UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

CIVIL ACTION NO. 83-200

DISTRICT 30, UNITED MINE WORKERS OF AMERICA, o/b/o LOCAL 1416, UNITED MINE WORKERS OF AMERICA, and GARY MOUNTS AND LEMAN LELL, PLAINTIFFS,

VS. MEMORANDUM OPINION AND ORDER

KENTUCKY CARBON CORPORATION, DEFENDANT.

* * * *

Plaintiffs brought this action, pursuant to §301 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §185, to obtain judicial review of the arbitration decision rendered by Arbitrator Stanley H. Sergent, Jr., on April 13, 1983. This matter is before the Court on cross-motions for summary judgment on the sole issue of whether the arbitration decision should be vacated and set aside.

The dispute culminating in the filing of this action arose when plaintiffs Gary Mounts and Leman Lell were notified by the defendant that based on the sequential order in which employees were scheduled to work on "idle days", said plaintiffs were not to report for work on the afternoon shift on January 12, 1983. Plaintiffs admit that their names were on the bottom of the roster from which employees are called to work on an "idle day"; however, they contended that the defendant improperly

decided that the day shift at the mines would work according to a normal "work day" schedule and that the afternoon shift, on which plaintiffs worked, would operate according to the "idle day" work schedule.

Before proceeding with the analysis of this action, the Court must momentarily digress from the issue at hand and summarize what it has gleaned from the arbitration decision.

The parties stipulated that due to a declining market for coal, the defendant reduced and realigned its work force in October of 1982, resulting in the elimination of the midnight shift and a revamping of the work schedules of the day and afternoon shifts. The mine began working a reduced work week and Gary Criste, defendant's Assistant Divisional Manager, testified that it was the practice of the defendant, according to the terms of the "1981 Agreement", to equalize the number of days worked by the day and afternoon shifts during each week, although the days which the two shifts worked had sometimes been different. He stated that because the afternoon shift is primarily a maintenance shift, the workweek for the employees on the second shift sometimes begins the day before the day shift, but that under this system of scheduling, all employees receive an equal number of shifts of work per week. His testimony is borne out by the stipulations of the parties set out in Paragraphs (4), (5), and (6) on pages 3 and 4 of the Arbitration Decision.

Nevertheless, the grievants, Gary Mounts and Leman Lell filed the following grievance:

> We are asking to be paid our regular shift on the 1-12-83. The mine produced coal on the day and evening shift and we were idled on the evening shift at the plant. We are also asking to work on any other shift that the mine produces coal.

It was the Union's position that splitting of the day into "idle day" shifts and "work day" shifts was opposed to the custom at the mine; therefore, such practice should be prohibited. The arbitrator found that the Union failed to prove a contrary practice in support of its claim.

Apparently, due to the depressed economy and the poor market conditions for the sale of coal at that time (the latter part of 1982), the defendant was forced to implement its plan to eliminate the midnight shift and to adopt a schedule for a reduced work week; therefore, the prior custom and practice of the defendant had to necessarily change to accomodate the revised work schedule. The Arbitrator amptly summarized the situation, as follows:

> The Union does not claim nor has it shown that the effect of the Employer's decision to have a production day for the two shifts on two different days of the week was discriminatory. Both of the shifts worked the same number of regular production days during each week. After an idle period, the Employer reasonably scheduled the second shift to perform its maintenance work at the plant on the day before the first shift began its week in order to ready the plant to process coal. The first or

> production shift then worked on the final day in that week on which the plant was operating while the second shift was idle. This insured that the second shift employees worked a shift for every production shift which was worked during the week. This satisfies the requirements of the Agreement. The method of organizing the work force used herein is a reasonable exercise of managerial authority which is based upon legitimate business considerations and which does not deny the employees on either shift an opportunity to work. Arbitrator's Decision, pp. 10-11.

The Court now turns to the applicable provisions of the National Bituminous Coal Wage Agreement of 1981 ("1981 Agreement"), under which the parties hereto were bound at the time of this dispute. Article IA provides as follows:

> Section (d) - Management of the Mines
>
> The management of the mine, the direction of the working force and the right to hire and discharge are vested exclusively in the Employer.

Additionally, Article IV, Section (d)(7) directs:

> Idle day work must be equally shared in accordance with past practice and custom. An overtime roster must be kept up to date and posted at each mine for the purpose of distributing overtime on an equitable basis to the extent practicable.

The Arbitrator found that the relevant practice in question was not long standing or well-established in any case, since the mine had only recently reduced its work week. However, he concluded that the practice, to the extent it has been established, would seem to support the Employer.

In support of their position that the arbitrator's decision should be set aside, the plaintiffs rely on the alleged authority of the matter of the arbitration between Beth-Elkhorn Corporation and UMWA, District 30 and Local 1468, ARB Case No. 81-30-82-378, decided by Arbitrator Harold G. Wren on February 7, 1983. This matter involved a situation where the coal company was trying to reduce its stockpile of coal and simultaneously meet its shipping schedule. The arbitrator found in favor of the Union.

The Court has reviewed Arbitrator Wren's decision and finds that it is factually distinguishable from the matter decided by Arbitrator Sergent. The crux of the Wren decision was that Beth-Elkhorn scheduled an "idle day" for its production employees, but not for its preparation employees, on a regular work day during the normal work week, Friday, September 3, 1982. The decision indicates that Beth-Elkhorn was routinely working a full five-day work week. Arbitrator Wren commented that "idle days" are usually scheduled on Saturdays or holidays other than Christmas Day or Christmas Eve. The Court infers from his comment that he assumes the company works every day Monday through Friday.

Obviously, the Wren decision, for more than one reason is inapplicable and is not controlling precedent for the matter between the parties hereto. First of all, the matters differ factually in terms of the concept of "idle days". When a

company works a full five-day work week, "idle days" are construed to be either Saturdays, Sundays, or some holidays. However, when a company works a reduced work week, the term takes on a different meaning, since the days during a normal work week when a company does not operate are appropriately denominated as "idle days".

The defendant submits that Aribtrator Sergent was not bound by the decision of Arbitrator Wren or any other precedent arbitration decisions. The Court finds merit in defendant's position, as evidenced by Article XXIII, Section (c)(4), of the "1981 Agreement", which provides that, "The arbitrator's decision shall be final and shall govern only the dispute before him."

As a general rule, it is well settled that the Courts should refrain from reviewing the merits of an arbitrator's award. Such a rule is due to the policy which favors arbitration as a means of resolving labor disputes. In United Steel Workers of America v. Enterprise Wheel and Car Corporation, 363 U.S. 593 (1960), the Supreme Court commented:

> The refusal of Courts to review the merits of an arbitration award is the proper approach to arbitration under the collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if Courts had the final say on the merits of the awards. Id., at 596.

However, such a policy allows the Courts to intervene and vacate an award if one of the following elements is present: (1) if the grievance is not arbitrable; (2) if the arbitrator exceeds his contractual authority; (3) where the indicia of fairness are absent; and (4) where it is arbitrary or capricious. Cannon v. Consolidated Freightways Corp. et al., 524 F.2d 290 (CA7, 1975). Upon a thorough review of Arbitrator Sergent's decision herein, the Court finds none of the foregoing elements present.

Furthermore, the Court is persuaded that United Steelworkers of America, AFL-CIO, CLC v. Smoke-Craft, Inc., 652 F.2d 1356 (CA9, 1981), provides insight into this matter, which provides:

> Parties to arbitration proceedings cannot sit idle while an arbitration decision is rendered and then, if the decision is adverse, seek to attack the award collaterally on grounds not raised before the arbitrator. See Cook Industries, Inc. v. C. Itoh & Co. (America) Inc., 449 F.2d 106, 107-08 (CA2, 1971), cert denied, 405 U.S. 921, 92 S.Ct. 957, 30 L. Ed.2d 792 (1972). To rule otherwise would be to thwart the national labor policy of encouraging the expeditious private arbitration of labor disputes without resort to the courts. Mogge v. District 8, International Association of Machinists, 454 F.2d 510, 513 (CA7, 1971). Id., at 1360.

In conclusion, the Court has reviewed the entire record below, including the respective memoranda of the parties hereto in support of their motions for summary judgment, and the Court

sees no fatal flaw in the Arbitration Decision of Arbitrator Stanley H. Sergent, Jr., which would impose a duty on the Court to vacate said decision.

The Court being duly advised,

IT IS HEREBY ORDERED, as follows:

1. The plaintiffs' motion for summary judgment is DENIED.

2. The defendant's motion for summary judgment is GRANTED.

3. The Arbitration Decision rendered by Arbitrator Stanley H. Sergent, Jr., on April 13, 1983, is AFFIRMED.

4. This action is now DISMISSED and STRICKEN from the docket.

This the 29th day of March, 1984.

G. Wix Unthank

G. WIX UNTHANK, JUDGE

TO: Judge
FROM: Donald
DATE: 9-21-83
RE: 83-200
District 30, UMWA v. Kentucky Carbon Corporation

PC, Wednesday, 9-21-83, at 1:00

Synopsis:

Plaintiff is seeking to have the arbitrator's decision herein denying the grievance concerning the scheduling of work vacated as being arbitrary and capricious.

Two of defendant's employees, Gary Mounts and Leman Bell, were not called to work on 1-12-83, on a day that the company produced coal. They filed their grievance and based on the 1981 Agreement, it was submitted to arbitration, and the arbitrator denied the grievance.

Plff asserts that the decision should be set aside because the arbitrator failed to acknowledge the company's past practice of not having idle day shifts on any day that the company produces coal; hence the arbitrator ignored Article XXVI of the 1981 Agreement.

Pending Motions: NONE.

Substantive Issues:

1. Whether the arbitrator's decision is arbitrary and capricious, and contrary to the provisions of the '81 Agreement?

Comments:

1. My ignorance may be showing again, but this lawsuit seems to be a lot of trouble over two employees who missed <u>one shift</u> of work, and are seeking through the UMWA to be paid for this lost shift. Would Shakespeare say, "Much ado about nothing"?

(COPY FOR JUDGE UNTHANK)

FILED SEP 07 1983

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

AT PIKEVILLE

CIVIL ACTION NO. 83-200

DISTRICT 30, UNITED MINE WORKERS
OF AMERICA ON BEHALF OF LOCAL 1416,
UNITED MINE WORKERS OF AMERICA, and
GARY MOUNTS and LEMAN LELL PLAINTIFFS

VS: PRELIMINARY TRIAL MEMORANDUM
OF KENTUCKY CARBON CORPORATION

KENTUCKY CARBON CORPORATION DEFENDANT

* * * * * * * * * * * * * *

Defendant, Kentucky Carbon Corporation, for its Preliminary Trial Memorandum, says:

I. JURISDICTION OF THE COURT.

Plaintiffs seek to invoke the jurisdiction of this Court under Section 301 (a) of the Labor Management Relations Act (29 U.S.C. §185 (a)) which reads as follows:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, 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."

