing unions.[122] The court held that the union could not be ordered to arbitrate a dispute between its members and the employer where the contract provides that grievance proceedings shall be employee-oriented. In another case the Second Circuit dismissed a 301 action in a work-assignment dispute, holding that the word "may" in the arbitration clause of the collective bargaining agreement in regard to proceeding on a grievance to arbitration did not give the union the option of some other remedy, such as a court breach-of-contract action.[123] According to the court, the sole option given by the word "may" is the option of the aggrieved party to abandon its grievance. The same case also enforced the arbitrator's award which found that the union's grievance regarding the assignment of work was untimely filed under the contract, the court holding that an NLRB jurisdictional-dispute charge did not toll the time limitations of the collective bargaining agreement.

Another court granted an employer an injunction restraining a union from arbitrating a work-assignment dispute, holding that the employer was not bound to arbitrate the dispute on the ground that

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[121] *Santos* v. *Carpenters Dist. Council of N.Y.C.*, 547 F.2d 197, 94 LRRM 2244 (2d Cir. 1977).

[122] *Millar Elevator Ind., Inc.* v. *Local 3, Electrical Workers*, 542 F.2d 1165, 93 LRRM 3088 (2d Cir. 1976).

[123] *Stage Employees Local 771* v. *RKO General, Inc.*, 546 F.2d 1107, 94 LRRM 2928 (2d Cir. 1977), *rev'g in part* 419 F.Supp. 553, 93 LRRM 2228 (S.D.N.Y. 1976).

its parent company was signatory to such a contract.[124] The court held that there was a presumption of separateness of the two companies, and that the subsidiary and parent companies were not so interrelated so as to constitute a single employer warranting imputation of the parent's collective bargaining agreement to the subsidiary.

In a proceeding between two labor organizations, the Second Circuit enjoined the defendant union from performing certain work pursuant to a memorandum of understanding between the international unions of the two parties to the lawsuit.[125] The court held that the memorandum in question was an agreement between two international unions of definite content to prevent labor warfare and, therefore, was enforceable under Section 301. The Tenth Circuit refused in a jurisdictional dispute to enforce the award of a particular industry disputes board, where under its contract the employer was obliged to respect "agreements national in scope" with other internationals, so the AFL-CIO impartial jurisdictional-disputes board had exclusive jurisdiction.[126]

Where the jurisdictional-dispute procedures under the NLRA are invoked or involved, the federal courts are reluctant to intervene in a work-assignment dispute on the ground that the NLRB has exclusive jurisdiction under Section 10(k) of the statute. Thus a federal court will not, at the request of one labor organization, compel another labor organization and the employer to submit a jurisdictional dispute to arbitration, unless both unions agree to submit the dispute under their respective collective bargaining agreements and agree to guidelines for the conduct of the arbitration proceeding, and NLRB procedures are not invoked in the dispute.[127] Nor will a court permit a 301 breach-of-contract action to proceed in the face of a pending NLRB jurisdictional-dispute proceeding involving the same dispute.[128] A similar result prevails in disputes involving the refusal of an employer to recognize a union as bargaining agent of employees where representation proceedings are pending before the NLRB.[129] Even where the arbitration award, whether tripartite or not, has already issued, the courts will

[124] *Tishman Corp.* v. *Elevator Constructors Local 1*, 92 LRRM 2705 (S.D.N.Y. 1976).

[125] *Local 1974, Painters Union* v. *Local 60, Plasterers*, 92 LRRM 3203 (2d Cir. 1976), *aff'g* 92 LRRM 2920 and 2831 (S.D.N.Y.).

[126] *Sheet Metal Workers Local 49* v. *Los Alamos Constr., Inc.*, 550 F.2d 1258, 94 LRRM 2869 (10th Cir. 1977).

[127] *Electrical Workers Local 349* v. *Local 666, Stage Employees*, 93 LRRM 2462 (S.D.Fla. 1976).

[128] *Moshlak* v. *American Broadcasting Co.*, 94 LRRM 2851 (S.D.N.Y. 1976).

[129] *Central Motor Express, Inc.* v. *Local 89, Teamsters*, 92 LRRM 2940 (W.D.Ky. 1975).

not grant enforcement in the face of a contrary award of the NLRB in a Section 10(k) proceeding, the courts holding that the statutory proceeding takes precedence.[130]

Since the NLRB cannot award damages, the courts hold that deference to the NLRB is unnecessary and the injured party may obtain damages for breach of the collective bargaining agreement in an arbitration proceeding.[131] The damage action under the grievance procedure has been held to be severable from the jurisdictional-dispute part of the problem, which must be decided by the jurisdictional-disputes board established by the union to decide such questions.[132] Where the contract permits, a straight court action for damages for breach of contract for the wrongful assignment of work by an employer may be brought by the union or by the trustees of a pension plan.[133] A similar action by employees, however, for breach of contract was dismissed where the union was found not to have committed a breach of its duty of fair representation.[134]

C. Employee-Benefit Plans

A heavy court docket of cases involving pension and other employee-benefit plans, which sometimes involve the arbitral process, demands at least brief treatment herein. The great majority of cases fall into two classes. First are the numerous actions filed by the trustees of such funds in either state or federal courts for unpaid contributions.[135] It is held that arbitration is not required in such cases unless the contract so provides, and that the trustees are a proper party to bring suit even though they are not a labor organization under Section 301, since the cause of action arises out of a collective bargaining agreement.[136] In fact, arbitration under the col-

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[130] *Automobile Workers* v. *Rockwell Int'l Corp.*, 94 LRRM 2721 (E.D.Mich 1977) (single union arbitration award); *Metromedia, Inc.* v. *Theatrical Stage Employees*, 93 LRRM 2765 (C.D.Cal. 1976) (tripartite arbitration award).

[131] *LaMirada Trucking, Inc.* v. *Local 166, Teamsters*, 538 F.2d 286, 92 LRRM 3524 (9th Cir. 1976).

[132] *Bechtel Corp.* v. *Local 215, Laborers*, 544 F.2d 1207, 93 LRRM 2860 (3d Cir. 1976).

[133] *Seymour* v. *Hull & Moreland Eng.*, 418 F.Supp. 190 and 195, 93 LRRM 2138, 2140 (C.D.Cal. 1976).

