The Supreme Court and Labor Arbitration

By WILLIAM B. GOULD

This article deals with the three Supreme Court decisions handed down on June 20, 1960, involving Section 301 of the Taft-Hartley Act. The author contends that these decisions work well to preserve the labor arbitration system.

MANY YEARS AGO Mr. Justice Holmes said that "[i]f the State thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction . . . *the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law.'*" (Italics supplied.)[1]

This policy of judicial restraint which Holmes wished to exercise with regard to the power to void state legislation seems now to be governing the Supreme Court's attitude in its first encounters with the complex problem of labor arbitration. The Court's deference in the former situation was partially attributable to a recognition of the state's more expert understanding of its own economic problems and the inability of the judiciary to make substitutions in this realm. The similar treatment of labor contracts by the Court is an indication of respect for the skills and creativeness that are peculiar and necessary to the labor arbitration proceeding and, more importantly, it represents judicial acknowledgement that the arbitrator is a fact of American industrial life.[2]

The federal courts have become involved in the enforcement of arbitration agreements through Section 301 of the Taft-Hartley Act which provides that suits for violations of labor contracts may be brought in a United States district court without the usual requirements of amount in controversy and diversity.[3] If one can judge by the vast outpouring of literature on this subject it would seem to be a topic in which the scholars find great fascination.[4]

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[1] *Otis v. Parker,* 187 U. S. 606 (1903).

[2] A private survey in 1956 showed that 91 per cent of agreements surveyed provided for arbitration of some kind and 89 per cent contained some variety of no-strike clauses.

[3] 61 Stat. 156, 29 USC Sec. 185:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

[4] A classic treatment of this subject was writen by a pioneer in the field. See Shulman, "Reason, Contract, and Law in Labor Relations," 68 *Harvard Law Review*

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Of all aspects of contemporary life, none serves better than labor relations to demonstrate the vicious, antisocial consequences of the holistic view, with its subordination of the individual to the group, its sacrifice of personal freedom to group power and authority.—Sylvester Petro

Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation[5] marked the Supreme Court's first significant ruling on Section 301. This case did not involve arbitration, but was a suit brought by the union to recover back wages on behalf of the employees. Mr. Justice Frankfurter wrote the majority opinion and at the outset he expressed grave concern with regard to constitutional difficulties in litigation previously entertained by the states. He wrote the following:

"Federal jurisdiction based solely on the fact of federal incorporation has . . . been severely restricted by Congress, and this Court has cast doubt on its continued vitality. Whether the precedent might be extended to meet the substantial difficulties encountered under § 301 would pose a serious constitutional problem."[6]

Perhaps Justice Frankfurter could not resolve this question in his own mind. In any event he went on to other topics of discussion while the constitutional problem was left hanging.[7] He stated that this kind of suit was not contemplated by Congress under Section 301. There was no manifest intent on their part to flood the courts with grievances in search of remedies which could be obtained in state courts.[8] Consequently, the

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999 (1955). See also Cox, "Reflections Upon Labor Arbitration," 72 *Harvard Law Review* 1482 (1959); Cox, "Current Problems in the Law of Grievance Arbitration," 30 *Rocky Mountain Law Review* 247 (1958); Cox, "The Legal Nature of Collective Bargaining Agreements," 57 *Michigan Law Review* 1 (1958); Gregory, "The Law of the Collective Agreement," 57 *Michigan Law Review* 635 (1959); Feinsinger, "Enforcement of Labor Agreements—A New Era in Collective Bargaining," 43 *Virginia Law Review* 1261 (1957); Bunn, *"Lincoln Mills* and the Jurisdiction to Enforce Collective Bargaining Agreements," 43 *Virginia Law Review* 1247 (1957); Mendelsohn, "Enforceability of Arbitration Agreements Under Taft-Hartley Section 301," 66 *Yale Law Journal* 167 (1956); Summers, "Judicial Review of Labor Arbitration or Alice Through the Looking Glass," 2 *Buffalo Law Review* 1 (1952); Mayer, "Judicial 'Bulls' in the Delicate China Shop of Labor Arbitration," 2 LABOR LAW JOURNAL 502 (July, 1951); Bickel & Wellington, "Legislative Purpose and the Judicial Process: The *Lincoln Mills* Case," 81 *Harvard Law Review* 1 (1957); Kramer, "In the Wake of *Lincoln Mills*," 9 LABOR LAW JOURNAL 835 (November, 1958); Jolet, "Judicial Review of Arbitration: The Judicial Attitude," 45 *Cornell Law Quarterly* 519 (1960); Hoebreckx, "Federal Courts Under Section 301," 43 *Marquette Law Review* 417 (1960); Note, 59 *Columbia Law Review* 153 (1959); Note, 72 *Harvard Law Review* 577 (1959).

[5] 27 LC ¶ 69,063, 348 U. S. 437 (1955).

[6] Cited at footnote 5.

[7] He wrote that "serious constitutional problems may be avoided and indeed must be, through the orthodox process of limiting the scope of doubtful legislation."

Professor Wellington raises an interesting and subtle point on this subject. See, Wellington, "Judge Magruder and the Labor Contract," 72 *Harvard Law Review* 1268 (1959) wherein he writes the following:

"No one would suggest that under . . . Article III Congress may grant to the courts jurisdiction over subject matter which it can not reach substantively under Article I. Perhaps, however, it has the power to go just as far jurisdictionally as it could have gone substantively. The national interest in a particular area of law susceptible to regulation under Article I may not demand complete and immediate substantive uniformity."

[8] For an elaborate state statute in this area see New York Civil Practice Act, Secs. 1448-1469; The New York statute contains, among other things, provisions to stay arbitration proceedings brought in violation of the arbitration contract, and to confirm, vacate, modify or correct the award.

Court found itself without jurisdiction to hear *this particular suit:* [9]

"Nowhere in the legislative history did Congress discuss or show any recognition of the type of suit involved here, in which the union is suing on behalf of employees for accrued wages. Therefore, we conclude that Congress did not confer on the federal courts jurisdiction over a suit such as this one." [10]

If it is possible to make one sweeping comment about the *Westinghouse* case it is the absolute failure of the opinion to stake out a signpost for future litigants. The decision did not lend itself to predictability. The landmark decision of *Textile Workers of America v. Lincoln Mills* [11] was an attempt to clear up existing doubts and to establish a clear interpretation of Section 301.