This is an action to vacate an arbitration decision rendered April 13, 1983 on a grievance of the individual plaintiffs, Gary Mounts and Leman Lell, in which they were represented by their Union.

III. STATEMENT OF FACTS.

This labor arbitration case arose under the grievance and arbitration provisions of the National Bituminous Coal Wage AGreement of 1981. It concerns a grievance dated January 26, 1983, filed by Leman Lell and Gary Mounts, who claimed pay for January 12, 1983, on the ground that they were not scheduled to work that day despite the fact that coal was produced at the mine on both the day and evening shifts. It was the Union's contention that days on which coal is produced at the mine become production days for all employees; and consequently, such days cannot be treated as idle days for some of the employees on a given shift.

After a full-scale hearing before Stanley H. Sergent, Jr., Arbitrator, at which the two individuals were represented by a representative of their Union, and at which testimony was taken from both parties on the issue, the Arbitrator rendered a decision on April 13, 1983, denying the grievance. The grievance proceeding before the Arbitrator was styled as follows:

"IN THE MATTER OF ARBITRATION BETWEEN

KENTUCKY CARBON CORPORATION Preparation Plant and UNITED MINE WORKERS OF AMERICA District 30, Local Union 1416."	Case No. 81-30-83-469 Grievants: Gary Mounts and Leman Lell Grievance concerning scheduling of work

IV. ISSUES OF LAW

Courts will not review the merits of an arbitration award made under a collective bargaining agreement because the federal policy of settling grievances by arbitration would be undermined if Courts had the final say on the merits of the award. See United Steelworkers of America v. Enterprise Corp., 363 US 593, 4 L.Ed 2d 352, 80 S.Ct. 371 (1960) and United Steelworkers of America v. Warrier & Gulf Navigation Co., 363 US 574, 4 L.Ed. 2d 1409, 80 S.Ct. 1347 (1960).

Courts generally defer to arbitrator's interpretation of a collective bargaining agreement because of the arbitrator's special experience, expertise and selection by the parties. See Nolde Bros., Inc. v. Bakery & Confectionery Worker's Union, 430 US 243, 97 S.Ct. 1067, 51 L.Ed. 2d 300 (1977). This is true where the award draws its essence from the agreement. Amanda Bent Bolt Co. v. International Union, United Automobile, Aerospace, Agricultural Implement Workers of America, (6th Cir.), 451 F. 2d 1277 (1971).

In the absence of issue of fact either as to breach of duty of fair representation by the Union or as to substantial

inadequacy of the grievance procedure, employees may not step into the shoes of the Union to sue to vacate an award of the arbitrator. Harris v. Chemical Leaman Tank Lines, Inc., (5th Cir.), 437 F. 2d 167 (1971).

A Court may review and vacate an award for the following reasons: (1) if the grievance is not arbitrable; (2) if the arbitrator exceeds his contractual authority; (3) where the indicia of fairness are absent; or (4) where it is arbitrary or capricious. Cannon v. Consolidated Freightways Corp., Et Al, (7th Cir.), 524 F. 2d 290 (1975).

Under the complaint it appears that the sole issue in this action is whether or not the award was "arbitrary and capricious.

Respectfully Submitted this 7th day of September, 1983.

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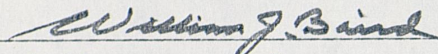
ATTORNEYS FOR DEFENDANT,
KENTUCKY CARBON CORPORATION

By: William J. Baird
William J. Baird,
Of Counsel

THIS IS TO CERTIFY that a true copy of the within Preliminary Trial Memorandum has this day been duly mailed to Hon. Bernard Pafunda, P.O. Box 1199, Pikeville, Kentucky 41501, Attorney for Plaintiffs.

This September 7, 1983.



William J. Baird

*[363 US 593]

*UNITED STEELWORKERS OF AMERICA, Petitioner,

v

ENTERPRISE WHEEL AND CAR CORPORATION

363 US 593, 4 L ed 2d 1424, 80 S Ct 1358

[No. 538]

Argued April 28, 1960. Decided June 20, 1960.

SUMMARY

Employees whose collective bargaining contract contained an arbitration clause providing for arbitration of differences as to the meaning and application of the contract and specifying that the employer was obliged to reinstate and compensate for lost pay an employee found by an arbitrator to have been suspended or discharged in violation of the contract, brought an action to compel the employer to arbitrate a grievance as to the discharge of employees who left their jobs in protest against the discharge of another employee. The court ordered arbitration, and the arbitrator found that the employees were entitled to reinstatement and back pay; he rejected the contention that expiration of the collective bargaining agreement between the time of the discharge of the employees and the time he made his award barred the award. On the employer's refusal to comply with the award, the employees moved the United States District Court for the Southern District of West Virginia for enforcement, and the District Court directed the employer to comply (168 F Supp 308). The Court of Appeals for the Fourth Circuit modified the District Court's judgment, holding that an award for back pay and for reinstatement subsequent to the date of termination of the collective bargaining agreement could not be enforced (269 F2d 327).

On certiorari, the United States Supreme Court reversed the judgment below. In an opinion reflecting the views of six members of the court, DOUGLAS, J., held that the Court of Appeals, in ruling that the award was barred by the termination of the collective bargaining contract, exceeded its proper function under the arbitration clause, which is to determine whether a grievance is arbitrable, and not the merits of an arbitrable grievance.

FRANKFURTER, J., concurred in the result.

BRENNAN, J., joined by HARLAN, J., concurred in an opinion which appears infra, page 1432. FRANKFURTER, J., joined in the observations stated in this opinion.

WHITTAKER, J., dissented, taking the view that the arbitrator exceeded his power in awarding reinstatement and back pay for the period following expiration of the collective bargaining agreement.

BLACK, J., did not participate.

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Labor § 125 — arbitration — judicial review.

1. The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements; the federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the award.

Labor § 125 — arbitration — appraising local situation.

2. Arbitrators acting under arbitration provisions of collective bargaining agreements are indispensable agencies in a continuous collective bargaining process, sitting to settle, at the plant level, disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.

[*See annotation references* 1, 2]

Labor § 125 — arbitration — objective.

3. When, under an arbitration clause of a collective bargaining contract, an arbitrator is commissioned to interpret and apply the contract, he is to bring his informed judgment to bear in order to reach a fair solution of a problem, this being especially true when it comes to formulating remedies to meet a wide variety of situations.

[*See annotation references* 1, 2]

Labor § 125 — arbitration — proper considerations.

4. An arbitrator, acting under an arbitration clause in a collective bargaining agreement, is confined to interpretation and application of the collective bargaining agreement, and he does not sit to dispense his own brand of industrial justice; he may look for guidance from many sources, but his award is legitimate only so long as it draws its essence from the collective bargaining agreement; when his words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

[*See annotation references* 1, 2]

Labor § 125 — arbitration — basis of award.

5. An arbitrator, acting under a clause in a collective bargaining contract providing for arbitration of differences as to the meaning and application of the contract, exceeds the scope of the submission to him when he bases his award solely upon his view of the requirements of enacted legislation.

[*See annotation references* 1, 2]

Labor § 125 — arbitration — ambiguity in award.

6. A mere ambiguity in the opinion accompanying an award made by an arbitrator, acting under an arbitration clause in a collective bargaining agreement, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for a court to refuse to enforce the award; arbitrators have no obligation to the court to give their reasons for an award, and to require their opinions to be free from ambiguity may lead them to play it safe by writing no supporting opinions.

Labor § 125 — arbitration — judicial review — authority of arbitrator.

7. A court, in determining whether to enforce an award made by an arbitrator acting under an arbitration clause in a collective bargaining contract, should not assume that the arbi-

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ANNOTATION REFERENCES

1. Right of arbitrators to act on their own knowledge of acts, or factors relevant to questions submitted to them, in absence of evidence in that regard, 154 ALR 1210.

2. Right of arbitrator to consider or to base his decision upon matters other than those involved in the legal principles applicable to the questions at issue between the parties, 112 ALR 873.

trator has abused the trust the parties confided in him and has not stayed within the areas marked out for his consideration, where it is not apparent that he went beyond the submission; hence, a court errs in refusing to enforce the reinstatement and partial back pay portions of a labor arbitrator's award where the court's action is not based upon any finding that the arbitrator did not premise his award on his construction of the contract containing the arbitration clause, but merely upon its disagreement with the arbitrator's construction of it.

[*See annotation references* 1, 2]

Labor § 125 — arbitration — finality.

8. A provision in an arbitration clause of a collective bargaining contract, to the effect that the arbitrator's decision is final, is rendered meaningless if the courts review the merits of every construction of the contract by the arbitrator.

Labor § 125 — arbitration — construction of contract.

9. Under a collective bargaining contract calling for arbitration of differences as to the meaning and application of the contract, the question of interpretation of the contract is for the arbitrator; 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 because their interpretation of the contract is different from his.

Appeal and Error § 1672; Labor § 125 — arbitration — judicial review — reinstatement and back pay.

10. Enforcement of a reinstatement and back pay award made by an arbitrator, acting under an arbitration clause of a collective bargaining agreement providing for arbitration of differences as to the meaning and application of the agreement and specifying that the employer is obligated to reinstate and compensate for lost pay an employee found by an arbitrator to have been suspended or discharged in violation of the collective bargaining agreement, should not be denied by a Court of Appeals, on review of a District Court's judgment granting enforcement, on the ground that enforcement is barred by the expiration of the collective bargaining agreement prior to the making of the award, where the arbitrator has ruled to the contrary on this matter; but where the arbitration award directs deduction from back pay of amounts earned by the employees in other work but does not specify the amount to be deducted, the Court of Appeals properly modifies the District Court's judgment to permit the amounts due the employees to be definitely determined by arbitration.

APPEARANCES OF COUNSEL

Elliott Bredhoff and **David E. Feller** argued the cause for petitioner.

William C. Beatty argued the cause for respondent.

Briefs of Counsel, p 2193, infra.

OPINION OF THE COURT

*[363 US 594]

*Opinion of the Court by Mr. Justice **Douglas**, announced by Mr. Justice **Brennan**.