[134] *Barrett* v. *Safeway Stores, Inc.*, 538 F.2d 1311, 92 LRRM 3406 (8th Cir. 1976); *cf.* the case cited in note 121 *supra*.

[135] *Pio* v. *Gilliland Constr. Co.*, 276 Or. 975, 94 LRRM 2477 (1976); *Northwest Adm'rs, Inc.* v. *Wildish Sand & Gravel Co.*, 275 Or. 659, 552 P.2d 547, 93 LRRM 2441 (1976); *Pio* v. *Kelly*, 275 Or. 585, 522 P.2d 1301, 93 LRRM 2168 (1976); *Trust Fund Services* v. *Thriftmart*, 15 Wn.App. 452, 550 P.2d 547, 93 LRRM 3081 (1976).

[136] *Todd* v. *Casemakers, Inc.*, 94 LRRM 2727 (N.D.Ill. 1977).

lective bargaining agreement may be enjoined where the trustees have previously chosen to resolve the issues through court action.[137] In one case a court denied an attempt by trustees to recover from an employee benefits paid erroneously, where the court found no fraud on the employee's part and the contract did not provide for a duty on the part of the employee to refund such erroneously paid benefits.[138]

Second, the largest category of cases are those brought by employees or their beneficiaries in attempts to enforce benefit-fund rights allegedly established under a collective bargaining agreement. The status of 301 jurisdiction in such cases is sometimes disputed, depending upon what legal or statutory theories are invoked by the plaintiff.[139] The Ninth Circuit recently held that the beneficiary of a deceased union member could sue under 301 for a survivor benefit under a pension plan, since the contract between the employer and the union creating the plan is a contract under 301, and 301 covers actions for enforcement of individual rights arising from collective bargaining agreements.[140] The same court pointed out that in such cases a breach of the duty of fair representation by the union is not always necessary for there to be a breach of contract. However, the use of fair-representation actions against unions to obtain the desired benefit is not uncommon.[141]

It has been held that there is no 301 jurisdiction of a suit by retired employee beneficiaries against fund trustees for breach of the collective bargaining agreement regarding failure to enforce the payment of employer contributions, since the trustees were not a party to the contract and the union owed no duty of fair representation to retired employees.[142] Such employees were successful, however, in a 301 breach-of-contract action where the employers entered into a new collective bargaining agreement with the union which extinguished a pension fund without making provision for the financial protection of retired employees who were held to have

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[137] *Ballard & Assoc., Inc.* v. *Mangum,* 368 A.2d 548, 94 LRRM 2449 (D.C.App. 1977).

[138] *McCarter* v. *Teafoe,* 93 LRRM 2769 (E.D.Mich. 1976).

[139] *Johnson* v. *Botica,* 537 F.2d 930, 92 LRRM 3366 (6th Cir. 1976); *Morowitz* v. *Bakery Drivers Local 802 Pension Fund,* 92 LRRM 3357 (E.D.N.Y. 1976); *Meehan* v. *Laborers Pension Fund,* 92 LRRM 2984 (N.D.Ill. 1976).

[140] *Rehmor* v. *Smith,* 555 F.2d 1362, 93 LRRM 2657, 94 LRRM 2511 (9th Cir. 1976, 1977); see also *Phillips* v. *Kennedy,* 542 F.2d 52, 93 LRRM 2353 (8th Cir. 1976); *Thurber* v. *Western Conf. of Teamsters Pension Plan,* 542 F.2d 1106, 93 LRRM 2464 (9th Cir. 1976); *Hodgins* v. *Central States Pension Fund,* 94 LRRM 2507 (E.D. Mich. 1976).

[141] *Hayes* v. *Kroger Co.,* 92 LRRM 3503 (S.D.Ohio 1976); *Kaminsky* v. *Connolly,* 51 A.D.2d 218, 380 N.Y.S.2d 658, 92 LRRM 2108 (1976).

[142] *Nedd* v. *Thomas,* 92 LRRM 2177 (M.D.Pa. 1976).

a right to a pension for life.[143] The court held that where employers have given assurances of a lifetime pension and employees elect to retire in reliance thereon, the doctrine of promissory estoppel bars such a later termination of the fund.

The Seventh Circuit has held, however, that where the collective bargaining agreement provides for the closing of the business, the employer and union may terminate the pension plan.[144] The court held that employees had no vested property interest in the pension plan under the collective bargaining agreement, that the union can change it under its own terms, and that there was no breach of fair representation by the union regarding the plant-closing agreement where the union engaged in fair and extensive bargaining in order to meet the problems presented by the employer's closing. The union's acceptance of the employer's proposal terminating a contract is held, therefore, as a satisfaction of all claims under the collective bargaining agreement, though such agreement may not release the employer from its obligation to the trustees of the pension and health-and-welfare funds.[145]

Upon the termination of a business, the collective bargaining agreement controls to what extent the employer must fund future retirement benefits for the affected employees, and such issues may be settled either by arbitration or by a direct 301 breach-of-contract action.[146] A 301 action, including injunctive relief, may also be used to challenge an alleged breach of an obligation under a declaration of trust set up pursuant to a collective bargaining agreement, similar to actions for breach of the contract itself. Thus, in one case a parent corporation was held to be an alter ego of the corporation with which the union had its contract, and was held jointly and severally liable for its tortious interference with obligations under an employee pension plan created and maintained pursuant to a collective bargaining agreement.[147]

D. Breach-of-Contract, Damage, and Fair-Representation Actions

Since, generally speaking, grievance-arbitration procedures are the exclusive remedy for breach of a collective bargaining agree-

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[143] *Hurd* v. *Hutnik*, 419 F.Supp. 630, 94 LRRM 2690 (D.N.J. 1976).

[144] *Dwyer* v. *Climatrol Ind., Inc.*, 544 F.2d 307, 93 LRRM 2728 (7th Cir. 1976).

[145] *Teamsters Local 688* v. *Mizerany Warehouse, Inc.*, 413 F.Supp. 911, 92 LRRM 3699 (E.D.Mo. 1974).