The *Lincoln Mills* case was a suit to enforce a collective bargaining agreement to arbitrate. Mr. Justice Douglas, writing for the majority, first sought to examine Section 301 and see if it was meant to be more than jurisdictional. Admitting that the legislative history was hazy, he nevertheless discerned "a few shafts of light that illuminate our problem." [12] Justice Douglas expressed the view that "Congress was also interested in promoting collective bargaining that ended with agreements not to strike." [13] That this was indeed the intent of Congress can be best demonstrated by a provision of Taft-Hartley which contains the following:

"Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." [14]

The court took notice of this legislative desire to insure industrial tranquillity through peaceful arbitration:

"Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can best be obtained only in that way." [15]

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[9] The Court was not troubled by the possibility of a breach of contract being an unfair labor practice and thus pre-empted by the exclusive jurisdiction of the National Labor Relations Board. It disposed of this problem in footnote 2 at pp. 443-444; See, *Cameron Iron Works, Inc. v. International Association of Machinists,* 35 LC ¶ 71,671, 257 F. 2d 467 (CA-5, 1958), cert. den., 358 U. S. 880 (1958); See, also, in this regard, Jenkins, "The Peacemakers," 47 *Georgetown Law Journal* 435 (1959); Meltzer, "The Supreme Court, Congress and State Jurisdiction Over Labor Relations," II 59 *Columbia Law Review* 269 (1959).

[10] Case cited at foonote 5. Chief Justice Warren concurred in a separate opinion, Mr. Justice Clark joining him. They rested their decision on statutory interpretation and they did not choose to raise the Constitutional issues. Mr. Justice Douglas dissented and Mr. Justice Black concurred in this dissent:

"We make mountains out of molehills in not allowing the union to be the suing as well as the bargaining agency by its members as respects matters involving the construction and enforcement of the collective bargaining agreement."

Justice Douglas went on to admonish the Court for failing "to keep the law abreast of the industrial development of this age."

[11] 32 LC ¶ 70,733, 353 U. S. 448 (1957).

[12] Cited at footnote 11.

[13] Cited at footnote 11. Senator Taft stated that "[t]he purpose of Title III is to give the employer *and the employee* the right to get to the federal court to bring a suit to enforce the terms of a *collective agreement.*"

[14] 29 USC Sec. 173(d).

[15] Case cited at footnote 11. In a footnote the *Westinghouse* case was found to be distinguishable in that arbitration was not involved there. Professor Gregory writes that "the Court has allowed indirectly in *Lincoln*

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The Undersecretary of Labor, W. Willard Wirtz, has been appointed Executive Director of the President's Advisory Committee on Labor-Management Policy, effective immediately, by President Kennedy.

The opinion went on to declare that federal law would be applicable and, with a furtive glance at the above quoted provision of Taft-Hartley, stated that it would be fashioned from our national labor laws. Some imagination was to be required in those cases which fell within the penumbra of statutory expressions: "The range of judicial inventiveness will be determined by the nature of the problem." [16] Federal interpretation of federal law would govern, but state law, if compatible, would be incorporated so as to effectuate federal policy.[17] Justice Douglas noted that it was not uncommon for federal courts to enunciate federal law where federal rights were concerned. The obstacle of the Norris-LaGuardia Act was surmounted through recognition that arbitration was not part of the abuses at which the act was aimed.[18]

(Footnote 15 continued)
Mills what it denied in *Westinghouse*. If it has in effect overruled the older case, we should be told about it!" See Gregory, "The Law of the Collective Agreement," 57 *Michigan Law Review* 635 (1959); Professor Meltzer writes that "[s]ince the decisions involved distinctions dubious in the light of the pertinent functional considerations as well as the possibility of early obsolescence it is doubtful that the delaying game was worth the candle." See Meltzer, cited at footnote 9.

The *Westinghouse* case was followed in *Silverton v. Valley Transit Cement Company Inc.*, 33 LC ¶ 71,082, 249 F. 2d 409 (CA-9, 1957); *Communications Workers of America v. Ohio Bell Telephone Company*, 35 LC ¶ 71,655, 160 F. Supp. 822 (DC Ohio, 1958); *Textile Workers Union of America v. Bates Manufacturing Company*, 34 LC ¶ 71,253, 158 F. Supp. 410 (DC Me., 1958); But, see, *International Union, UAW, Local 408 v. Crescent Brass and Pin Company*, 41 LC ¶ 16,760 (DC Mich., 1960) for a severe abrogation of the *Westinghouse* doctrine. Here arbitration was not in question, but rather company's attempted repudiation of its entire collective bargaining agreement. Under Sec. 301 the entire contract was held enforceable, the personal rights argument being rejected.

[16] Case cited at footnote 11.

[17] Professors Bickel and Wellington are staunch critics of the opinion in *Lincoln Mills*. They intimate that it lacks articularity and write that "there is nothing disreputable about the modern American doctrine which refuses to impute to Congress the casual intention to make vast and far-reaching changes in existing or statutory common law especially if the effect is an important alteration in the federal balance. Such is most certainly the effect of Section 301 if it is read to create a body of substantive federal law, for if it does, it creates an exclusive one. No competing state law could survive under the supremacy clause of the Constitution." Bickel and Wellington, "Legislative Purpose and the Judicial Process: The *Lincoln Mills* Case," cited at footnote 4. In this regard see also Hanslowe, "Section 301 of Taft-Hartley and the Brooding Omnipresence of William Winslow Crosskey," 35 *University of Detroit Law Journal* 201 (1957).

[18] In the case cited at footnote 11, Justice Douglas wrote that "(t)he kinds of acts which had given rise to abuse of the power to enjoin are listed in Sec. 4. The failure to arbitrate was not a part and parcel of the abuses against which the Act was aimed."

A problem that now besets the courts concerns the enjoining of violations of no-strike clauses. Generally it has been held that injunctive relief under Sec. 301 could not apply to picketing and strikes; *W. L. Mead, Inc. v. Teamsters, Local 25*, 27 LC ¶ 68,808, 217 F. 2d 6 (CA-1, 1954); *Alcoa Steamship Company, Inc. v. McMahon*, 15 LC ¶ 64,819, 81 F. Supp. 541 (DC N. Y., 1948); *UE, Local 205 v. General Electric Company*, 30 LC ¶ 69,908, 233 F. 2d 85 (CA-1, 1956); *A. H. Bull Steamship Company v. Seafarers' Union*, 33 LC ¶ 71,095, 250 F. 2d 326 (CA-2, 1957), cert. den., 355 U. S. 932 (1958). There are, however, recent decisions upholding the injunction; *American Smelting and Refining Company v. Tacoma Smeltermen's Union, Local 25*, 37 LC ¶ 65,714, 175 F. Supp. 750 (DC Wash., 1959); *Johnson & Johnson v. Textile Workers Union*, 40 LC ¶ 66,658 (DC N. J., 1960); *Teamsters Union, Local 795 v. Yellow Transit Freight Lines*, 41 LC ¶ 16,541, 282 F. 2d 345 (CA-10, 1960).