Petitioner union and respondent during the period relevant here had a collective bargaining agreement which provided that any differences "as to the meaning and application" of the agreement should be submitted to arbitration and that the arbitrator's decision "shall be final and binding on the parties." Special provisions were included concerning the suspension and discharge of employees. The agreement stated:

"Should it be determined by the Company or by an arbitrator in accordance with the grievance procedure that the employee has been

suspended unjustly or discharged in violation of the provisions of this Agreement, the Company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for the time lost."

*[363 US 595]

*The agreement also provided:

". . . It is understood and agreed that neither party will institute *civil suits or legal proceedings* against the other for alleged violation of any of the provisions of this labor contract; instead all disputes will be settled in the manner outlined in this Article III—Adjustment of Grievances."

A group of employees left their jobs in protest against the discharge of one employee. A union official advised them at once to return to work. An official of respondent at their request gave them permission and then rescinded it. The next day they were told they did not have a job any more "until this thing was settled one way or the other."

A grievance was filed; and when respondent finally refused to arbitrate, this suit was brought for specific enforcement of the arbitration provisions of the agreement. The District Court ordered arbitration. The arbitrator found that the discharge of the men was not justified, though their conduct, he said, was improper. In his view the facts warranted at most a suspension of the men for 10 days each. After their discharge and before the arbitration award the collective bargaining agreement had expired. The union, however, continued to represent the workers at the plant. The arbitrator rejected the contention that expiration of the agreement barred reinstatement of the employees. He held that the provision of the agreement above quoted imposed an unconditional obligation on the employer. He awarded reinstatement with back pay, minus pay for a 10-day suspension and such sums as these employees received from other employment.

Respondent refused to comply with the award. Petitioner moved the District Court for enforcement. The District Court directed respondent to comply. 168 F Supp 308. The Court of Appeals, while agree-

*[363 US 596]

ing that *the District Court had jurisdiction to enforce an arbitration award under a collective bargaining agreement,[1] held that the failure of the award to specify the amounts to be deducted from the back pay rendered the award unenforceable. That defect, it agreed, could be remedied by requiring the parties to complete the arbitration. It went on to hold, however, that an award for back pay subsequent to the date of termination of the collective bargaining agreement could not be enforced. It also held that the requirement for reinstatement of the discharged employees was likewise unenforceable because the collective bargaining agreement had expired. 269 F2d 327. We granted certiorari. 361 US 929, 4 L ed 2d 352, 80 S Ct 371.

Headnote 1 The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. As we stated in United Steelworkers of America v Warrior & Gulf Navigation Co. 363 US 574, 4 L ed 2d 1409, 80 S Ct 1347, decided this day, the **Headnote 2** arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that re-

1. See Textile Workers Union v Cone Mills Corp., 268 F2d 920 (CA4th Cir).

quire for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.[2]

*[363 US 597]

*When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Headnote 3

Headnote 4

The opinion of the arbitrator in this case, as it bears upon the award of back pay beyond the date of the agreement's expiration and reinstatement, is ambiguous. It may be read as based solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the scope of the

*[363 US 598]

submission. Or it may *be read as embodying a construction of the agreement itself, perhaps with the arbitrator looking to "the law" for help in determining the sense of the agreement. 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. Arbitrators have no obligation to the court to give their reasons for an award. To require opinions[3] free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement. Moreover, we see no reason

Headnote 5

Headnote 6

2. "Persons unfamiliar with mills and factories—farmers or professors, for example—often remark upon visiting them that they seem like another world. This is particularly true if, as in the steel industry, both tradition and technology have strongly and uniquely molded the ways men think and act when at work. The newly hired employee, the 'green hand,' is gradually initiated into what amounts to a miniature society. There he finds himself in a strange environment that assaults his senses with unusual sounds and smells and often with different 'weather conditions' such as sudden drafts of heat, cold, or humidity. He discovers that the society of which he only gradually becomes a part has of course a formal government of its own—the rules which management and the union have laid down—but that it also differs from or parallels the world outside in social classes, folklore, ritual, and traditions.

"Under the process in the old mills a very real 'miniature society' had grown up, and in important ways the technological revolution described in this case history shattered it. But a new society or work community was born immediately, though for a long time it developed slowly. As the old society was strongly molded by the *discontinuous* process of making pipe, so was the new one molded by the *continuous* process and strongly influenced by the characteristics of new high-speed automatic equipment." Walker, Life in the Automatic Factory, 36 Harv Bus Rev 111, 117.

3. See Jalet, Judicial Review of Arbitration: The Judicial Attitude, 45 Cornell LQ 519, 522.

to assume that this arbitrator has abused the trust the parties confided in him and has not stayed within the areas marked out for his consideration. It is not apparent that he went beyond the submission. The Court of Appeals' opinion refusing to enforce the reinstatement and partial back pay portions of the award was not based upon any finding that the arbitrator did not premise his award on his construction of the contract. It merely disagreed with the arbitrator's construction of it.

Headnote 7

The collective bargaining agreement could have provided that if any of the employees were wrongfully discharged, the remedy would be reinstatement and back pay up to the date they were returned to work. 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, and that therefore the arbitrator's decision was not based upon the contract. The acceptance of this view would require courts, even under the standard arbitration clause, to re- *[363 US 599] view the merits of every *construction of the contract. This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. This underlines the fundamental error which we have alluded to in United Steelworkers of America v American Mfg. Co. 363 US 564, 4 L ed 2d 1403, 80 S Ct 1343, decided this day. As we there emphasized, the question of interpretation of the collective bargaining agreement is a question for the arbitrator. 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 because their interpretation of the contract is different from his.

Headnote 8

Headnote 9

We agree with the Court of Appeals that the judgment of the District Court should be modified so that the amounts due the employees may be definitely determined by arbitration. In all other respects we think the judgment of the District Court should be affirmed. Accordingly, we reverse the judgment of the Court of Appeals, except for that modification, and remand the case to the District Court for proceedings in conformity with this opinion.

Headnote 10

It is so ordered.

Mr. Justice **Frankfurter** concurs in the result.

Mr. Justice **Black** took no part in the consideration or decision of this case.

[For opinion of Mr. Justice **Brennan,** joined by Mr. Justice **Frankfurter** and Mr. Justice **Harlan,** see infra p. 1432.]

SEPARATE OPINION

Mr. Justice **Whittaker,** dissenting.

Claiming that the employer's discharge on January 18, 1957, of 11 employees violated the provisions of its collective bargaining contract with the employer—covering the period beginning April 5, 1956, and *[363 US 600] ending April 4, *1957—the union sought and obtained arbitration, under the provisions of the contract, of the issues whether these employees had been discharged in violation of the agreement and, if so,

should be ordered reinstated and awarded wages from the time of their wrongful discharge. In August 1957, more than four months after the collective agreement had expired, these issues by agreement of the parties, were submitted to a single arbitrator, and a hearing was held before him on January 3, 1958. On April 10, 1958, the arbitrator made his award, finding that the 11 employees had been discharged in violation of the agreement and ordering their reinstatement with back pay at their regular rates from a time 10 days after their discharge to the time of reinstatement. Over the employer's objection that the collective agreement and the submission under it did not authorize nor empower the arbitrator to award reinstatement or wages for any period after the date of expiration of the contract (April 4, 1957), the District Court ordered enforcement of the award. The Court of Appeals modified the judgment by eliminating the requirement that the employer reinstate the employees and pay them wages for the period *after* expiration of the collective agreement, and affirmed it in all other respects, 269 F2d 327, and we granted certiorari, 361 US 929, 4 L ed 2d 352, 80 S Ct 371.

That the propriety of the discharges, under the collective agreement, was arbitrable under the provisions of that agreement, even after its expiration, is not in issue. Nor is there any issue here as to the power of the arbitrator to award reinstatement status and back pay to the discharged employees to the date of expiration of the collective agreement. It is conceded, too, that the collective agreement expired by its terms on April 4, 1957, and was never extended or renewed.

The sole question here is whether the arbitrator exceeded the submission and his powers in awarding

*[363 US 601]

*reinstatement and back pay for any period after expiration of the collective agreements. Like the Court of Appeals, I think he did. I find nothing in the collective agreement that purports to so authorize. Nor does the Court point to anything in the agreement that purports to do so. Indeed, the union does not contend that there is any such covenant in the contract. Doubtless all rights that accrued to the employees under the collective agreement during its term, and that were made arbitrable by its provisions, could be awarded to them by the arbitrator, even though the period of the agreement had ended. But surely no rights *accrued* to the employees under the agreement after it had expired. Save for the provisions of the collective agreement, and in the absence, as here, of any applicable rule of law or contrary covenant between the employer and the employees, the employer had the legal right to discharge the employees at will. The collective agreement, however, protected them against discharge, for specified reasons, during its continuation. But when that agreement expired, it did not continue to afford rights in futuro to the employees—as though still effective and governing. After the agreement expired, the employment status of these 11 employees was terminable at the will of the employer, as the Court of Appeals quite properly held, 269 F2d, at 331, and see Meadows v Radio Industries, Inc. 222 F2d 347, 349 (CA7th Cir); Atchison, T. & S. F. R. Co. v Andrews, 211 F2d 264, 265 (CA10th Cir); Warden v Hinds, 163 F 201, 25 LRA NS 529 (CA4th Cir), and the announced discharge of these 11 employees then became lawfully effective.

Once the contract expired, no rights continued to accrue under it to the employees. Thereafter they

had no contractual right to demand that the employer continue to employ them, and a fortiori the arbitrator did not have power to order the employer to do so; nor did the arbitrator have power to order the em-
*[363 US 602]
ployer to pay wages to *them after the date of termination of the contract, which was also the effective date of their discharges.

The judgment of the Court of Appeals, affirming so much of the award as required reinstatement of the 11 employees to employment status and payment of their wages until expiration of the contract, but not thereafter, seems to me to be indubitably correct, and I would affirm it.

*[363 US 574]

*UNITED STEELWORKERS OF AMERICA, Petitioner,

v

WARRIOR & GULF NAVIGATION COMPANY

363 US 574, 4 L ed 2d 1409, 80 S Ct 1347

[No. 443]

Argued April 27, 1960. Decided June 20, 1960.

SUMMARY

Employees whose collective bargaining contract with the employer provided for arbitration of differences as to the meaning and application of the provisions of the contract, but excepted from arbitration matters which are strictly a function of management, protested the employer's practice of contracting out work formerly done by employees. Upon the employer's refusal to arbitrate this grievance, a suit to compel arbitration was brought in the United States District Court for the Southern District of Alabama; the District Court dismissed the complaint, holding that the collective bargaining contract did not permit arbitration of the employer's business judgment in contracting out work (168 F Supp 702). The Court of Appeals for the Fifth Circuit affirmed (269 F2d 633).