[146] See *White Motor Corp.* v. *Malone*, 545 F.2d 599, 93 LRRM 3008 (8th Cir. 1976); *Automobile Workers* v. *H.K. Porter Co.*, 93 LRRM 2917 (E.D.Mich. 1976); *Machinists Local 1574* v. *Gulf & Western Mfg. Co.*, 417 F.Supp. 191, 92 LRRM 3309 (D.Me. 1976).

[147] *Automobile Workers* v. *Cardwell Mfg. Co.*, 94 LRRM 2149 (D.Kan. 1976); see also *Associated Contractors of Essex Co.* v. *Local 342, Laborers*, 92 LRRM 3460 (D.N.J. 1976).

ment, unless there is a breach of the duty of fair representation by the labor organization involved, and since both breach-of-contract and fair-representation actions often involve similar issues, these cases are treated herein together, along with civil rights actions with fair-representation issues. Before bringing any such action, the complaining party must fulfill the terms of any applicable contract and exhaust its grievance procedure.[148] In the case of a fair-representation action against a labor organization, the internal-appeal procedures under the union constitution or bylaws must also be exhausted, unless shown to be futile or excused for some other compelling reason.[149] Even under such specialized areas of the law as that applying to seamen[150] or to employees covered by the Railway Labor Act,[151] the exhaustion of statutory or grievance-arbitration remedies is strictly applied. Thus, the failure to file a grievance will defeat a fair-representation action,[152] and the failure to request arbitration will preclude a breach-of-contract action if there is no breach of the duty of fair representation.[153] Of course, where a contract contains no binding-arbitration clause, a strike is not the only remedy of the union, and a breach-of-contract action may be maintained by the union or an aggrieved employee.[154]

The court must find that the defendant employer or union is subject to its jurisdiction in these cases,[155] and that it is bound by a col-

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[148] *Malone* v. *Delco Battery-Muncie,* 540 F.2d 297, 93 LRRM 2023 (7th Cir. 1976); *Thurman* v. *TVA,* 533 F.2d 180, 92 LRRM 3167 (5th Cir. 1976); *McCorkel* v. *Exxon Corp.,* 94 LRRM 2467 (S.D.Ga. 1976); *Ryder* v. *State Univ. of N.Y.,* 39 N.Y.2d 845, 351 N.E.2d 747, 92 LRRM 2736 (1976); *cf. Markarian* v. *Roadway Express, Inc.,* _____Mich.App._____, 92 LRRM 3295 (1976); but see in public employment where civil service exists, *Hackett* v. *State of New York,* 375 N.Y.S.2d 895, 92 LRRM 2366 (1975).

[149] Compare *Willetts* v. *Ford Motor Co.,* 93 LRRM 2832 (E.D.Mich. 1976); with *Wingenbach* v. *Mushroom Transp. Co.,* 51 A.D.2d 355, 379 N.Y.S.2d 567, 92 LRRM 2575 (1976); see regarding employer waiver of exhaustion requirement, *May* v. *Southland Corp.,* 94 LRRM 3028 (La.App. 1976); under the RLA, see *Goglowski* v. *Penn Central Transp. Co.,* 423 F.Supp. 901, 94 LRRM 2183 (W.D.Pa. 1976).

[150] *Kowalik* v. *General Marine Transp. Co.,* 550 F.2d 770, 94 LRRM 2785 (2d Cir. 1977), *aff'g* 411 F.Supp. 1325, 92 LRRM 2657 (S.D.N.Y. 1976).

[151] *Benoist* v. *Locomotive Engineers,* 94 LRRM 2724 (E.D.Mo. 1976); *Axe* v. *B & O RR,* 92 LRRM 2654 (S.D.Ind. 1976); but see *Kennan* v. *Pan American Airways, Inc.,* 93 LRRM 2621 (N.D. Cal. 1976).

[152] *McClain* v. *Newspaper Printing Corp.,* 14 FEP Cases 1033 (M.D.Tenn. 1977); *Mendelsohn* v. *United Parcel Service,* 93 LRRM 2843 (E.D.N.Y. 1976).

[153] *Vandever* v. *Bell Helicopter Co.,* 93 LRRM 2235 (N.D.Tex. 1976); *Generalis* v. *Local 25, Restaurant Employees,* 92 LRRM 3668 (D.D.C. 1975).

[154] *Pacific Log Scalers Ass'n* v. *Columbia River Log Scaling Bureau,* 92 LRRM 3336 (D.Ore. 1976); *Breish* v. *Ring Screw Works,* 397 Mich. 586, 248 N.W.2d 526, 94 LRRM 2061 (1976).

[155] *Crilly* v. *Pa. Transp. Auth.,* 529 F.2d 1355, 92 LRRM 2102 (3d Cir. 1976); *Glass Workers Local 1928* v. *Florida Glass & Mirror, Inc.,* 409 F.Supp. 225, 92 LRRM 3698 (M.D.Fla. 1976); *City of Stuart* v. *Clifford Ragsdale, Inc.,* 92 LRRM 3679 (S.D. Fla. 1976); *Baldwin* v. *Poughkeepsie Newspapers, Inc.,* 410 F.Supp. 648, 92 LRRM 2298 (S.D.N.Y. 1976); see in public employment, *Cofrancesco* v. *City of Wilmington,* 93 LRRM 2387 (D.Del. 1976); *Jack-*

lective bargaining agreement within the meaning of Section 301.[156] In one case the Seventh Circuit held that the federal courts had no jurisdiction under 301 of an action by a discharged salaried employee on the theory of an implied contractual right to be retransferred to an hourly position, since the employee was claiming a common law and state theory of breach of contract rather than a violation of a collective bargaining agreement.[157] Employee fair-representation and breach-of-contract actions frequently fail because the courts apply to such cases the shorter statute of limitations applicable to tort or personal injury, rather than the longer breach-of-contract limitation period.[158] The lack of proper pleading with specificity of the material facts from which the breach-of-contract or fair-representation claim can be inferred also leads to the dismissal of many such actions, since bald allegations of bias, conspiracy, and the like are insufficient.[159]

Employers and unions use 301 for a wide variety of purposes with varying results, depending on the facts of the particular case. For example, a declaratory judgment in regard to a wage reopener under a collective bargaining agreement, finding the lack of a right to strike thereunder, was obtained during the past year.[160] Specific performance of a contract against a successor employer may also be obtained, if it can be shown that the successor assumed the obligations of the contract.[161] In one case it was held that a union's invocation of its grievance-arbitration procedures to enforce an unlawful restraint-on-transfer clause in its contract regarding a buyer picking up the union contract did not make the union liable for inducing a breach of contract between the employer and the buyer.[162]

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son v. *Regional Transit Service*, 54 A.D.2d 305, 388 N.Y.S.2d 441, 94 LRRM 2070 (1976); see of doubtful validity an employer's action against employees, 92 LRRM 2266 (N.D.Ohio 1976).