See, also, Dannett, "Picketing in Breach of a No-Strike Clause," 11 LABOR LAW JOURNAL 379 (May, 1960).

Mr. Justice Frankfurter dissented emphatically. He viewed Section 301 as jurisdictional alone and barren with respect to federal rights. Thus, since the statute said that there was no need for diversity of citizenship and the required amount, Frankfurter reasoned that the federal courts could not constitutionally hear such actions.[19] The reasons for this dissent went beyond constitutional grounds, however, and one of them is particularly pertinent to the main theme of this paper.

Justice Frankfurter voiced deep skepticism in Justice Douglas' reliance on "judicial inventiveness" when he criticized the Court for failing to perceive the troublesome problems involved in judicial review of arbitration agreements. He remarked caustically that "the task of applying a whole industrial code . . . is as yet in the bosom of the judiciary." [20]

Since it was clear that the courts must now meet the many questions involved in arbitration [21] many of the scholars began to echo Justice Frankfurter's concern. Was the judiciary prepared to delve into the virgin territory of labor contracts? The resounding answer was bleakly pessimistic.

Professors Bickel and Wellington wrote that "the courts are enormously unequal to the task and its imposition on them is therefore capable of damaging their usefulness for the essential duties that they are suited to perform." [22] They viewed the experience of the courts as not germane to the issues at hand and predicted that the judiciary would fumble. Professor Aaron found judicial interference "more terrifying than beautiful." He indicated dismay at the "intervention by the federal courts into the hitherto private relationships of employers and unions, an intervention which . . . may well result in the destruction of systems of industrial self-government that have taken decades to build." [23] Professor Feinsinger envisaged the breakdown in specific terms.[24] He wrote that a uniform federal law would be fashioned from atypical cases and that labor and management would desist from their own rule making and incorporate that of the courts. He also feared that labor, finding the injunction and damage sword to be two-edged, would think seriously about eliminating both no-strike and arbitration clauses. The general tenor running through these writings was one of doubt and a justifiable fear that the federal courts would indulge in the excesses of the *Cutler-Hammer* doctrine.

The New York decision of *International Association of Machinists v. Cutler-Hammer, Inc.*[25] vividly exemplified

[19] It is to be remembered that he had intimated as much in the *Westinghouse* case.

[20] Case cited at footnote 11.

[21] Professor Gregory would have arbitrators decide the question of arbitrability in the first instance with the courts having "practically" nothing to do with it. Gregory, "The Law of the Collective Agreement," 57 *Michigan Law Review* 635 (1959); See, also, Note, cited at footnote 4, at pp. 172-173.

Draft, 3, proposed United States Labor Arbitration Act (National Academy of Arbitrators) treats the problem similarly. Sec. 5 allows the court to look for an agreement to arbitrate. If such an agreement exists the case will be remanded to the arbitrator who will decide the arbitrability question with respect to the particular dispute involved.

[22] Bickel and Wellington, cited at footnote 4.

[23] Aaron, "On First Looking Into the *Lincoln Mills* Decision," *Arbitration and the Law-Proceedings of the Twelfth Annual Meeting National Academy of Arbitrators,* pp. 1, 3 (McKelvey, ed., 1959).

[24] Feinsinger, "Enforcement of Labor Agreements—A New Era In Collective Bargaining," 43 *Virginia Law Review* 1261, (1957).

[25] 12 LC ¶ 63,574, 271 App. Div. 917, 67 N. Y. S. 2d 317 (NY, 1947), aff'd, 13 LC ¶ 63,931, 297 N. Y. 519, 74 N. E. 2d 464 (1947). The appellate division said: "If the

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John L. Seigenthaler, assistant to the attorney general was named by Attorney General Kennedy as his alternate on the President's Committee on Equal Employment Opportunity, and was given the responsibility for studying government department employment practices.

unlimited judicial review in the interpretation of labor agreements. In this case the contract said that a 6 per cent bonus was to be given to the workers for the last six months of 1945. Trouble arose over a clause which stated the following:

"The Company agrees to meet with the union early in July, 1946, to discuss payment of a bonus for the first six months of 1946."

The company met, but refused to pay the bonus. The union claimed that the contract contemplated *some* bonus to be paid and that the amount alone was left open for discussion. Despite two dissenting opinions, the New York Court of Appeals, nevertheless, held that the words in dispute were too clear to render the union's contention possible and, consequently, no arbitrable dispute existed. Thus the court daringly plunged itself into the heart of arbitration. It had decided the merits of this case under the guise of deciding the arbitrability question and it achieved this undesirable result when a more capable and specialized *forum* was available—the arbitration proceedings.

On June 20, 1960, the Supreme Court handed down three decisions which will send the courts in another direction from that of *Cutler-Hammer*. In doing so the Court has recognized that this problem cannot be easily analogized to those controversies which the courts are more accustomed to dealing with.

The first of the trilogy is *United Steelworkers of America v. American Manufacturing Company.*[26] This suit was brought by the union in district court to compel arbitration of a "grievance of a member." The employer defended its position on the ground that the employee was estopped from making his claim because he had already settled a workmen's compensation claim against the company. This settlement was made on the basis that the employee was permanently partially disabled, that he was unable to do the physical work required, and that the dispute was not arbitrable. The agreement had both a no-strike clause and a standard arbitration provision covering all disputes of the parties as to the meaning, interpretation and application of the contract.[27] Also included was the management power to suspend or discharge "for cause" and the promise to employ and promote employees on the basis of seniority "where ability and efficiency are equal." The union grieved for reinstatement of the employee and

(Footnote 25 continued)
meaning of the provision of the contract sought to be arbitrated is beyond dispute, there can not be anything to arbitrate and the contract can not be said to provide for arbitration." In accord, see, *General Electric Company v. UE,* 300 N. Y. 262 (1949).

[26] 40 LC ¶ 66,628, 363 U. S. 564 (1960).