On certiorari, the United States Supreme Court reversed the judgment below. In an opinion reflecting the views of six members of the court, Douglas, J., held that the employees' grievance was not necessarily excluded from arbitration by the terms of the collective bargaining contract, and, since this grievance amounted to a difference as to the meaning and application of the provisions of the contract, arbitration thereof was compellable.

Frankfurter, J., concurred in the result.

Brennan, J., joined by Harlan, J., concurred in an opinion which appears infra, page 1432. Frankfurter, J., joined in the observations stated in this opinion.

Whittaker, J., dissented, asserting that the grievance as to contracting out was not an arbitrable dispute under the terms of the collective bargaining contract and the practice of the parties thereunder.

Black, J., did not participate.

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Labor § 21 — collective bargaining.

1. It is the federal policy to promote industrial stabilization through the collective bargaining agreement.

Labor § 125 — arbitration.

2. The inclusion in a collective bargaining agreement of a provision for arbitration of grievances is a major factor in achieving industrial peace.

Labor § 125 — arbitration — strikes.

3. Complete effectuation of federal policy is achieved when a collective bargaining agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration provision being the quid pro quo for the agreement not to strike.

Labor § 125 — arbitration — attitude of courts.

4. In the commercial case, arbitration is the substitute for litigation, while in labor relations arbitration is the substitute for industrial strife; arbitration of labor disputes has different functions from arbitration under the ordinary commercial agreement, and the hostility evinced by the courts toward arbitration of commercial contracts has no place in the field of labor relations.

Labor § 125 — arbitration.

5. Arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.

Labor § 40 — collective bargaining — nature of contract.

6. A collective bargaining agreement states the rights and duties of the parties and is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.

Labor § 40 — collective bargaining — nature of contract.

7. A collective bargaining agreement covers the whole employment relationship; it calls into being a new common law—the common law of the particular industry or of a particular plant.

Labor § 44 — collective bargaining — construction of contract.

8. A collective bargaining agreement is not simply a document by which the union and the employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he can point to a specific provision upon which the claim is founded; the words of the contract are not the exclusive source of rights and duties.

Labor § 44 — collective bargaining — construction of contract.

9. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the bargaining process demand a common law of the shop which implements and furnishes the context of the agreement.

Labor § 40 — collective bargaining.

10. A collective bargaining agreement is an effort to erect a system of industrial self-government.

Labor § 40 — collective bargaining — alternatives.

11. The choice of parties to a collective bargaining agreement is not between entering or refusing to enter into a relationship, but is between having that relationship governed by an agreed upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces.

ANNOTATION REFERENCES

1. Matters arbitrable under arbitration provisions of collective labor contract, 24 ALR2d 752.

2. Right of arbitrators to act on their own knowledge of facts, or factors relevant to questions submitted to them, in absence of evidence in that regard, 154 ALR 1210.

3. Right of arbitrator to consider or to base his decision upon matters other than those involved in the legal principles applicable to the questions at issue between the parties, 112 ALR 873.

Labor § 40 — collective bargaining — contents of agreement.

12. Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a concise and readable instrument, the collective bargaining agreement which is the product of negotiation is a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith.

Labor § 125 — arbitration — importance.

13. Whereas courts and arbitration in the context of most commercial contracts are resorted to because there has been a breakdown in the working relationship of the parties, such resort being the unwanted exception, the machinery for arbitration of grievances under a collective bargaining agreement is at the very heart of a system of industrial self-government.

Labor § 125 — arbitration — scope.

14. Arbitration pursuant to a provision in a collective bargaining contract for arbitration of grievances is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and providing 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 a vehicle by which meaning and content is given the collective bargaining contract.

[*See annotation reference* 1]

Labor § 125 — arbitration — scope.

15. The grievance and arbitration provision of a collective bargaining agreement embraces all of the questions on which the parties disagree except the matters which the parties specifically exclude; the grievance procedure is a part of the continuous collective bargaining process, and it, rather than a strike, is the terminal point of a disagreement.

[*See annotation reference* 1]

Labor § 125 — arbitration — functions of arbitrator.

16. The labor arbitrator, acting under the arbitration provision of a collective bargaining contract, performs functions which are not normal to the courts, and the considerations which help him fashion judgments may be foreign to the competence of courts; the arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practice of the industry and the shop — is equally a part of the collective bargaining contract, although not expressed in it.

[*See annotation references* 2, 3]

Arbitration § 8 — arbitrator — status.

17. An arbitrator is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept; he has no general charter to administer justice for a community which transcends the parties, but is a part of a system of self-government created by and confined to the parties.

Arbitration § 2 — based on contract.

18. Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.

Labor § 125 — arbitration — scope — function of courts.

19. Under § 301 of the Labor Management Relations Act of 1947 (29 USC § 185(a)), by which Congress has assigned to the courts the duty of determining whether the reluctant party to a collective bargaining agreement containing an arbitration provision has breached his agreement to arbitrate, the judicial inquiry must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or to give the arbitrator the power to make the award he made; an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitra-

tion clause is not susceptible of an interpretation that covers the asserted dispute, doubts being resolved in favor of coverage.

[*See annotation reference* 1]

Labor § 125 — arbitration — function of courts.

20. Under a collective bargaining contract's provision for arbitration of differences as to the meaning and application of the provisions of the contract, the question of arbitrability is for the courts to decide.

[*See annotation reference* 1]

Evidence § 385; Labor § 125 — arbitration — burden of proof — arbitrability.

21. A party to a collective bargaining contract containing a grievance-arbitration clause who, in seeking to compel arbitration over the objection of the other contracting party, asserts that the parties, by their contract, excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, and vested power to make both determinations in the arbitrator, must bear the burden of a clear demonstration that the contract had that purpose.

[*See annotation reference* 1]

Labor § 125 — arbitration — scope — contracting out work.

22. A collective bargaining contract provision for arbitration of grievances which excepts from arbitration matters which are strictly a function of management but makes the grievance procedure applicable to differences or local trouble of any kind which may arise, does not necessarily except from the grievance procedure a dispute regarding the employer's practice of contracting out work previously performed by employees.

[*See annotation reference* 1]

Labor § 40 — collective bargaining — effect.

23. Collective bargaining agreements regulate or restrain the exercise of management functions; they do not oust management from the performance of these functions.

Labor § 1 — management functions.

24. Hiring and firing, pay and promotion, supervision and planning, are a part of the management's function, and, absent a collective bargaining agreement, this function may be exercised freely except as limited by public law and by the willingness of employees to work under particular, unilaterally imposed conditions.

Labor § 125 — arbitration — no-strike clause.

25. When a collective bargaining contract containing a provision for arbitration of grievances also contains a no-strike clause, everything that management does is subject to the agreement, for either management is prohibited or limited in the action it takes, or if not, it is protected from interference by strikes.

Labor § 125 — arbitration — functions of management.

26. The phrase "strictly a function of management," as used in the provision of a collective bargaining agreement excepting from arbitration grievances as to matters which are strictly a function of management, has reference only to that over which the contract gives management complete control and unfettered discretion and does not refer to any practice in which, under particular circumstances prescribed by the contract, management is permitted to indulge.

[*See annotation reference* 1]

Labor § 125 — arbitration — contracting out work.

27. If the provision of a collective bargaining agreement regarding arbitration of grievances excludes from the grievance procedure the contracting out of work by the employer, or a written collateral agreement makes it clear that contracting out of work is not a matter for arbitration, a grievance based solely on contracting out is not arbitrable.

[*See annotation reference* 1]

Labor § 125 — arbitration — exclusion — function of courts.

28. In the absence from a collective

bargaining agreement's provision for arbitration of grievances of any express exclusion from arbitration of a particular grievance, only the most forceful evidence of a purpose to exclude that grievance from arbitration can prevail, especially where the exclusionary clause is vague and the arbitration clause is broad; and, since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement when the alternative is to use the services of an arbitrator.

[*See annotation reference* 1]

Labor § 125 — arbitration — contracting out work.

29. An employee grievance alleging that the employer violated the terms of a collective bargaining agreement in contracting out work formerly done by employees is subject to arbitration under a provision of the contract calling for arbitration of disputes "as to the meaning and application of the provisions of this Agreement."

[*See annotation reference* 1]

Labor § 125 — arbitration — policy.

30. In cases involving the arbitrability, under a collective bargaining contract, of a particular labor dispute, the judiciary sits to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the old regime of industrial conflict.

APPEARANCES OF COUNSEL

David E. Feller argued the cause for petitioner.

Samuel Lang argued the cause for respondent.

Briefs of Counsel, p 2193, infra.

OPINION OF THE COURT

*[363 US 575]

*Opinion of the Court by Mr. Justice **Douglas**, announced by Mr. Justice **Brennan**.

Respondent transports steel and steel products by barge and maintains a terminal at Chickasaw, Alabama, where it performs maintenance and repair work on its barges. The employees at that terminal constitute a bargaining unit covered by a collective bargaining agreement negotiated by petitioner union. Respondent between 1956 and 1958 laid off some employees, reducing the bargaining unit from 42 to 23 men. This reduction was due in part to respondent contracting maintenance work, previously done by its employees, to other companies. The latter used respondent's supervisors to lay out the work and hired some of the laid-off employees of respondent (at reduced wages). Some were in fact assigned to work on respondent's barges. A number of employees signed a grievance which petitioner presented to respondent, the grievance reading:

"We are hereby protesting the Company's actions, of arbitrarily and unreasonably contracting out work to other concerns, that could and previously has been performed by Company employees.

"This practice becomes unreasonable, unjust and discriminatory in lieu [sic] of the fact that at present

*[363 US 576]

*there are a number of employees that have been laid off for about 1 and ½ years or more for allegedly lack of work.

"Confronted with these facts we charge that the Company is in violation of the contract by inducing a partial lock-out, of a number of the employees who would otherwise be working were it not for this unfair practice."

The collective agreement had both a "no strike" and a "no lockout" pro-

vision. It also had a grievance procedure which provided in relevant part as follows:

"Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.

"Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences but an earnest effort shall be made to settle such differences immediately in the following manner:

"A. For Maintenance Employees:

"First, between the aggrieved employees, and the Foreman involved;

"Second, between a member or members of the Grievance Committee designated by the Union, and the Foreman and Master Mechanic.