[156] *Dearborn Sheet Metal, Inc.* v. *Local 19, Sheet Metal Workers*, 547 F.2d 221, 94 LRRM 2353 (3d Cir. 1977) (incorporation by reference); *Laborers Local 1140* v. *Sheesley-Winter Constr.*, 421 F.Supp. 137, 93 LRRM 2794 (D.Neb. 1976) (prehire contract).

[157] *Jones* v. *General Tire & Rubber Co.*, 541 F.2d 660, 93 LRRM 2225 (7th Cir. 1976).

[158] *Howard* v. *Aluminum Workers*, 93 LRRM 2385 (E.D.Va. 1976); *Smith* v. *Local 442, Meat Cutters*, 92 LRRM 2261 (N.D.Ala. 1976); *Glowacki* v. *Motor Wheel Corp.*, _____Mich. App.,_____, 241 N.W.2d 240, 92 LRRM 2769 (1976).

[159] *Wilson* v. *Washington Post Co.*, 93 LRRM 2300 (D.D.C. 1976); *Harrell* v. *Blount Bros. Corp.*, 92 LRRM 3522 (S.D.Ohio 1976); *Evans* v. *Dow Chemical Co.*, 13 FEP Cases 1461 (D.Colo. 1975); *cf. Balsavich* v. *Local 170, Teamsters*, 356 N.E.2d 1217, 94 LRRM 2502 (Mass.S.J.Ct. 1976).

[160] *Communications Workers* v. *Continental Tel. Co. of Va.*, 94 LRRM 2186 (E.D.Va. 1976); see also *Southdown Sugars, Inc.* v. *Meat Cutters*, 93 LRRM 2634 (E.D.La. 1976); *cf. Pottery Workers Local 380* v. *Toalston*, 380 F.Supp. 1274, 13 FEP Cases 495 (N.D.Ohio 1974).

[161] *Bartenders Local 340* v. *Howard Johnson Co.*, 535 F.2d 1160, 92 LRRM 2525 (9th Cir. 1976).

[162] *Maritime Union* v. *Commerce Tankers Corp.*, 411 F.Supp. 1224, 92 LRRM 2385 (S.D.N.Y. 1976).

In a tort action against an employer for carelessness by its employees, a federal court held that the employer may be indemnified by the union under the collective bargaining agreement for breach of its duty to provide competent employees from its hiring hall.[163] In another unusual decision, a court held that employers were not entitled to vacate the adjudication of bankruptcy of a local union which was liable for damages for breach of no-strike clauses of its collective bargaining agreements.[164] The court held that 301 permits a local union to be sued and to sue as an entity, and that the local was sufficiently autonomous for it to be adjudged bankrupt without joinder of the international. The implications of this decision in regard to collection of heavy damage awards against local unions for breach of their collective bargaining agreements are obvious.

Most fair-representation actions by employees against labor organizations involve direct attacks on the processing of grievances filed by the employees. Unions generally may refuse to process a grievance found to be without merit, as long as they have made a reasonable attempt to consider and investigate the grievance and their conduct is not arbitrary, discriminatory, or in bad faith.[165] Thus a court found that an individual employee stated a cause of action by alleging the union's negligent failure to file a written grievance regarding the employee's discharge.[166] The court ordered the union to process the employee's claim through its internal union grievance procedure while it retained jurisdiction of the case.

The courts treat a union's refusal to request arbitration of a grievance similar to its refusal to process the grievance in the first place.[167] The fact that the union's executive board disagreed with local officials on proceeding to arbitration does not establish that the union acted arbitrarily, discriminatorily, or in bad faith,[168] and individual union officers cannot be held personally liable for damages for their conduct.[169] One court held that no breach of fair representation was alleged by reason of the union's refusal to arbitrate

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[163] *Nivins* v. *Sievers Hauling Corp.*, 94 LRRM 2137 (D.N.J. 1976).

[164] *In re Freight Drivers Local 600, Teamsters*, 94 LRRM 3161 (E.D.Mo. 1976).

[165] *Dishman* v. *Crain Bros., Inc.*, 415 F.Supp. 277, 92 LRRM 3137 (W.D.Pa. 1976); *Wagner* v. *Burlington Northern, Inc.*, 411 F.Supp. 537, 92 LRRM 2326 (N.D.Ill. 1976); *Papillon* v. *Hughes Printing Co.*, 92 LRRM 2841 (M.D.Pa. 1976); *Fountain* v. *Safeway Stores, Inc.*, 13 FEP Cases 25 (N.D.Cal. 1975); see also cases at note 37 *supra*.

[166] *Ruggirello* v. *Ford Motor Co.*, 411 F.Supp. 758, 92 LRRM 2228 (E.D.Mich. 1976).

[167] *Gates* v. *Brockway Glass Co.*, 93 LRRM 2367 (C.D.Cal. 1976); *Generalis* v. *Hotel & Restaurant Employees Local 781*, 93 LRRM 2719 (D.D.C. 1975).

[168] *Pesola* v. *Inland Tool & Mfg. Co.*, 423 F.Supp. 30, 93 LRRM 2458 (E.D.Mich. 1976).