[27] Here the contract contained the following: "Any disputes, misunderstandings, differences or grievances arising between the parties as to the meanings, interpretation and application of the provisions of this agreement, which are not adjusted as herein provided, may be submitted to the Board of Arbitration for decision . . . ."

For a similar standard form see *Agreement Between General Motors Corporation and the UAW:* "Any issue involving the interpretation and/or the application of any term of this Agreement may be initiated by either party with the other party. Upon failure of the parties to agree with respect to the correct interpretation or application of the Agreement to the issue, it may then be appealed directly to the Umpire . . . ."

asked for arbitration on the basis of the seniority clause. Upon action to compel arbitration the district court accepted the employer's estoppel argument, but the Sixth Circuit, realizing that the matter of the grievant's injury had never been judicially determined,[28] restricted its affirmance to the contention that this grievance was frivolous and baseless.[29] Mr. Justice Douglas writing for the majority, admonished the lower courts for a preoccupation with ordinary contract law. He noted that industrial grievances assumed "proportions of which judges are ignorant." The Court went on to state that ". . . the agreement to arbitrate is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious. There is no exception in the 'no-strike' clause and none therefore should be read into the grievance clause, since one is the *quid pro quo* for the other. The question is not whether in the mind of a court there is equity in the claim. Arbitration is a stabilizing influence only as it serves as a vehicle for handling every and all disputes that arise under the agreement." [30] The judicial function, as enunciated by Justice Douglas, is to be restricted to ascertaining whether or not the party is making a claim that is governed by the collective agreement:

"The courts . . . have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those the court will deem meritorious. The processing of even frivolous claims may have therapeutic value which those who are not a part of the plant environment may be quite unaware."[31]

Since in this case the union based its case on the seniority provision the controversy was ordered to arbitration.

United Steelworkers of America v. Warrior and Gulf Navigation Company [32] involved a grievance concerning company subcontracting which reduced the bargaining unit from 42 to 23 men. The agreement contained "no-strike" and "no lockout" clauses and the only significant difference from the *American* arbitration provision was that here disputes over "local trouble" were included. Despite such provisions the district court focused primary attention on the management rights clause and dismissed the union complaint to compel arbitration.[33] The Fifth Circuit affirmed the "inherent" right of management to subcontract. They viewed union contentions that this action was a lockout as "clearly a simple play on words." [34] Evidently, all was not so certain as the majority would have had us believe for, as in *Cutler-Hammer,* there was disagreement among the judges themselves as to the clear meaning of words. Judge Rives, dissenting, wrote that

[28] *United Steelworkers of America v. American Manufacturing Company,* 36 LC ¶ 65,300, 264 F. 2d 624 (CA-6, 1959).

[29] Cited at footnote 28. This is a good example of judicial interference in the field. How did the court know that grievant's claim of equal efficiency was completely baseless? Did it compare grievant to the most efficient employee? Did it compare him to the least efficient? The court did not say. See *Brief for Petitioner,* pp. 53-56.

[30] Case cited at footnote 26.

[31] Case cited at footnote 26.

[32] 40 LC ¶ 66,629, 363 U. S. 574 (1960).

[33] *United Steelworkers of America v. Warrior & Gulf Navigation Company,* 36 LC ¶ 65,125, 168 F. Supp. 702 (DC Ala., 1958): "The Court finds that the contracting out of repair and maintenance work as well as construction work, is strictly a function of management not limited in any respect by the labor agreement involved here."

[34] *United Steelworkers of America v. Warrior & Gulf Navigation Company,* 37 LC ¶ 65,675, 269 F. 2d 633 (CA-5, 1959).

Total strike idleness rose slightly in February to approximately 850,000 man-days; about a third less than in the two previous Februarys.
—Labor Department.

"[t]he essential question then is whether the contract contemplates the determination of these charges by arbitration. When attention is directed to the nature of the issues raised by charges, it is clear that this question must be answered affirmatively." [35] In skirting the question of merits Mr. Justice Douglas looked once more to the federal labor laws and the *quid pro quo* argument:

"In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife." [36]

He realized that this was more than an ordinary contract, but rather a code to govern cases which the draftsman could not anticipate in entirety. He wrote the following:

"Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shop covered by the agreement. Many of the specific practices which underlie the agreement may be unknown except in hazy form, even to the negotiators . . . . *Arbitration is the means of solving the unforseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement.*" (Italics supplied.)[37]

The considerations that must enter into the arbitrator's mind with respect to shop tensions, morale and uninterrupted production have all been noted by the Court.[38] Doubts that face the judiciary as to whether a particular grievance is arbitrable or not are to be resolved in favor of coverage. This

[35] Cited at footnote 34. An implied bar against subcontracting was found to exist in the following cases: *Celanese Corporation of America,* 14 L. A. 31 (1950); *A. D. Juliard Company,* 21 L. A. 713 (1953); *Magnolia Petroleum Company,* 21 L. A. 267 (1953). See, particularly, *Celanese Corporation of America,* 33 L. A. 925 (1959) wherein the arbitrator notes that implied limitations on management's power to subcontract have been drawn in 45 out of 64 reported cases. Most of the other cases indicated that company action must be in good faith and not be done to undermine the collective bargaining relationship. *No arbitrator doubted that such action involved the interpretation and application of the agreement.*

Mr. Ralph Seward, a leading arbitrator, wrote that the question of an implied contractual bar rested on *"this particular . . . work, at this particular plant and under the circumstances of this particular case." Bethlehem Steel Company,* 30 L. A. 678 (1958). To state that these decisions must be made by the arbitrator on an ad hoc basis is to state the only generalization that one can make in this area.

It is, of course, axiomatic that the union must not be hindered in performing its contractual obligations with increasing difficulties. It is an old principle that "where a party stipulates that another shall do a certain thing, he thereby impliedly promises that he will himself do nothing which will hinder or destruct the other in doing that thing." 3 Williston, *Contracts* 570 (Rev. Ed.).

[36] Case cited at footnote 32. The vital difference between the arbitration and the commercial arbitration which requires express language is that the former is "the substitution of the judgment of a third party for the use of economic force." See *Brief for Petitioner, Textile Workers Union of America v. Lincoln Mills,* p. 32.

[37] Case cited at footnote 32.