. . . .

"Fifth, if agreement has not been reached the matter shall be referred to an impartial umpire for decision. The parties shall meet to decide on an umpire acceptable to both. If no agreement on selection of an umpire is reached, the parties shall

*[363 US 577]

jointly petition *the United States Conciliation Service for suggestion of a list of umpires from which selection will be made. The decision of the umpire shall be final."

Settlement of this grievance was not had and respondent refused arbitration. This suit was then commenced by the union to compel it.[1]

The District Court granted respondent's motion to dismiss the complaint. 168 F Supp 702. It held after hearing evidence, much of which went to the merits of the grievance, that the agreement did not "confide in an arbitrator the right to review the defendant's business judgment in contracting out work." Id. 168 F Supp at 705. It further held 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." Ibid. The Court of Appeals affirmed by a divided vote, 269 F2d 633, the majority holding that the collective agreement had withdrawn from the grievance procedure "matters which are strictly a function of management" and that contracting out fell in that exception. The case is here on a writ of certiorari. 361 US 912, 4 L ed 2d 183, 80 S Ct 255.

We held in Textile Workers Union v Lincoln Mills, 353 US 448, 1 L ed 2d 972, 77 S Ct 912, that a grievance arbitration provision in a collective agreement could be enforced by reason of § 301(a) of the Labor Management Relations Act[2] and that the policy to be applied in enforcing

*[363 US 578]

this type of arbitration *was that reflected in our national labor laws. Id. 353 US at 456, 457. The present

1. Section 301(a) of the Labor Management Relations Act, 1947, 61 Stat 156, 29 USC § 185(a), provides:

"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." See Textile Workers Union v Lincoln Mills, 353 US 448, 1 L ed 2d 972, 77 S Ct 912.

2. Note 1, supra.

federal policy is to promote industrial stabilization through the collective bargaining agreement.[3] Id. 353 US at 453, 454. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.[4]

Headnote 1
Headnote 2

Thus the run of arbitration cases, illustrated by Wilko v Swan, 346 US 427, 98 L ed 168, 74 S Ct 182, becomes irrelevant to our problem. There the choice is between the adjudication of cases or controversies in courts with established procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal arbitration tribunal on the other. In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.

Headnote 4
Headnote 5

The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. See Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv L Rev 999, 1004–1005. The collective *[363 US 579] agreement covers *the whole employment relationship.[5] It calls into being a new common law—the common law of a particular industry or of a particular plant. As one observer has put it:[6]

Headnote 6
Headnote 7

". . . [I]t is not unqualifiedly true that a collective-bargaining

3. In § 8(d) of the National Labor Relations Act as amended by the 1947 Act, 29 USC § 158(d), Congress indeed provided that where there was a collective agreement for a fixed term the duty to bargain did not require either party "to discuss or agree to any modification of the terms and conditions contained in" the contract. And see NLRB v Sands Mfg. Co. 306 US 332, 83 L ed 682, 59 S Ct 508.

4. Complete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement being the "quid pro quo" for the agreement not to strike. Textile Workers Union v Lincoln Mills, 353 US 448, 455, 1 L ed 2d 972, 979, 77 S Ct 912.

Headnote 3

5. "Contracts which ban strikes often provide for lifting the ban under certain conditions. Unconditional pledges against strikes are, however, somewhat more frequent than conditional ones. Where conditions are attached to no-strike pledges, one or both of two approaches may be used: certain *subjects* may be exempted from the scope of the pledge, or the pledge may be lifted after certain *procedures* are followed by the union. (Similar qualifications may be made in pledges against lockouts.)

"Most frequent conditions for lifting no-strike pledges are: (1) The occurrence of a deadlock in wage reopening negotiations; and (2) violation of the contract, especially non-compliance with the grievance procedure and failure to abide by an arbitration award.

"No-strike pledges may also be lifted after compliance with specified procedures. Some contracts permit the union to strike after the grievance procedure has been exhausted without a settlement, and where arbitration is not prescribed as the final recourse. Other contracts permit a strike if mediation efforts fail, or after a specified cooling-off period." Collective Bargaining, Negotiations and Contracts, Bureau of National Affairs, Inc., 77:101.

6. Cox, Reflections Upon Labor Arbitration, 72 Harv L Rev 1482, 1498–1499 (1959).

agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded. There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics

Headnote 8

Headnote 9

*[363 US 580]

*and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledge so plain a need unless they stated a contrary rule in plain words."

A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability pre-exists the negotiations. Rather it is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces. The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time. Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is, in the words of the late Dean Shulman, "a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith." Shulman, supra, at 1005. Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of

Headnote 10

Headnote 11

Headnote 12

*[363 US 581]

the specific practices *which underlie the agreement may be unknown, except in hazy form, even to the negotiators. Courts and arbitration in the context of most commercial contracts are resorted to because there has been a breakdown in the working relationship of the parties; such resort is the unwanted exception. But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable 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

Headnote 13

Headnote 14

the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement. The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement.

Headnote 15

The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. "A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. . . ." Shulman, supra, at 1016.

Headnote 16

Headnote 17

The labor arbitrator's source of law is not confined to the express provisions of the contract, as the in-

*[363 US 582]

dustrial *common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in her personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. 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.

The Congress, however, has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation*

Headnote 18
Headnote 19

*[363 US 583]

that covers the asserted dispute.

Doubts should be resolved in favor of coverage.[7]

We do not agree with the lower courts that contracting-out grievances were necessarily excepted from the grievance procedure of this agreement. [Headnote 22] To be sure, the agreement provides that "matters which are strictly a function of management shall not be subject to arbitration." But it goes on to say that if "differences" arise or if "any local trouble of any kind" arises, the grievance procedure shall be applicable.

Collective bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from the performance of them. [Headnote 23] [Headnote 24] Management hires and fires, pays and promotes, supervises and plans. All these are part of its function, and absent a collective bargaining agreement, it may be exercised freely except as limited by public law and by the willingness of employees to work under the particular, unilaterally imposed conditions. A collective bargaining agreement may treat only with certain specific practices, leaving the rest to management but subject to the possibility of work stoppages. When, however, an absolute no-strike clause is included in the agreement, then in a very real [Headnote 25] sense everything that management does is subject to the agreement, for either management is prohibited or limited in the action it takes, or if not, it is protected from interference by strikes. This comprehensive reach of the collective bargaining agreement does not mean, however, *[363 US 584] *that the language, "strictly a function of management," has no meaning.

"Strictly a function of management" might be thought to refer to any practice of management in which, under particular circumstances prescribed by the agreement, it is permitted to indulge. But if courts, in order to determine arbitrability, were allowed to determine what is permitted and what is not, the arbitration clause would be swallowed up by the exception. Every grievance in a sense involves a claim that management has violated some provision of the agreement.

Accordingly, "strictly a function of management" must be interpreted as referring only to that over which the contract gives management complete control and unfettered discretion. [Headnote 26] Respondent claims that the contracting out of work falls within this category. Contracting out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators.[8] A specific

7. It is clear that under both the agreement in this case and that involved in American Mfg. Co. 4 L ed 2d 1403, the question of arbitrability is for the courts to decide. [Headnote 20] [Headnote 21] Cf. Cox, Reflections Upon Labor Arbitration, 72 Harv L Rev 1482, 1508–1509. Where the assertion by the claimant is that the parties excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator, the claimant must bear the burden of a clear demonstration of that purpose.

8. See Celanese Corp. of America, 33 Lab Arb Rep 925, 941 (1959), where the arbiter in a grievance growing out of contracting out work said:

"In my research I have located 64 published decisions which have been concerned with this issue covering a wide range of factual situations but all of them with the common characteristic—i. e., the contracting-out of work involved occurred under an Agreement that contained no provision that specifically mentioned contracting-out of work."

collective bargaining agreement may exclude contracting out from the grievance procedure. Or a written collateral agreement may make clear that contracting out was not a matter for arbitration. In such a case a grievance based solely on contracting out would not be arbitrable. Here, however, there is no such provision. Nor is there any showing that the parties designed the phrase "strictly a function of management" to encompass any and all forms of contracting out. In the absence of any *express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator.

Headnote 27

*[363 US 585]

Headnote 28

The grievance alleged that the contracting out was a violation of the collective bargaining agreement. There was, therefore, a dispute "as to the meaning and application of the provisions of this Agreement" which the parties had agreed would be determined by arbitration.

Headnote 29

The judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict. Whether contracting out in the present case violated the agreement is the question. It is a question for the arbiter, not for the courts.

Headnote 30

Reversed.

Mr. Justice **Frankfurter** concurs in the result.

Mr. Justice **Black** took no part in the consideration or decision of this case.

[For opinion of Mr. Justice **Brennan,** joined by Mr. Justice **Frankfurter** and Mr. Justice **Harlan,** see infra, p. 1432.]

SEPARATE OPINION

Mr. Justice **Whittaker,** dissenting.

Until today, I have understood it to be the unquestioned law, as this Court has consistently held, that arbitrators are private judges chosen by the parties to decide *particular matters specifically submitted;[1] that the contract under which matters are submitted to arbitrators is at once the source and limit of their authority and power;[2] and that their power to decide issues with finality, thus ousting the normal functions of the courts, must rest upon a clear, definitive agreement of the parties, as such powers can never be implied. United States v Moorman, 338 US 457, 462, 94 L ed 256,

*[363 US 586]

1. "Arbitrators are judges chosen by the parties to decide the matters submitted to them." Burchell v Marsh (US) 17 How 344, 349, 15 L ed 96, 99.

2. "The agreement under which [the arbitrators] were selected *was at once the source and limit of their authority,* and the award, to be binding, must, in substance and form, conform to the submission." (Emphasis added.) Continental Ins. Co. v Garrett, 125 F 589, 590 (CA6th Cir)—Opinion by Judge, later Mr. Justice, Lurton.

260, 70 S Ct 288;[3] Mercantile Trust Co. v Hensey, 205 US 298, 309, 51 L ed 811, 815, 27 S Ct 535, 10 Ann Cas 572.[4] See also B. Fernandez & Hnos., S. en C. v Rickert Rice Mills, 119 F2d 809, 815, 136 ALR 351 (CA 1st Cir);[5] Marchant v Mead-Morrison Mfg. Co. 252 NY 284, 299, 169 NE 386, 391;[6] Continental Milling *[363 US 587] & Feed Co. *v Doughnut Corp. of America, 186 Md 669, 676, 48 A2d 447, 450;[7] Jacob v Weisser, 207 Pa 484, 489, 56 A 1065, 1067.[8] I believe that the Court today departs from the established principles announced in these decisions.