[169] *Mims* v. *Capitol Printing Ink Co.*, 92 LRRM 3702 (D.D.C. 1976).

an employee's discharge for alcoholism, because no bad faith was shown by reason of the union's advanced attitude toward alcoholism as a disease and its treatment of the grievant as an ill or disabled employee.[170] In an admitted broad reading of the *Vaca* case which is not universally followed, a Michigan court held that a cause of action was stated by the union's failure to timely request arbitration which led to the arbitrator's denial of the grievance.[171]

A union's good-faith settlement of a grievance as the best deal it can obtain for the employee may preclude further consideration of the claim by the courts.[172] A former supervisor demoted back into the bargaining unit was held not to have a 301 cause of action by reason of the change in the union's contract that deprived him of his accumulated seniority.[173] The court found that the present contract was not violated and that the union does not owe a duty of fair representation to an employee who is not a member of the bargaining unit at the time the language adverse to his interests is negotiated. A union's negotiation of different benefits for different groups of employees or different bargaining units is generally held not to breach its duty of fair representation, since in representing employees a union is bound to experience some conflict of interests.[174]

Even the finding of a violation of Title VII of the Civil Rights Act by the maintaining of a collective bargaining agreement that perpetuates the effects of past discriminatory practices does not mean that the union is guilty of a breach of its duty of fair representation by reason of its negotiation and enforcement of the discriminatory collective bargaining agreement, absent evidence of bad faith or hostile discrimination.[175] The results may be different, however, where the union is engaged in current conduct that is found to be discriminatory.[176]

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[170] *Hilliard* v. *Armco Steel Corp.*, 92 LRRM 3682 (W.D.Pa. 1976).

[171] *Handwerk* v. *Local 136, Steelworkers*, 67 Mich.App. 747, 92 LRRM 3478 (1976).

[172] *Powell* v. *Globe Ind., Inc.*, 94 LRRM 3140 (N.D.Ohio 1977); *Chatman* v. *U.S. Steel Corp.*, 14 FEP Cases 979 (N.D.Cal. 1977); *cf. Atterburg* v. *Anchor Motor Freight*, 23 WH Cases 17.

[173] *Schwartz* v. *Robertshaw Controls Co.*, 92 LRRM 2859 (W.D.Pa. 1976); see also as to union officer returning to the bargaining unit, *Tedford* v. *Peabody Coal Co.*, 533 F.2d 952, 92 LRRM 2990 (5th Cir. 1976).

[174] *Deboles* v. *TWA*, 552 F.2d 1005, 94 LRRM 3237 (3d Cir. 1977); *Anderson* v. *Ambac Ind., Inc.*, 93 LRRM 2747 (N.Y.Ct. of App. 1976); *Belen* v. *Woodbridge Twp. Bd. of Ed.*, 142 N.J.Super 486, 362 A.2d 47, 92 LRRM 3584 (1976).

[175] *Turnow* v. *Eastern Airlines*, 13 FEP Cases 1227 (D.N.J. 1976); *Miller* v. *Continental Can Co.*, 13 FEP Cases 1585 (S.D.Ga. 1976); *Cates* v. *TWA, Inc.*, 13 FEP Cases 201 (S.D.N.Y. 1976); *cf.* regarding use of arbitration as part of remedy, *EEOC* v. *A.T.&T. Co.*, 13 FEP Cases 392 (E.D.Pa. 1976).

[176] See *Allen* v. *Transit Union*, 13 FEP Cases 171 (E.D.Mo. 1976).

According to the reported cases, even in the very few successful fair-representation and breach-of-contract actions by individual employees, the plaintiff is often left with little more than a moral victory due to the limitation of damages to those compensatory rather than punitive in nature unless malice is shown, and the restrictions placed on the recovery of attorney fees.[177] Thus, the Sixth Circuit, in remanding to the district court for the second time a case in which the employee obtained a favorable jury verdict, held that the award of $12,500 damages against the union rested on "sheerly speculative foundation and cannot stand," but affirmed reimbursement to the plaintiff for certain trial expenses incurred in the prosecution of the action in the amount of $1,500.[178] The court noted that an award of attorney fees against the employer would be improper under the traditional American rule, but the plaintiff may include in his action against the union the amount which it cost him in attorney fees and other expenses to do that which the union was obliged to do but failed to do on his behalf. The difficulties of the plaintiff in a wrongful-discharge, fair-representation action is illustrated by a decision of the Fourth Circuit which reversed a jury verdict of $20,000 compensatory damages and $50,000 punitive damages on the ground that the verdict was not supported by substantial evidence.[179] The court held that an arbitration award upholding the employer's discharge action was a final and binding determination, and that the evidence did not establish that the union breached its duty of fair representation in handling the grievance.

V. Arbitration and the NLRB

A. Deferral to Arbitration

The close split among the five Board members of the NLRB on *Collyer*-type deferrals to arbitration has during the past year resulted in a significant change in the NLRB doctrine. After it appeared that the Board's development of its policy regarding deferral-to-arbitration procedures was about to settle down, several decisions were handed down in early 1977 that constitute a retrenchment in that policy. Perhaps as presaging this retrenchment, an analysis of

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[177] *Emmanuel* v. *Carpenters Dist. Council*, 535 F.2d 420, 92 LRRM 2504 (8th Cir. 1976), on remand 422 F.Supp. 204, 93 LRRM 2929 (D.Neb.).

[178] *Scott* v. *Local 377, Teamsters*, 548 F.2d 1244, 94 LRRM 2505 (6th Cir. 1977), citing regarding the denial of attorney fees, *Alyeska Pipeline Services Co.* v. *Wilderness Society*, 421 U.S. 240 (1975).

[179] *Hardee* v. *Allstate Services, Inc.*, 537 F.2d 1255, 92 LRRM 3342 (4th Cir. 1976).

the Board and courts of appeals cases issued during the past year reflects situations restricting deferral to arbitration rather than expanding such deferral. The leading case recently issued by the NLRB is *General American Transportation Corp.*,[180] where Chairman Murphy joined the original *Collyer* dissenters, Members Fanning and Jenkins, to hold that deferral to arbitration is not appropriate in cases alleging a discharge for union activity in violation of Section 8(a)(3) of the NLRA. Chairman Murphy, however, did not reject *Collyer* entirely and would still apply it where (1) the dispute is essentially between the parties to the contract, as in refusal-to-bargain cases; and (2) where no alleged interference with the basic rights of individual employees under Section 7 of the NLRA is involved. Board Members Penello and Walther would continue to apply *Collyer* to all cases involving a contractual violation as established by prior precedent.