[38] A stalemate over the small grievance will favor the employer in that the union will be unable or unwilling to strike over every dispute. Dean Shulman wrote that "[t]he consequence is either that unadjusted grievances are accumulated until there is an explosion or that groups of workers less than the entirety, resort to job action, small stoppages, slow-downs, or careless workmanship to force adjustment of their grievances." Shulman, cited at footnote 4.

is because the "labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective part of the collective bargaining agreement although not expressed in it . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." [39] Thus the Court has laid down a broad policy interpretation of Section 301 [40] in an attempt to avoid the prophesied pitfalls:

"In the absence of any express provisions excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim can prevail . . . . The judiciary sits in these cases to bring into operation an arbitrae process which substitutes a regime of peaceful settlement for the older regime of industrial conflict." [41]

The significance of this attitude becomes manifest when we contrast it with the following statement of the First Circuit:

"Focusing our attention exclusively on the language of § 301(a), *it is obvious that the plaintiff, in a suit under § 301(a), has the burden of establishing that it is bringing a suit for appropriate relief, legal or equitable, for violation of a collective bargaining agreement.*" (Italics supplied.) [42]

The burden of proof is now completely on the shoulders of the defendant.

The third opinion, *United Steelworkers of America v. Enterprise Wheel and Car Corporation,* [43] has a

[39] Case cited at footnote 32. Past practices outside the contract may be important to an arbitrator's judgment. See Cox, "Reflections Upon Labor Arbitration," cited at footnote 4.

An example of implied contractual provisions can be found in the arbitrator's power to award back pay. See *International Harvester Company,* 9 L. A. 895 (1947); *International Paper Company,* 31 L. A. 494 (1958); *Mississippi Aluminum Corporation,* 27 L. A. 625 (1956); *Oregonian Publishing Company,* 33 L. A. 574 (1959); *Consolidated Paper Company,* 33 L. A. 841 (1959); *Electra Crate Box Company,* 32 L. A. 228 (1959); *United States Industrials Chemicals Company,* 33 L. A. 335 (1959).

[40] Mr. Justice Whittaker was the lone dissenter in this case. He remarked that the majority opinion "is an entirely new and strange doctrine to me." Case cited at footnote 32.

It must be admitted that decisions are pure judicial legislation. There were those who advocated turning the task over to Congress. See Kramer, cited at footnote 4; Meltzer, cited at footnote 9.

[41] Case cited at footnote 32. Justice Douglas seems to have stated the case for arbitration even more strongly than so staunch an advocate as Professor Cox. The latter's view was slightly different: "the court's role is limited to determine whether the moving party is really basing its claim on the contract or is seeking to have the arbitrator decide according to equity and sound industrial relations. In the latter event arbitration should be denied. In the former case arbitration should be ordered in a judgment which should also emphasize the restrictions upon the arbitrator's power." Cox, "Current Problems in the Law of Grievance Arbitration," cited at footnote 4.

[42] *Local No. 149, Technical Engineers v. General Electric Company,* 33 LC ¶ 71,149, 250 F. 2d 922 (CA-1, 1957), cert. den., 356 U. S. 938 (1958). See Judge Wyzanski's interesting comment with respect to this case in *Boston Mutual Life Insurance Company v. Insurance Agents' International Union,* 34 LC ¶ 71,469, 161 F. Supp. 222 (DC Mass., 1958). This case involved the refusal of the employer to arbitrate a discharge. Judge Wyzanski held that "this Court's view is that such a determination should be left for initial consideration by the arbitrator, and should not be foreclosed by a court decision preceding the arbitrator's opportunity to rule. Undoubtedly this view squints in a direction different from some of the dicta in *Local No. 149 v. General Electric Co. . . . . In time to come that case may be narrowly limited to situations where a party to a collective bargaining agreement seeks to involve arbitration of an issue clearly outside the specific provisions of the agreement.*" (Italics supplied.)

[43] 40 LC ¶ 66,630, 363 U. S. 593 (1960).

The number of civilian workers employed by the federal, state and local governments of the United States totaled 8.8 million during the month of October, 1960.—United States Department of Commerce.

slightly different twist in that it was concerned with the enforcement of an arbitrator's award.[44] The agreement provided that the arbitrator could reinstate with full back pay an employee who had been discharged in violation of the contract. A number of employees left their jobs in protest against one discharge and a union official advised them to return. When they did, the company informed them that they did not have a job "until this thing was settled one way or the other." The employer refused to arbitrate a grievance over this matter, but subsequently the district court compelled arbitration. The arbitrator held that a ten-day suspension was sufficient. He rejected the argument that expiration of the agreement barred reinstatement.[45] The company refused to comply with the award and the district court ordered enforcement.[46] The Fourth Circuit, however, ordered the parties back to arbitration so as to specify the amount to be deducted from back pay. It also held that an award for back pay and reinstatement that was subsequent to the termination of the contract was unenforceable.[47]

Mr. Justice Douglas, speaking once again for the majority, wrote that the courts must declare awards unenforceable only when the arbitrator manifested clear infidelity to the essence of the contract. Disagreement with the arbitrator is not enough. "A mere ambiguity in the opinion accompanying an award which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. . . . Respondent's major argument seems to be that by applying correct principles of law to the interpretation of the collective bargaining agreement it can be determined that the agreement did not so provide [in favor of back pay and reinstatement until return to work], and that therefore the arbitrator's decision was not based on the contract. *The acceptance of this view would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract.*" (Italics supplied.)[48]

The Court went on to state the following:

"It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him be-

[44] The enforcement of an arbitrator's award is valid under Sec. 301. See *Textile Workers Union of America v. Cone Mills Corporation,* 37 LC ¶ 65,587, 268 F. 2d 920 (CA-4, 1959), cert. den., 361 U. S. 886 (1959). For a discussion of this case see Note, *72 Harvard Law Review* 1408 (1960); See also A. L. *Kornman Co. v. Amalgamated Clothing Workers,* 36 LC ¶ 65,234, 264 F. 2d 733 (CA-6, 1959), cert. den., 361 U. S. 819.

[45] Sometimes there is an attempt to deal with this problem in the contract. See, for example, *Agreement Between Allis-Chalmers Manufacturing Company and UAW:* "Complaints and grievances which have arisen under provisions of the preceding collective bargaining agreement and are now in process of consideration in the second, third, and fourth steps of the Complaint and Grievance Procedure may be processed to completion in accordance with the provisions of said agreement."

[46] *United Steelworkers v. Enterprise Wheel and Car Corporation,* 36 LC ¶ 65,174, 168 F. Supp. 308 (DC W. Va., 1958).