Here, the employer operates a shop for the normal maintenance of its barges, but it is not equipped to make major repairs, and accordingly the employer has, from the beginning of its operations more than 19 years ago, contracted out its major repair work. During most, if not all, of this time the union has represented the employees in that unit. The District Court found that "[t]hroughout the successive labor agreements between these parties, including the present one, . . . [the union] has unsuccessfully sought to negotiate changes in the labor contracts, and particularly during the negotiation of the present labor agreement, . . . which *[363 US 588] would have limited *the right of the [employer] to continue the practice of contracting out such work." 168 F Supp 702, 704, 705.

The labor agreement involved here provides for arbitration of disputes respecting the interpretation and application of the agreement and, arguably, also some other things. But the first paragraph of the arbitration section says:

3. "It is true that *the intention of parties to submit their contractual disputes to final determination outside the courts should be made manifest by plain language.*" (Emphasis added.) United States v Moorman, 338 US 457, 462, 94 L ed 256, 260, 70 S Ct 288.

4. "To make such [an arbitrator's] certificate conclusive *requires plain language in the contract.* It is not to be implied." (Emphasis added.) Mercantile Trust Co. v Hensey, 205 US 298, 309, 51 L ed 811, 815, 27 S Ct 535, 10 Ann Cas 572.

5. "A party is never required to submit to arbitration any question which he has not agreed so to submit, and contracts providing for arbitration *will be carefully construed in order not to force a party to submit to arbitration a question which he did not intend to be submitted.*" (Emphasis added.) B. Fernandez & Hnos., S. – C. v Rickert Rice Mills, 119 F2d 809, 815, 136 ALR 351 (CA1st Cir).

6. In this leading case, Judge, later Mr. Justice, Cardozo said:

"The question is one of intention, to be ascertained by the same tests that are applied to contracts generally. . . . No one is under a duty to resort to these conventional tribunals, however helpful their processes, *except to the extent that he has signified his willingness.* Our own favor or disfavor of the cause of arbitration is not to count as a factor in the appraisal of the thought of others." (Emphasis added.) Marchant v Mead-Morrison Mfg. Co. 252 NY 284, 299, 169 NE 386, 391.

7. In this case, the Court, after quoting Judge Cardozo's language in Marchant (NY) supra, saying that "the question is one of intention," said:

"Sound policy demands that the terms of an arbitration agreement *must not be strained to discover power to pass upon matters in dispute, but the terms must be clear and unmistakable to oust the jurisdiction of the Court, for trial by jury cannot be taken away in any case merely by implication.*" (Emphasis added.) Continental Milling & Feed Co. v Doughnut Corp. of America, 186 Md 669, 676, 48 A2d 447, 450.

8. "But, under any circumstances, before the decision of an arbitrator can be held final and conclusive, it must appear, as was said in Chandley Bros. v. Cambridge Springs, 200 Pa. 230, 49 Atl. 772, *that power to pass upon the subject-matter, is clearly given to him. 'The terms of the agreement are not to be strained to discover it. They must be clear and unmistakable to oust the jurisdiction of the courts; for trial by jury cannot be taken away by implication merely in any case.'*" (Emphasis added.) Jacob v Weisser, 207 Pa 484, 489, 56 A 1065, 1067.

"[M]atters which are strictly a function of management shall not be subject to arbitration under this section." Although acquiescing for 19 years in the employer's interpretation that contracting out work was "strictly a function of management," and having repeatedly tried —particularly in the negotiations of the agreement involved here—but unsuccessfully, to induce the employer to agree to a covenant that would prohibit it from contracting out work, the union, after having agreed to and signed the contract involved, presented a "grievance" on the ground that the employer's contracting out work, at a time when some employees in the unit were laid off for lack of work, constituted a partial "lockout" of employees in violation of the antilockout provision of the agreement.

Being unable to persuade the employer to agree to cease contracting out work or to agree to arbitrate the "grievance," the union brought this action in the District Court, under § 301 of the Labor Management Relations Act, 29 USC § 185, for a decree compelling the employer to submit the "grievance" to arbitration. The District Court, holding that the contracting out of work was, and over a long course of dealings had been interpreted and understood by the parties to be, "strictly a function of management," and was therefore specifically excluded from arbitration by the terms of the contract, denied the relief prayed, 168 F Supp 702. The Court of Appeals affirmed, 269 F2d 633, and we granted certiorari. 361 US 912, 4 L ed 2d 183, 80 S Ct 255.

*[363 US 589]

*The Court now reverses the judgment of the Court of Appeals. It holds that the arbitrator's source of law is "not confined to the express provisions of the contract," that arbitration should be ordered "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," that "[d]oubts [of arbitrability] should be resolved in favor of coverage," and that when, as here, "an absolute no-strike clause is included in the agreement, then . . . everything that management does is subject to [arbitration]." I understand the Court thus to hold that the arbitrators are not confined to the express provisions of the contract, that arbitration is to be ordered unless it may be said with positive assurance that arbitration of a particular dispute is excluded by the contract, that doubts of arbitrability are to be resolved in favor of arbitration, and that when, as here, the contract contains a no-strike clause, everything that management does is subject to arbitration.

This is an entirely new and strange doctrine to me. I suggest, with deference, that it departs from both the contract of the parties and the controlling decisions of this Court. I find nothing in the contract that purports to confer upon arbitrators any such general breadth of private judicial power. The Court cites no legislative or judicial authority that creates for or gives to arbitrators such broad general powers. And I respectfully submit that today's decision cannot be squared with the statement of Judge, later Mr. Justice, Cardozo in Marchant that "No one is under a duty to resort to these conventional tribunals, however helpful their processes, *except to the extent that he has signified his willingness*. Our own favor or disfavor of the cause of arbitration is not to count as a factor in the appraisal of the thought of others" (emphasis added), 252 NY at 299, 169 NE at 391; nor with his state-

*[363 US 590]

ment *in that case that "[t]he ques-

tion is one of intention, to be ascertained by the same tests that are applied to contracts generally," id.; nor with this Court's statement in Moorman, "that the intention of the parties to submit their contractual disputes to final determination outside the courts *should be made manifest by plain language*" (emphasis added), 338 US at 462; nor with this Court's statement in Hensey that: "To make such [an arbitrator's] certificate conclusive *requires plain language in the contract.* It is not to be implied." (Emphasis added.) 205 US at 309. "A party is never required to submit to arbitration any question which he has not agreed so to submit, and *contracts providing for arbitration will be carefully construed in order not to force a party to submit to arbitration a question which he did not intend to be submitted.*" (Emphasis added.) B. Fernandez & Hnos., S. en C. v Rickert Rice Mills, supra (119 F2d at 815 (CA 1st Cir)).

With respect, I submit that there is nothing in the contract here to indicate that the employer "signified [its] willingness" (Marchant, supra (169 NE at 299)) to submit to arbitrators whether it must cease contracting out work. Certainly no such intention is "made manifest by plain language" (Moorman, supra (338 US at 462)), as the law "requires," because such consent "is not to be implied." (Hensey, supra (205 US at 309)). To the contrary, the parties by their conduct over many years interpreted the contracting out of major repair work to be "strictly a function of management," and if, as the concurring opinion suggests, the words of the contract can "be understood only by reference to the background which gave rise to their inclusion," then the interpretation given by the parties over 19 years to the phrase "matters which are strictly a function of management" should logically have some significance here. By their contract, the parties agreed that "matters

*[363 US 591]

*which are strictly a function of management shall not be subject to arbitration." The union over the course of many years repeatedly tried to induce the employer to agree to a covenant prohibiting the contracting out of work, but was never successful. The union again made such an effort in negotiating the very contract involved here, and, failing of success, signed the contract, knowing, of course, that it did not contain any such covenant, but that, to the contrary, it contained, just as had the former contracts, a covenant that "matters which are strictly a function of management shall not be subject to arbitration." Does not this show that, instead of signifying a willingness to submit to arbitration the matter of whether the employer might continue to contract out work, the parties fairly agreed to exclude at least that matter from arbitration? Surely it cannot be said that the parties agreed to such a submission by any "plain language." Moorman, supra (338 US at 462), and Hensey, supra (205 US at 309). Does not then the Court's opinion compel the employer "to submit to arbitration [a] question which [it] has not agreed so to submit"? (B. Fernandez & Hnos., S. en C., supra (119 F2d at 815)).

Surely the question whether a particular subject or class of subjects is or is not made arbitrable by a contract is a judicial question, and if, as the concurring opinion suggests, "the court may conclude that [the contract] commits to arbitration any [subject or class of subjects]," it may likewise conclude that the contract does not commit such subject or class of subjects to arbitration, and "[w]ith that find-

ing the court will have exhausted its function" no more nor less by denying arbitration than by ordering it. Here the District Court found, and the Court of Appeals approved its finding, that by the terms of the contract, as interpreted by the parties over 19 years, the contracting out
*[363 US 592]
of work was "strictly a function *of management" and "not subject to arbitration." That finding, I think, should be accepted here. Acceptance of it requires affirmance of the judgment.

I agree with the Court that courts have no proper concern with the "merits" of claims which by contract the parties have agreed to submit to the exclusive jurisdiction of arbitrators. But the question is one of jurisdiction. Neither may entrench upon the jurisdiction of the other. The test is: Did the parties in their contract "manifest by plain language" (Moorman, supra (338 US at 462)) their willingness to submit the issue in controversy to arbitrators? If they did, then the arbitrators have exclusive jurisdiction of it, and the courts, absent fraud or the like, must respect that exclusive jurisdiction and cannot interfere. But if they did not, then the courts must exercise their jurisdiction, when properly invoked, to protect the citizen against the attempted use by arbitrators of pretended powers actually never conferred. That question always is, and from its very nature must be, a judicial one. Such was the question presented to the District Court and the Court of Appeals here. They found the jurisdictional facts, properly applied the settled law to those facts, and correctly decided the case. I would therefore affirm the judgment.

[430 US 243]

NOLDE BROTHERS, INC., Petitioner,

v

LOCAL NO. 358, BAKERY & CONFECTIONERY WORKERS UNION, AFL-CIO

430 US 243, 51 L Ed 2d 300, 97 S Ct 1067, reh den 430 US 988, 52 L Ed 2d 384, 97 S Ct 1689

[No. 75–1198]

Argued November 9, 1976. Decided March 7, 1977.