General American Transportation has been subsequently applied by the Board in cases involving alleged concerted or union activity protected by Section 7 of the NLRA, such as cases involving the discharge of an employee for asserting a right under the collective bargaining agreement,[181] the discharge of a shop steward,[182] or the punishment of employees for filing grievances.[183] In one such case the Board rejected the contention that the Postal Reorganization Act called for the parties to adopt binding-arbitration procedures and thereby supplanted the NLRB's jurisdiction.[184] In an earlier case the Board had deferred to arbitration a case where the sole issue was whether an employee had been denied the presence of a union representative at a meeting with the employer that preceded the employee's discharge and where all parties, including the employee involved, agreed to utilize and be bound by the grievance and arbitration procedure.[185] The validity of such consensual cases would, under *General American,* appear to be in doubt.

The refusal to defer to arbitration under the *Collyer* decision occurred in a relatively large number of cases issued during the year before the *General American* decision. Thus, the Board refused to defer to arbitration where an employer refused to hire employees referred from the union hiring hall because of their prior efforts to

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[180] 228 NLRB No. 102, 94 LRRM 1483 (1977), overruling *National Radio Co.*, 198 NLRB 527, 80 LRRM 1718 (1972).
[181] *United Parcel Service,* 228 NLRB No. 136, 94 LRRM 1641 (1977).
[182] *Sioux Quality Packers Div., Armour & Co.*, 228 NLRB No. 115, 94 LRRM 1679 (1977).
[183] *U.S. Postal Service,* 228 NLRB No. 147, 94 LRRM 1728 (1977).
[184] *U.S. Postal Service,* 227 NLRB No. 267, 94 LRRM 1685 (1977).
[185] *U.S. Postal Service,* 225 NLRB No. 33, 93 LRRM 1089 (1976).

enforce the collective bargaining agreement, since deferral is inappropriate where the Board's own remedies must be invoked to facilitate access to the contractual grievance procedure and the employer's conduct may have had the effect of discouraging employees from resorting to the grievance procedure.[186] Similarly, there is no deferral in cases alleging a union's discriminatory refusal to refer individuals for employment.[187] In such cases the employee's interests are presumed to conflict with that of the union at arbitration, so these cases are treated the same as if the union had indicated an unwillingness to process a grievance on the employee's behalf.[188]

The Board also generally refuses to defer either in prearbitration disputes under *Collyer* or in postarbitration situations under *Spielberg* in cases involving hot-cargo clauses, secondary boycotts, or jurisdictional disputes.[189] However, a union's attempt to enforce an illegal contractual provision as a means of enforcing a colorable contract right, rather than to accomplish an unlawful objective, does not violate the LMRA.[190] There is also no deferral in unit clarification, accretion, or other representation-case problems.[191] There can be no deferral in cases where the existence of the contract or coverage of the contract is in dispute,[192] nor where a party to the collective bargaining agreement is unwilling to proceed to arbitration or waive the expired time limits for processing a grievance.[193]

At the same time as the *General American* decision, the Board in a second case deferred to arbitration a refusal-to-bargain charge alleging that the employer closed its shop and discharged the employees without notice and bargaining with the union.[194] In this in-

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[186] *Wabash Asphalt Co.*, 224 NLRB No. 108, 93 LRRM 1254 (1976); see also *Houston Chronicle Pub. Co.*, 227 NLRB No. 268, 94 LRRM 1639 (1977); *U.S. Postal Service*, 226 NLRB No. 171, 94 LRRM 1144 (1976); *Nissan Motor Corp.*, 226 NLRB No. 56, 93 LRRM 1249 (1976).

[187] *Operating Engineers Local 18* (Groves & Sons Co.), 227 NLRB No. 213, 94 LRRM 1336 (1977); *Teamsters Local 70* (Lucky Stores, Inc.), 226 NLRB No. 34, 93 LRRM 1245 (1976); *Plumbers Local 725* (Powers Regulator Co.), 225 NLRB No. 18, 93 LRRM 1045 (1976); *Electrical Workers Local 675* (S & M Elec. Co.), 223 NLRB No. 223, 92 LRRM 1207 (1976).

[188] *Columbia Corrugated Container Corp.*, 226 NLRB No. 31, 93 LRRM 1232 (1976).

[189] *Longshoremen Local 1575* (San Juan Freight, Inc.), 226 NLRB No. 10, 93 LRRM 1427 (1976); *T.I.M.E.-DC, Inc.*, 225 NLRB No. 166, 93 LRRM 1270 (1976); *Bricklayers Local 2* (A.G.C. of Minn.) 224 NLRB No. 132, 92 LRRM 1347 (1976).

[190] *AGC of Calif., Inc.*, 227 NLRB No. 27, 94 LRRM 1210 (1976).

[191] *Retail Clerks Local 588* (Raley's), 224 NLRB No. 209, 92 LRRM 1381 (1976); *Ford Tryon Nursing Home*, 223 NLRB No. 98, 92 LRRM 1132 (1976).

[192] *Atlas Tack Corp.*, 226 NLRB No. 38, 93 LRRM 1236 (1976); *Anaconda Co.*, 224 NLRB No. 141, 93 LRRM 1139 (1976); *U.S. Steel Corp.*, 223 NLRB No. 183, 92 LRRM 1158 (1976).

[193] *Central Excavating Co.*, 225 NLRB No. 167, 93 LRRM 1049 (1976) (unwillingness to proceed to arbitration); *Pilot Freight Carriers, Inc.*, 224 NLRB No. 46, 92 LRRM 1338 (1976) (timeliness defense).