[47] *Enterprise Wheel and Car Corporation v. United Steelworkers,* 37 LC ¶ 65,588, 269 F. 2d 327 (CA-4, 1959).

[48] Case cited at footnote 43. The union argument on the merits was quite plausible. It was pointed out that in *NLRB v. Knight Morley Corporation,* 33 LC ¶ 71,148, 251 F. 2d 753 (CA-6, 1957) it was held that after an agreement had expired the employer may lawfully insist that the grievance and arbitration procedure is the only forum to

cause their interpretation of the contract is different from his." [49]

Mention should be made of a concurring opinion written for all three cases by Mr. Justice Brennan, with whom Mr. Justice Harlan joins.[50] Justice Brennan wrote that the court would ordinarily refrain from contract interpretation, but also avoid the temptation to evolve inflexible rules. If the arbitration clause is narrower than in the present cases and the exclusion clause is more specific, the scope of judicial inquiry will be broader. The parties will have manifested a greater interest in confining the arbitrator. The concurring opinion also showed understanding for the sweeping policy implications in these cases:

"The Court makes reference to an arbitration clause being the *quid pro quo* for a no-strike clause. I do not understand the Court to mean that the application of the principles announced today depends upon the presence of a no-strike clause in the agreement." [51]

The usefulness of this opinion seems to lie in its elaboration of the majority opinion so as to guide future litigants and also in its warning not to take Justice Douglas too literally with respect to the no-strike clause. The former, however, is regarded by this writer as somewhat of a narrowing process on the language of the majority.

Other Cases and Comments

The view espoused by the Supreme Court has long been advocated by some judges and almost all of the authorities in the field. In the vanguard was the late Dean Shulman when he wrote of the tendency for labor and management to brush aside the questions relating to more difficult cases in order that their compulsory relationship continue without such hindrances as strikes and work stoppages.[52] Of course the hope of the parties is that these unprovided for situations will never arise but, as we have witnessed, this is not always the case. The *quid pro quo* idea also found its way into his writings:

"To consider . . . arbitration as a substitute for court litigation or as the consideration for a no-strike pledge is to take a foreshortened view of it. In a sense it is a substitute for both—*but in the sense in which a transport airplane is a substitute for a stagecoach.*" (Italics supplied.)[53]

Professor Cox has most vigorously advocated the policy now accepted by the Court. His philosophy is accurately expressed in the following statement:

(Footnote 48 continued)
discuss the reinstatement of other employees who were discharged during the agreement. He may refuse to discuss this subject at the bargaining table. For the union to insist on discussion at the bargaining table is unfair labor practice because of the grievance alternative. *Local No. 611, International Chemical Workers,* 123 NLRB 182 (1959). If the Court had decided against plaintiff here it would have been an act of inconsistency. Such a decision would also have been inconsistent with the Court's holding in *Vitarelli v. Seaton,* 359 U. S. 535 (1959) according to the union. There an employee discharged from the Department of Interior on security ground was given reinstatement with back pay even though he could have been discharged subsequently. See *Brief for Petitioner,* pp. 26-29, 72-83.

[49] Case cited at footnote 43.

[50] Case cited at footnote 43. Mr. Justice Frankfurter joins in these observations and concurs in all three results. Perhaps this is an indication that previous objections are no longer present.

[51] Case cited at footnote 43.

[52] Shulman, cited at footnote 4.

[53] Shulman, cited at footnote 4, at p. 1024. However, Dean Shulman was not inclined to trust the judiciary: "When their [the parties'] autonomous system breaks down, might not the parties better be left to the usual methods for adjustment of labor disputes rather than to court actions on the contract or on arbitration award? I suggest that the law stay out—but, mind you, not the lawyers."

Although compulsion was introduced in other countries to end strikes, it did not end them. What you find, instead is a constant rash of hit-and-run strikes, day-long stoppages, slowdowns, etc.

—James P. Mitchell

"[L]ess harm is done by sending an apparently weak case to arbitration than by denying the moving party the opportunity to be heard in the forum having the primary responsibility for determining the issue." [54]

Cox cited Judge Magruder's decision in *Local No. 149, Technical Engineers v. General Electric Company* [55] as an example of judicial error in labor arbitration. In this case the union maintained that a dispute over job classifications was arbitrable within the meaning of the agreement. The court could see no language in the agreement which contained anything about job descriptions or whether or not an employee fell within a particular grade. To Judge Magruder the answer could be given with certainty. Not so, said Professor Cox:

"[N]o one can say at this distance whether the establishment of numerical job grades with an hourly rate for each was 'intended' to reserve for the company a free hand in classifying jobs or to incorporate classifications recognized in plant practice. . . . In the particular case, the answer lies in the way of living evolved by General Electric and the Technical Engineers which is manifested in small practices over a period of years." [56]

Some of the opinions [57] that were written before the Supreme Court's decision exhibited an appreciation for the problems that arbitrators would confront. The Court's holdings were anticipated in *New Bedford Defense*

[54] Cox, "Current Problems in the Law of Grievance Arbitration," cited at footnote 4, at pp. 247, 265.

[55] Cited at footnote 42. Judge Magruder seemed to be on another road in *Local 205 v. General Electric Company,* 30 LC ¶ 69,908, 233 F. 2d 85 (CA-1, 1956) where he wrote that if the contract gave the matter of arbitrability to the arbitrator the matter should be given to him unless the claim was "frivolous or patently baseless." For other Magruder opinions in this field see *New Bedford Defense Products Division v. Local 1113,* 35 LC ¶ 71,716, 258 F. 2d 522 (CA-1, 1958); *IUE, Local 201 v. General Electric Company,* 36 LC ¶ 65,142, 262 F. 2d 265 (CA-1, 1959); *UE, Local 259 v. Worthington Corporation,* 30 LC ¶ 70,142, 236 F. 2d 364 (CA-1, 1956); *Newspaper Guild of Boston v. Boston Herald-Traveler Corporation,* 238 F. 2d 471 (CA-1, 1956); *Boston Mutual Life Insurance Company v. Insurance Agents' International Union,* 35 LC ¶ 71,715, 258 F. 2d 516 (CA-1, 1958); *Goodall-Sanford, Inc. v. United Textile Workers,* 30 LC ¶ 69,910, 233 F. 2d 104 (CA-1, 1956), aff'd, 32 LC ¶ 70,734, 353 U. S. 547 (1957). For a discussion of Judge Magruder's opinions in this area, see, Wellington, cited at footnote 7.