SUMMARY

After a union had terminated a collective bargaining agreement with an employer while negotiating contract changes, the union threatened a strike. The employer then closed its plant and refused the union's demand that severance pay be paid to qualified employees under the terminated bargaining agreement. The employer also refused to arbitrate the severance pay claim pursuant to a clause in the terminated bargaining agreement requiring submission of all disputes to arbitration. The union then instituted an action in the United States District Court for the Eastern District of Virginia, seeking to compel the employer to arbitrate the severance pay issue or, in the alternative, a judgment for the severance pay due. The District Court granted the employer's motion for summary judgment on both issues, holding as to the arbitration question that the duty to arbitrate terminated with the contract that had created it (382 F Supp 1354). The United States Court of Appeals for the Fourth Circuit reversed, holding that the duty to arbitrate survived the contract's termination with respect to claims that arose by reason of the collective bargaining agreement (530 F2d 548).

On certiorari, the United States Supreme Court affirmed. In an opinion by Burger, Ch. J., joined by Brennan, White, Marshall, Blackmun, Powell, and Stevens, JJ., it was held that the employer was required to arbitrate the union's claim for severance pay notwithstanding that the dispute arose after the union had terminated the bargaining agreement, since (1) the agreement had contained a clause requiring submission of all disputes to arbitration, (2) the dispute arose "under" the agreement, even though after its termination, and (3) the arbitration clause did not expressly exclude from

Briefs of Counsel, p 871, infra.

its operation a dispute which arose under the contract, but which was based on events that occurred after its termination—there being little reason to construe the contract to mean that the parties, who were deemed to have been conscious of the federal labor policy favoring arbitration, intended their contractual arbitration duty to terminate immediately on the termination of the contract.

Stewart, J., joined by Rehnquist, J., dissenting, expressed the view that (1) the duty to arbitrate could arise only upon the parties' agreement to resolve their contractual differences in the arbitral forum, and (2) neither federal labor law nor the interest of maintaining industrial peace warranted the conclusion that the dispute in the case at bar was subject to arbitration, since the agreement providing for arbitration had terminated and the rights in dispute, though claimed to have arisen under the agreement, had ripened only after the agreement had expired and the employment relationship had terminated.

HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

Labor § 125 — arbitration — termination of agreement

1a, 1b, 1c. An employer must arbitrate a union's claim that qualified employees

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

48 Am Jur 2d, Labor and Labor Relations §§ 1252, 1268

2 Am Jur Pl & Pr Forms (Rev Ed), Arbitration and Award, Forms 11 et seq.; 16 Am Jur Pl & Pr Forms (Rev Ed), Labor and Labor Relations, Forms 152, 155

10 Am Jur Legal Forms 2d, Labor and Labor Relations §§ 159:1201 et seq.

11 Am Jur Trials 327, Arbitration of a Labor Dispute—Management Representation

US L Ed Digest, Labor § 125

ALR Digests, Labor § 73.3

L Ed Index to Annos, Arbitration and Award

ALR Quick Index, Arbitration and Award

Federal Quick Index, Collective Bargaining

ANNOTATION REFERENCES

Breach or repudiation of collective labor contract as subject to, or as affecting right to enforce, arbitration provision in contract. 29 ALR3d 688.

Enforcement of contractual arbitration clause as affected by expiration of contract prior to demand for arbitration. 5 ALR3d 1008.

Matters arbitrable under arbitration provisions of collective labor contract. 24 ALR2d 752.

were entitled to severance pay under a collective bargaining agreement when the employer closed its plant, notwithstanding that the plant closing and the dispute did not arise until shortly after the union had terminated the collective bargaining agreement, where (1) the agreement had contained a clause requiring submission of all disputes to arbitration, (2) the dispute arose "under" the agreement, even though after its termination, and (3) the arbitration clause did not expressly exclude from its operation a dispute which arose under the contract, but which was based on events that occurred after its termination—there being little reason to construe the contract to mean that the parties, who must be deemed to have been conscious of the federal labor policy favoring arbitration, intended their contractual arbitration duty to terminate immediately on the termination of the contract. (Stewart and Rehnquist, JJ., dissented from this holding.)

Labor § 45 — termination of agreement — subsequent realization of rights

2. Parties to a collective bargaining agreement may agree that rights accrued during the term of the agreement shall be realized after its expiration.

Labor § 125 — arbitration — dispute as to severance pay

3. Under a collective bargaining agreement containing a clause for submitting "all grievances" to arbitration, a dispute over the meaning of a severance pay clause in the agreement, arising during the life of the agreement, is subject to the agreement's mandatory arbitration procedures.

Labor § 125 — arbitration — termination of agreement

4. Although the duty to arbitrate is a creature of a collective bargaining agreement and a party cannot be compelled to arbitrate any matter in the absence of a contractual obligation to do so, nevertheless termination of a collective bargaining agreement does not automatically extinguish a party's duty to arbitrate grievances arising under the contract.

Labor § 125 — arbitration — expiration of agreement

5. The expiration of a collective bargaining agreement prior to the commencement or completion of arbitration proceedings thereunder to resolve a dispute arising during the life of the contract does not terminate the parties' contractual obligation to resolve such dispute by an arbitral rather than a judicial forum.

Labor § 125 — arbitration — construction of agreement

6. Courts generally defer to an arbitrator's interpretation of a collective bargaining agreement, because of the arbitrator's special experience, expertise, and selection by the parties.

Labor § 125 — arbitration — construction of agreement

7. Under a collective bargaining agreement containing an arbitration clause, the question of interpretation of the collective bargaining agreement is a question for the arbitrator; 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 because their interpretation of the contract is different from his.

Labor § 125 — arbitration — federal policy

8. Federal labor policy favors arbitration as the means of resolving disputes over the meaning and effect of collective bargaining agreements.

Labor § 125 — arbitration — order

9. There is a strong presumption favoring arbitrability of disputes under an arbitration clause of a collective bargaining agreement; an order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute, doubts being resolved in favor of coverage.

Labor § 125 — arbitration — termination of agreement

10. When parties agree to a collective bargaining agreement containing an arbitration clause, they must be deemed to have been conscious of the federal labor policy favoring arbitration as the means of resolving disputes over the meaning and effect of collective bargaining agreements, and thus, the parties' failure to exclude from arbitrability contract disputes arising after termination of the bargaining agreement, far from manifesting an intent to have arbitration obligations cease with the agreement, affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship; where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication before it may be concluded that the dispute is not subject to arbitration.

SYLLABUS BY REPORTER OF DECISIONS

Petitioner corporation entered into a collective-bargaining agreement with respondent Union which contained a provision for severance pay on termination of the employment of certain employees. The agreement, which specified that any grievance arising between the parties was subject to binding arbitration, was to remain in effect until its expiration date and thereafter until execution of a new agreement or the existing agreement was terminated by either party upon seven days' written notice. While contract changes were being negotiated after the contract's expiration date, respondent on August 20, 1973, gave notice of cancellation, and the contract terminated August 27. Negotiations nevertheless continued but ended on August 31, when petitioner, threatened with a strike, informed respondent that it was closing its plant effective that day. Plant operations ceased shortly thereafter. Petitioner paid accrued wages, but rejected respondent's demand for severance pay under the collective-bargaining agreement and declined to arbitrate the claim therefor on the ground that its obligation to do so terminated with the collective-bargaining agreement. Respondent then brought this action in District Court to compel petitioner, inter alia, to arbitrate the severance-pay issue. The District Court granted petitioner's motion for summary judgment, holding that the employees' right to severance pay expired with respondent's voluntary termination of the agreement: that consequently there was no longer a severance-pay issue to arbitrate: and that, in any event, the duty to arbitrate ended with the contract. The Court of Appeals reversed, concluding that the parties' arbitration duties under the contract survived its termination with respect to claims arising by reason of the agreement. *Held:* Respondent's claim for severance pay under the expired contract is subject to resolution under the contract's arbitration terms.

(a) The obligations of parties under the arbitration clause of a collective-bargaining agreement may survive contract termination when the dispute is over an obligation arguably created by the expired agreement. John Wiley & Sons v Livingston, 376 US 543, 11 L Ed 2d 898, 84 S Ct 909.

(b) The parties agreed to resolve *all* disputes by resort to the mandatory grievance-arbitration machinery established by the agreement. There is nothing in the arbitration clause that expressly excluded from its operation a dispute arising under the contract but based on events occurring after its termination. Absent some contrary indication, there are strong reasons to conclude that the parties did not intend their arbitration obligations to end automatically with the contract.

(c) The parties clearly expressed their preference for an arbitral, rather than a judicial, interpretation of their obligations and drafted their broad arbitration clause against a backdrop of a well-established federal labor policy favoring arbitration as a means of resolving disputes. There is a strong presumption

favoring arbitrability. Steelworkers v Warrior & Gulf Nav. Co. 363 US 574, 582–583, 4 L Ed 2d 1409, 80 S Ct 1347.

(d) Where the dispute is over a provision of the expired collective-bargaining agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication.

530 F2d 548, affirmed.

Burger, C. J., delivered the opinion of the Court, in which Brennan, White, Marshall, Blackmun, Powell, and Stevens, JJ., joined. Stewart, J., filed a dissenting opinion, in which Rehnquist, J., joined, post, p 255, 51 L Ed 2d, p 311.

APPEARANCES OF COUNSEL

Allan L. Bioff argued the cause for petitioner.
Ronald Rosenberg argued the cause for respondent.
Briefs of Counsel, p 871, infra.

OPINION OF THE COURT

Mr. Chief Justice **Burger** delivered the opinion of the Court.

[1a] This case raises the question of whether a party to a collective-bargaining contract may be required to arbitrate a contractual dispute over severance pay pursuant to the arbitration clause of that agreement even though the dispute, although governed by the contract, arises after its termination. Only the issue of arbitrability is before us.

(1)

In 1970, petitioner Nolde Brothers, Inc., entered into a collective-bargaining agreement with respondent Local No.

[430 US 245]

358, of the Bakery & Confectionery Workers Union, AFL-CIO, covering petitioner's Norfolk, Va., bakery employees. Under the contract, "any grievance" arising between the parties was subject to binding arbitration.[1] In addition, the contract contained a provision which provided for severance pay on termination of employment for all employees having three or more years of active service.[2] Vacation rights were

[430 US 246]

also granted employees by the

1. ARTICLE XII
GRIEVANCES AND ARBITRATION

"Section 1. All grievances shall be first taken up between the Plant Management and the Shop Steward. If these parties shall be unable to settle the grievance, then the Business Agent of the Union shall be called in, in an attempt to arrive at a settlement of the grievance. If these parties are unable to settle the grievance, the dispute will be settled as called for in Sections 2 and 3 of this Article.