[194] *Ray Robinson Chevrolet*, 228 NLRB No. 103, 94 LRRM 1474 (1977).

stance Chairman Murphy voted to defer because the case involved economic considerations and there was no allegation of hostility or animus toward the union or protected concerted activities of the employees. Thus refusal-to-bargain charges appear to be the only viable area left for prearbitral deferral under the *Collyer* doctrine, and there is an exception even in these cases where the alleged refusal to bargain relates to a refusal to furnish information relative to contract administration and enforcement, which is viewed as an obstruction to the grievance and arbitration process.[195]

B. Postarbitral Deferral Under Spielberg

Even the Board's longer standing deferral to arbitration awards under the *Spielberg* case came in for some lumps during the past year, although no serious change in that doctrine occurred, such as occurred to union or protected concerted-activity cases under *Collyer*.[196] In a third decision handed down at the same time as *General American,* the Board refused to defer to an arbitration award in a case where an employee was held not to have been unlawfully discharged for union activity under Section 8(a)(1) and (3) of the LMRA, and for giving testimony or filing charges under Section 8(a)(4) of the LMRA.[197] The Board has always carefully shepherded cases involving 8(a)(4) of the Act as being within its special province to decide, so its refusal to defer to an arbitration award in such a case is expected. The Board further held that the hearing on the charges should include all issues, since the 8(a)(1) and (3) allegations were closely intertwined with the allegations of a violation of Section 8(a)(4)

The Ninth Circuit in *Stephenson* v. *NLRB,*[198] in a two-to-one decision, held that the NLRB's deferral to an arbitration award reinstating a discharged employee was improper because there was no evidence that the arbitration panel "clearly decided the unfair labor practice issue." The majority opinion held that in addition to the traditional three prerequisites for the application of *Spielberg,* namely, (1) the proceedings appear to be fair and regular, (2) all parties had consented to be bound by the arbitration decision, and

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[195] *A.O. Smith Corp.*, 223 NLRB No. 122, 92 LRRM 1160 (1976); see also under *Spielberg, Kroger Co.*, 226 NLRB No. 77, 93 LRRM 1315 (1976).

[196] See such protected-activity cases under *Spielberg* as *AMF Voit, Inc.*, 223 NLRB No. 65, 92 LRRM 1335 (1976); *Automobile Transp., Inc.*, 223 NLRB No. 31, 92 LRRM 1330 (1976).

[197] *Filmation Assoc., Inc.*, 227 NLRB No. 237, 94 LRRM 1470 (1977).

[198] 550 F.2d 535, 94 LRRM 3224 (9th Cir. 1977), citing *Banyard* v. *NLRB,* 505 F.2d 342, 87 LRRM 2001 (D.C.Cir. 1974).

(3) the award was not repugnant to the purposes and policies of the statute, two new prerequisites should be added before deferral is proper: (1) the arbitral tribunal must have *clearly decided* the unfair-labor-practice issue on which the Board is later urged to give deference, and (2) the arbitral tribunal must have decided only issues within its competence. The majority opinion was openly critical of the Board's decision in *Electronic Reproduction Service Corp.*,[199] in which the Board held that it would defer to an arbitration award absent unusual circumstances, even when no indication exists as to whether the arbitral tribunal had considered the unfair-labor-practice issue.

The dissenting judge in the *Stephenson* case held that to put more requirements on top of *Spielberg* may make effective use of the arbitration process extremely difficult. Further, he feared the possibility of game-playing with judicial processes by a party holding back on material issues or arguments, and then, if the arbitration is lost, getting a "second bite at the apple," as was happening in the *Stephenson* case itself. The dissenting judge, therefore, held that the majority opinion would only "prolong and complicate the orderly settlement of labor disputes."

An analysis of the court and NLRB decisions dealing with *Spielberg* during the past year makes it difficult to see how the two additional prerequisites requested by the *Stephenson* majority would add anything of substance to the existing three prerequisites, especially the requirements that the proceedings be fair and regular and that the resulting arbitration award not be repugnant to the policies and purposes of the NLRA. Thus, the Ninth Circuit upheld the NLRB's refusal to defer to an arbitration award where the arbitrator sustained the discharge of an employee for calling the employer's manager a "liar" during a grievance session, on the ground that the award was clearly repugnant to the LMRA and the employer's actions substantially diluted the employee's right to fully present his grievance.[200] In another court decision, the Seventh Circuit also upheld the NLRB's refusal to defer to an arbitration award sustaining a discharge of an employee for distributing leaflets as also being repugnant to the policies and purposes of the statute.[201]

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[199] 213 NLRB 758, 87 LRRM 1211 (1974).

[200] *Hawaiian Hauling Service, Ltd.* v. *NLRB*, 545 F.2d 674, 93 LRRM 2952 (9th Cir. 1976).

[201] *Dreis & Krump Mfg. Co.* v. *NLRB*, 544 F.2d 320, 93 LRRM 2739 (7th Cir. 1976).

The NLRB itself, in a number of decisions during the past year utilizing *Spielberg* criteria, refused to defer to arbitation awards on the ground that the arbitral tribunal failed in sustaining discharges to consider the unfair-labor-practice issue or LMRA protections.[202] What the *Stephenson* holding would add in the consideration of these and similar *Spielberg*-type cases is not clear. The NLRB also refuses to defer to arbitration awards where there is evidence of continuing discrimination against employees after the issuance of an award because of the filing of grievances.[203]

C. Other NLRA Decisions Affecting Arbitration

The NLRB and the courts are continually presented with cases dealing with the grievance-arbitration process as it is affected by the NLRA. Even though the filing of grievances under a collective bargaining agreement is held to be protected concerted activity by the NLRB,[204] the Board has held that the fact that an employee has a right to file a grievance is not a ground to withhold a complaint, since the right to file a grievance does not preclude the Board from seeking to redress conduct which clearly violates the statute.[205] The Third Circuit, however, held during the past year that the NLRB erred in finding that an employer violated Section 8(a)(3) of the LMRA by the discharge of employees who engaged in a strike to protest the execution of a collective bargaining agreement while a decertification-election petition and a rival-union-representation petition for election were pending, since the discharges were arbitrable under the existing contract.[206]

Most of the cases deal with problems faced by employees in processing their grievances. The Seventh Circuit upheld an NLRB finding that a union breached its duty of fair representation by failing in its obligation to advocate a member's grievance fully and fairly despite the fact that the grievance actually lacked merit.[207] The NLRB itself found that a union violated the statute by its perfunctory handling of a grievance;[208] by its arbitrary refusal to take a

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[202] *Versi Craft Corp.*, 227 NLRB No. 129, 94 LRRM 1207 (1977); *Jo-Jo Mgt. Corp.*, 225 NLRB No. 156, 93 LRRM 1475 (1976); *Clara Barton Conval. Center*, 225 NLRB No. 139, 92 LRRM 1621 (1976); *Sabine Towing & Transp. Co.*, 224 NLRB No. 135, 92 LRRM 1562 (1976).