[56] Cox, "Current Problems in the Law of Grievance Arbitration," cited at footnote 4, at p. 262.

[57] Among the decisions are the following: *American Lava Corporation v. International Union, UAW,* 33 LC ¶ 71,173, 250 F. 2d 137 (CA-6, 1958); *Council of Western Electric Technical Employees-National v. Western Electric Company,* 31 LC ¶ 70,343, 238 F. 2d 892 (CA-2, 1956); *Davenport v. Procter & Gamble Manufacturing Company,* 31 LC ¶ 70,945, 241 F. 2d 511 (CA-2, 1957); *Engineers Association v. Sperry Gyroscope Company,* 31 LC ¶ 70,483, 251 F. 2d 133 (CA-2, 1957) cert. den., 356 U. S. 932 (1958); *Food Handlers, Local 425 v. Pluss Poultry, Inc.,* 35 LC ¶ 71,936, 260 F. 2d 835 (CA-8, 1958); *United Furniture Workers v. Little Rock Furniture Manufacturing Company,* 31 LC ¶ 70,489, 148 F. Supp. 129 (DC Ark., 1957); *Hirsch v. ILGWU,* 36 LC ¶ 65,007, 167 F. Supp. 531 (DC Md., 1958); *Monument Mills v. Textile Workers, Local 1370,* 32 LC ¶ 70,756, 152 F. Supp. 429 (DC Mass., 1957); *O'Malley v. Petroleum Maintenance Company,* 32 LC ¶ 70,552, 48 Cal. 2d 107, 308 P. 2d 9 (1957); *Standard Oil Development Company Employees' Union v. Esso Research & Engineering Company,* 29 LC ¶ 69,655, 38 N. J. Super. 106, 118 A. 2d 70 (1955); *Samuel Adler, Inc. v. Local 584, IBT,* 23 LC ¶ 67,669, 282 App. Div. 142 (1953); *A. E. Nettleton Co. v. United Shoeworkers, Local 63,* 28 LC ¶ 69,211, 138 N. Y. S. 2d 256 (N. Y., 1955); *Niles-Bemet-Pond Company v. Local 405,*

Products Division v. Local 1113, UAW [58] by Judge Wyzanski. In this case the question concerned the right of laid-off employees to have vacation pay. In ordering this dispute to arbitration under the contract the court took a position in direct contradiction to *Cutler-Hammer* when it wrote the following:

"Issues do not lose their quality of arbitrability because they can be correctly decided only one way." [59]

Another case in point is *Butte Miners Union, Local 1 v. Anaconda Company.*[60] Here the main issue was whether or not termination of employment for members of the union who had reached 68 (even where some were not entitled to pensions under the agreement) constituted a grievance or dispute that was arbitrable under the contract. The court ruled that it would not usurp the function of the arbitrator under the guise of deciding the arbitrability question. The only exception carved out of this rule by the court was cases involving frivolous claims.

Refinery Employees' Union of Lake Charles Area v. Continental Oil Company [61] was a deviation from the theme spelled out in the two above cases. In that case unthinking reliance on the rules developed in ordinary arbitration governed the judicial process. The dispute arose over the misappropriation of overtime work and the arbitrator's power to award to back pay. Since the contract was silent on this point the court rejected contentions for arbitrability.[62] There was, however, a lone dissenter in the *Refinery Employees* case. Judge Brown wrote that the majority opinion was "the same old effort to sugar-coat what to the judiciary, has long been a bitter pill—the idea that someone other than a court can properly adjudicate disputes; that in the field of human disputes lawyers and ex-lawyers as judges alone have the Keys to the Kingdom." [63]

The Tenth Circuit recently handed down a decision in *IAM Local 1912 v. United States Potash Company* [64] that was remarkably similar to the *Warrior and Gulf* case. It also involved the arbitrability of subcontracting. Here arbitration was ordered so as to serve the underlying purpose of the whole agreement rather than construe according to its "dry words." [65]

(Footnote 57 continued)
International Union, UAW, 23 LC ¶ 67,681, 140 Conn. 32, 97 A. 2d 898 (1953); *Leonard v. Eastern Massachusetts Street Railway Company,* 335 Mass. 308, 14 W. E. 2d 187 (1956); *Potoker v. Brooklyn Eagle, Inc.,* 32 LC ¶ 70,680, 2 N.Y. 2d 553, 141 N.E. 2d 841 (1957).

For cases dealing with arbitration when there is a strike in process see *Signal-Stat Corporation v. Local 475, UE,* 30 LC ¶ 70,090, 235 F. 2d 298 (CA-2, 1956), cert. den., 354 U. S. 911 (1957); *International Union, UAW v. Benton Harbor Malleable Industries,* 32 LC ¶ 70,590, 242 F. 2d 536 (CA-6, 1957); *Armstrong-Norwalk Rubber Corporation v. Rubber Workers, Local 283,* 36 LC ¶ 65,001, 167 F. Supp. 817 (DC Conn., 1958).

[58] 34 LC ¶ 71,331, 160 F. Supp. 103 (DC Mass., 1958). For another significant Wyzanski opinion in this area see *Textile Workers Union of America v. American Thread Company,* 23 LC ¶ 67,660, 113 F. Supp. 137 (DC Mass., 1953).

[59] *New Bedford Defense Products Division,* cited at footnote 58.

[60] 34 LC ¶ 71,540, 159 F. Supp. 431 (DC Mont., 1958), aff'd, 37 LC ¶ 65,589, 267 F. 2d 940 (CA-9, 1959).

[61] 37 LC ¶ 65,564, 268 F. 2d 447 (CA-5, 1959), cert. den., 361 U. S. 896 (1959).

[62] See footnote 39 for the well established implied power of the arbitrator to award back pay.

[63] Case cited at footnote 61. For an opinion in conflict with that of Judge Brown see Jolet, cited at footnote 4.

[64] 38 LC ¶ 65,787, 270 F. 2d 496 (CA-10, 1959); For a discussion of this case see Note, 58 *Michigan Law Review* 935 (1960). Another recent case in this field is *Brass & Copper Workers v. American Brass Company,* 38 LC ¶ 66,049, 272 F. 2d 849 (CA-7, 1959), cert. den., 363 U. S. 845 (1960).

[65] But see *Dairy, Bakery and Food Workers v. Grand Rapids Milk Division,* 35 LC ¶ 71,593, 160 F. Supp. 34 (DC Mich., 1958).