[203] *Shippers Dispatch, Inc.*, 223 NLRB No. 52, 92 LRRM 1252 (1976).

[204] *Givaudan Corp.*, 225 NLRB No. 177, 93 LRRM 1188 (1976).

[205] *F.S. Willey Co.*, 224 NLRB No. 151, 92 LRRM 1589 (1976).

[206] *Suburban Transit Corp.* v. *NLRB*, 536 F.2d 1018, 92 LRRM 3045 (3d Cir. 1976).

[207] *Kesner* v. *NLRB*, 352 F.2d 1169, 92 LRRM 2137 (7th Cir. 1976).

[208] *P & L Cedar Products*, 224 NLRB No. 39, 93 LRRM 1341 (1976).

grievance;[209] by its refusal to consider evidence offered by the grievant;[210] and by its refusal to investigate the merits of the grievance and filing intra-union charges against the grievant for causing dissension because of the filing of the unfair-labor-practice charge.[211] No violation was found, however, where a union withdrew a grievance of one employee accused of fighting, but processed the grievance of the second employee involved in order to equalize the discipline of both employees where the second employee was given a much longer suspension.[212] The Ninth Circuit upheld an NLRB ruling that a union violated the statute by denying an employee the contractual right to bump by submitting the question to a referendum of the membership.[213] The court and the Board held that this was an unfair method to determine a question where there was no issue as to whether bumping in general should be allowed, but only whether this employee on this occasion should be permitted to exercise the right to bump. Another union was found to have violated the NLRA by insisting on and enforcing a ban on its members accepting temporary supervisory positions, on the ground that this conduct restrained and coerced the employer in its selection of representatives for purposes of adjusting grievances.[214]

The Ninth Circuit held that the NLRB erred in refusing to give any weight to a federal court decision in a 301 action rescinding a collective bargaining agreement, where the Board found to the contrary that the union had an irrebuttable presumption of a majority at the time it entered into a contract.[215] The court noted that the Board was faced with the same parties, essentially the same contract issue, and the same arguments that were before the court in the 301 action. Also in the bargaining area, where an employer was found to have bargained in bad faith during contract negotiations with the union, the Board refused to order the employer to submit the unresolved issues to arbitration, since the evidence failed to establish that an agreement to arbitrate such issues was reached by the parties.[216] In regard to interest-arbitration clauses, the courts and

[209] *Automobile Workers Local 600* (Ford Motor Co.), 225 NLRB No. 185, 93 LRRM 1233 (1976).
[210] *Steelworkers* (Inter-Royal Corp.), 223 NLRB No. 177, 92 LRRM 1108 (1976).
[211] *Western Exterminator Co.*, 223 NLRB No. 181, 92 LRRM 1161 (1976).
[212] *Steelworkers Local 2610* (Bethlehem Steel Corp.), 225 NLRB No. 54, 93 LRRM 1163 (1976).
[213] *NLRB* v. *Teamsters Local 315* (Rhodes & Jamieson, Ltd.), 545 F.2d 1173, 93 LRRM 2747 (9th Cir. 1976).
[214] *Communications Workers Local 1122* (N.Y. Tel. Co.), 226 NLRB No. 7, 93 LRRM 1161 (1976).
[215] *NLRB* v. *Stanwood Thriftmart*, 540 F.2d 796, 92 LRRM 3603 (9th Cir. 1976).
[216] *Television Wisconsin, Inc.*, 224 NLRB No. 96, 93 LRRM 1494 (1976).

the NLRB, with Chairman Murphy dissenting, are in agreement than an interest-arbitration clause is a nonmandatory subject of bargaining.[217] Therefore, a union violates its bargaining obligation by insisting to impasse on such a clause, even where the union has such a clause in its existing contract and is invoking it in order to obtain a similar clause in a new contract.[218]

VI. Conclusion

The shifting sands of NLRB and court opinion as to whether formalized Board processes and procedures are to be exalted over the promotion of collective bargaining and the utilization of the methods agreed upon by the parties to settle their disputes promises to have little overall effect on the arbitral process or on the number of cases submitted thereunder. While some parties and employees will continue to have recourse outside of contractual procedures to settle their particular problems, either in lieu of or in addition to grievance-arbitration processes, the use of the arbitral forum for the settlement of disputes does not appear to be in any danger of diminution, as evidenced by the continuing choice of arbitration clauses in collective bargaining agreements for the resolution of disputes and by the steady volume of court litigation touching on the arbitral process.

The Supreme Court continues to show an abiding interest in resolving disputed issues affecting arbitration and tends to extend the use of arbitration whenever possible. This is evidenced during the past year by the *Nolde* decision regarding the use of arbitration for certain disputes after the termination of a collective bargaining agreement. Thus there is no indication of any lessening of the influence of arbitration in the labor relations field.

Further, the courts are very sensitive about not usurping the role of the arbitrator in reaching a final and binding decision of a contract dispute. The finality accorded to arbitration by the courts is well illustrated by the language of District Judge Connor in *Garment Workers Local 32,*[219] wherein he stated as follows:

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[217] *NLRB* v. *Greensboro Printing Pressmen No. 319,* 549 F.2d 308, 94 LRRM 2752 (4th Cir. 1977); *Massachusetts Nurses Ass'n* (Lawrence Gen. Hosp.), 225 NLRB No. 91, 92 LRRM 1478 (1976).

[218] *NLRB* v. *Columbus Printing Pressmen No. 252,* 543 F.2d 1161, 93 LRRM 3055 (5th Cir. 1976).

[219] *Supra* note 89.

"The Employer's contentions need not detain us long. It is enough to note that those contentions in effect invite this Court to go beyond the proper scope of its review. That scope is restricted for good reason: the national policy favoring settlement of labor disputes through arbitration would surely be subverted by an unrestrained judicial inquiry into the merits of an arbitrator's award. . . . So long as an arbitrator has based his award on an even-handed interpretation of the parties' agreement—as was clearly done in the present case—rather than by reference to his own notions of 'industrial justice,' . . . his award cannot be undone." (92 LRRM at 2660-61)