The holding seems to have been in keeping with the idea that in this area "[t]he court should at best be a constitutional monarch with very limited powers." [66] If the court had acted otherwise it would have disposed of the arbitrability questions and the merits with one ruling (and indeed the courts seem often to confuse the two). By ordering arbitration both questions could be decided by the arbitrator.

Conclusion

The decisions in the *American, Warrior* and *Enterprise* cases assume landmark dimensions. The *Cutler-Hammer* attitude is overruled not only in federal tribunals, but also in the state courts.[67] Thus, federal principles enunciated in these cases will govern irrespective of the state's statutory or judicially created limitations.[68] If the plaintiff does not care to rely on the state court's interpretation of federal law, the action would seem to be removable to the federal courts.[69]

It has been maintained that decisions such as the court has now written would reduce the voluntary nature of arbitration and it must be admitted that there is some truth in this statement.[70] Yet the judiciary has a limited discretion to exercise. Can they not still decide that a grievance is prima facie outside of the contract and thus once again determine what is frivolous and patently baseless?

An example of this problem can be seen in a very recent decision by the district court of North Dakota in *International Union of Operating Engineers, Local 725 v. Standard Oil Company of Indiana.*[71] This case involved a grievance over subcontracting, but the court distinguished it from *Warrior* in that the contract here stated that the arbitration clause was subject to limitations. The limitations were that no proposal to modify, amend or terminate the agreement would be considered to be arbitrable. In refusing arbitration the court said:

"While the arbitration clause is quite broad, it is expressly limited,

[66] Summers, cited at footnote 4.

[67] *Textile Workers Union v. Lincoln Mills,* cited at footnote 11. See also *McCarroll v. Los Angeles County District Council of Carpenters,* 33 LC ¶ 70,759, 49 Cal. 2d 45, 60, 315 P. 2d 322 (1957), cert. den., 355 U. S. 932 (1958). Judge Traynor wrote that "[s]tate courts . . . have concurrent jurisdiction with federal courts over actions that can be brought in the federal courts under Section 301. It is obvious that in exercising this jurisdiction state courts are no longer free to apply state law, but must apply the federal law of collective bargaining agreements, otherwise the scope of the litigant's rights will depend on the accident of the forum in which the action is brought."

[68] Memorandum from Arthur J. Goldberg to General Counsel of all IUD Unions. Thus the outcome in *Black v. Cutter Laboratories,* 30 LC ¶ 70,002, 351 U. S. 292 (1956) would be changed. In this case an arbitration board ordered reinstatement of an employee discharged for union activity which was supposed to be Communist. The Supreme Court of California reversed on the ground of the grievant's alleged Communist affiliation. The United States Supreme Court upheld this action as within California's right to make public policy. This would no longer be a good argument because *Lincoln Mills* has made federal law applicable to arbitration proceedings. Because of *Enterprise,* the courts will rarely upset the arbitrator's award.

[69] 28 USC Sec. 1441(b); "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties."

See, *Fay v. American Cystoscope Makers, Inc.,* 20 LC ¶ 66,358, 98 F. Supp. 278 (DC N. Y., 1951). *Tool and Die Workers Lodge No. 78, IAM v. General Electric Company,* 36 LC ¶ 65,312, 170 F. Supp. 945 (DC Wis., 1959) wherein removal from an administrative agency was upheld; See also Fitzsimmons, "Removal Rights in Labor Litigation," 11 LABOR LAW JOURNAL 137 (February, 1960).

[70] See Wellington, cited at footnote 7.

[71] 41 LC ¶ 16,544 (DC N. D., 1960).

the exclusion clause is plain, explicit and specific." [72]

Yet there was no more indication in the *Standard Oil* case that the specific limitations applied to the subcontracting question than there was in *Warrior*. (It must be remembered that there was a management rights limitation in *Warrior*.) This might once again be a matter for the expertise of an arbitrator. On the other hand, the decision draws inspiration from Justice Brennan's concurring opinion where he noted that if the arbitration clause was more narrow and the limitations more specific then the result might be different.

Thus labor and management can look forward to the prospect of ad hoc rulings in this field caused, of course, by varying contractual language. The inevitability of numerous fact situations may breed the same number of distinctions. It is apparent that judicial discretion, limited though it would seem to be, will keep the door slightly ajar to the doctrine of *Cutler-Hammer*. Complete judicial abnegation is not contemplated.[73]

One other problem lurks in the background. Will the courts be deciding the question of arbitrability so that it will be *res judicata* for purposes of future litigation? This would become important if a litigant sought review of the arbitrator's decision and ruling on arbitrability. Has the court already decided this question thus precluding judicial review in this area? This writer thinks that a court would not be correct in viewing this matter as *res judicata*. Even though the court's function will be more than that of a mere conduit the question of arbitrability will not be decided by the judiciary. The court will simply order the parties to arbitration and the arbitrator will decide the questions of arbitrability and, if necessary, the merits. *Enterprise* teaches us that review of the decision will be narrowly limited.

Despite remaining judicial discretion these cases indicate that the courts will accord much greater deference to the arbitrator in labor-management relations and, indeed, some of the lower courts have already taken their cue from Justice Douglas.[74] All three decisions stake out a definite direction that the courts are to follow and they have helped to diminish the hideous variety of situations that might have confronted the judges. The Pandora's box of problems that some anticipated is not quite so awesome and the Court's rulings may also stimulate labor and management to be more careful in clarifying their contracts. Of utmost significance is the giant step forward that the law has taken in its understanding of this relatively new field. These decisions not only preserve the private system of arbitration devised by labor and management, but they also have given judicial sanction to the values of unimpeded production and a policy which may ultimately herald the obsolescence of the picket line. **[The End]**

The United States must "face up to the fact" that the increase in chronic unemployment in this country "is too persistent to be ignored."—Statement of the National Planning Association.

[72] Cited at footnote 71.

[73] Reply Brief for Petitioner, pp. 1-3.

[74] *ILGWU v. Sidele Fashions, Inc.*, 40 LC ¶ 66,774 (DC Pa., 1960); *Retail Shoe and Textile Salesmen's Union v. Sears, Roebuck & Company*, 40 LC ¶ 66,760 (DC Cal., 1960); *Volunteer Electric Cooperative v. Gann*, 41 LC ¶ 16,537 (Tenn. Ct. App., 1960).