"Section 2. In the event that any grievance cannot be satisfactorily adjusted by the procedure outlined above, either of the parties hereto may demand arbitration and shall give written notice to the other party of its desire to arbitrate. No individual employee shall have the right to invoke arbitration without the written consent of the Union. The Arbitration Board shall consist of three (3) persons, one selected by the Company and one selected by the Union. The two persons selected shall agree upon a third person who shall act as Chairman of the Arbitration Board.

"Section 3. The decision or award of the Arbitration Board, or a majority thereof, shall be final and binding on both parties. If the third party to arbitration is not selected in ten (10) days from receipt of notice, the Director of the U. S. Conciliation Service shall be requested to make the appointment. The expense of the neutral arbitrator shall be borne equally by the parties.

"Section 4. Pending negotiations or during arbitration there shall be no strikes, lock-outs, boycotts, or any stoppages of work."

2. ARTICLE IX
WAGES

. . . .

"Section 5. Each full-time employee who is permanently displaced from his employment with the Company by reason of the introduction of labor saving equipment, the closing of

agreement;[3] like severance pay, these rights were geared to an employee's length of service and the amount of his earnings. By its terms, the contract was to remain in effect until July 21, 1973, and thereafter, until such time as either a new agreement was executed between the parties, or the existing agreement was terminated upon seven days' written notice by either party.

[430 US 247]

In May 1973, the parties resumed bargaining after the Union advised Nolde, pursuant to § 8(d) of the National Labor Relations Act, 29 USC § 158(d) (1970 ed and Supp V) [29 USCS § 158(d)] of its desire to negotiate certain changes in the existing agreement. These negotiations continued without resolution up to, and beyond, the July 21 contract expiration date. On August 20, the Union served the requisite seven days' written notice of its decision to cancel the existing contract. The Union's termination of the contract became effective August 27, 1973.

Despite the contract's cancellation, negotiations continued. They ended, however, on August 31, when Nolde, faced by a threatened strike after the Union had rejected its latest proposal, informed the Union of its decision to close permanently its Norfolk bakery, effective that day. Operations at the plant ceased shortly after midnight on August 31. Nolde then paid employees their accrued wages and accrued vacation pay under the canceled contract; in addition, wages were paid for work performed during the interim between the contract's termination on August 27 and the bakery's closing four days later. However, the company rejected the Union's demand for the severance pay called for in the collective-bargaining agreement. It also declined to arbitrate the severance-pay claim on the ground that its contractual obligation to arbitrate disputes terminated with the collective-bargaining agreement.

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a department, the closing of an entire plant, or by lay off, shall be compensated for such displacement providing he has been actively employed by the Company for a period of at least three (3) years. An eligible employee's compensation for his displacement shall be on the basis of thirty (30) hours of severance pay, at his straight time hourly rate, for each full year or major portion of a year of active employment commencing with the fourth (4th) year following his most recent date of hire. Payment under this formula shall be limited to a maximum of nine hundred (900) hours of severance pay.

"Section 6. No severance pay will be paid to an eligible employee if he:

"(a) accepts employment in another plant of the Company; or

"(b) is voluntarily or involuntarily separated from his employment prior to the date he would otherwise be displaced for one of the reasons stated in Section 5 above."

3. ARTICLE IV
VACATIONS

"Section 1. Each full time employee is entitled to one week's vacation after one year's service, two (2) weeks' vacation after two (2) years' service, three (3) weeks' vacation after nine (9) years' service, and four (4) weeks' vacation after eighteen (18) years' service. . . .

. . . .

"Effective January 1, 1972, the service requirement for the fourth (4th) week of vacation shall be reduced to seventeen (17) years.

"Effective January 1, 1972, each employee with twenty-five (25) or more years of service shall be entitled to a vacation benefit of five (5) weeks.

"Section 2. The anniversary date of employment shall be adjusted by periods of lay-offs or leaves of absence for the purpose of computation of vacation benefits only.

"Section 3. Vacation pay shall be based on straight time at the employee's regular hourly rate for the average number of hours worked by the employee in the thirteen (13) weeks preceding the vacation period, not including holiday weeks or weeks in which time is lost on account of sickness, with a minimum of forty (40) hours' pay and a maximum of forty-eight (48) hours' pay for each week of the vacation allowance."

The Union then instituted this action in the District Court under § 301 of the Labor Management Relations Act, 29 USC § 185 [29 USCS § 185], seeking to compel Nolde to arbitrate the severance-pay issue, or in the alternative, judgment for the severance pay due. The District Court granted Nolde's motion for summary judgment on both issues. It held that the employees' right to severance pay expired with the Union's voluntary termination of the collective-bargaining contract and that, as a result, there was no longer any severance-pay
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issue to arbitrate. It went on to note that even if the dispute had been otherwise arbitrable, the duty to arbitrate terminated with the contract that had created it. 382 F Supp 1354 (ED Va 1974).

On appeal, the United States Court of Appeals for the Fourth Circuit reversed. 530 F2d 548 (1975). It took the position that the District Court had approached the case from the wrong direction by determining that Nolde's severance-pay obligations had expired with the collective-bargaining agreement before determining whether Nolde's duty to arbitrate the claim survived the contract's termination. Turning to that latter question first, the Court of Appeals concluded that the parties' arbitration duties under the contract survived its termination with respect to claims arising by reason of the collective-bargaining agreement. Having thus determined that the severance-pay issue was one for the arbitrator, the Court of Appeals expressed no views on the merits of the dispute. We granted certiorari to review its determination that the severance-pay claim was arbitrable. 425 US 970, 48 L Ed 2d 793, 96 S Ct 2165 (1976).

(2)

In arguing that Nolde's displaced employees were entitled to severance pay upon the closing of the Norfolk bakery, the Union maintained that the severance wages provided for in the collective-bargaining agreement were in the nature of "accrued" or "vested" 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. In support of this claim, the Union noted that the severance-pay clause is found in the contract under an article entitled "Wages." The inclusion within that provision, it urged, was evidence that the parties considered severance pay as part of the employees' compensation for services performed during the life of the agreement.[4] In addition, the Union
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pointed out that the severance-pay clause itself contained nothing to suggest that the employees' right to severance pay expired if the events triggering payment failed to occur during the life of the contract. 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

4. The fact that the amount of severance pay to which an employee is entitled under the collective-bargaining agreement varies according to the length of his employment and the amount of his salary also supports the Union's position that severance pay was nothing more than deferred compensation.

with the Union's unilateral cancellation of the contract.

[2] As the parties' arguments demonstrate, both the Union's claim for severance pay and Nolde's refusal to pay the same are based on their differing perceptions of a provision of the expired collective-bargaining agreement. The parties may have intended, as Nolde maintained, that any substantive claim to severance pay must surface, if at all, during the contract's term. However, there is also "no reason why parties could not if they so chose agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired." John Wiley & Sons v Livingston, 376 US 543, 555, 11 L Ed 2d 898, 84 S Ct 909 (1964).[5] Of course, in determining the arbitrability of the dispute, the merits of the underlying claim for severance pay are not before us. However, it is clear that, whatever the outcome, the resolution of that claim hinges on the interpretation ultimately given the contract clause providing for severance pay. The dispute therefore, although arising *after* the expiration of the collective-bargaining contract, clearly arises *under* that contract.

[3] There can be no doubt that a dispute over the meaning of the severance-pay clause during the life of the agreement

[430 US 250]

would have been subject to the mandatory grievance-arbitration procedures of the contract. Indeed, since the parties contracted to submit "all grievances" to arbitration, our determination that the Union was "making a claim which on its face is governed by the contract" would end the matter had the contract not been terminated prior to the closing of the plant. Steelworkers v American Mfg. Co. 363 US 564, 568, 4 L Ed 2d 1403, 80 S Ct 1343 (1960). Here, however, Nolde maintains that a different rule must prevail because the event giving rise to the contractual dispute, i.e., the employees' severance upon the bakery's closing, did not occur until after the expiration of the collective-bargaining agreement.

(3)

Nolde contends that the duty to arbitrate, being strictly a creature of contract, must necessarily expire with the collective-bargaining contract that brought it into existence. Hence, it maintains that a court may not compel a party to submit any post-contract grievance to arbitration for the simple reason that no contractual duty to arbitrate survives the agreement's termination. Any other conclusion, Nolde argues, runs contrary to federal labor policy which prohibits the imposition of compulsory arbitration upon parties except when they are bound by an arbitration agreement. In so arguing, Nolde relies on numerous decisions of this Court which it claims establish that "arbitration is a matter of contract and [that] a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Steelworkers v Warrior & Gulf Nav. Co. 363 US 574, 582, 4 L Ed 2d 1409, 80 S Ct 1347

5. The parties apparently viewed the vacation rights provided by Art IV of the contract as vested in nature since after the bakery's closing, Nolde, upon the Union's request, paid its former employees all vacation pay which had accrued under the collective-bargaining agreement.

(1960); e.g., Gateway Coal Co. v Mine Workers, 414 US 368, 374, 38 L Ed 2d 583, 94 S Ct 629 (1974); John Wiley & Sons v Livingston, supra, at 547, 11 L Ed 2d 898, 84 S Ct 909; Atkinson v Sinclair Refining Co. 370 US 238, 241, 8 L Ed 2d 462, 82 S Ct 1318 (1962).

[4, 5] Our prior decisions have indeed held that the arbitration duty is a creature of the collective-bargaining agreement and that a party cannot be compelled to arbitrate any matter in

[430 US 251]

the absence of a contractual obligation to do so. Adherence to these principles, however, does not require us to hold that termination of a collective-bargaining agreement automatically extinguishes a party's duty to arbitrate grievances arising under the contract. Carried to its logical conclusion that argument would preclude the entry of a post-contract arbitration order even when the dispute arose during the life of the contract but arbitration proceedings had not begun before termination. The same would be true if arbitration processes began but were not completed, during the contract's term. Yet it could not seriously be contended in either instance that the expiration of the contract would terminate the parties' contractual obligation to resolve such a dispute in an arbitral, rather than a judicial forum. See, John Wiley & Sons, supra; Steelworkers v Enterprise Wheel & Car Corp. 363 US 593, 4 L Ed 2d 1424, 80 S Ct 1358 (1960); Machine Workers v Oxco Brush Div. 517 F2d 239, 242–243 (CA6 1975); Procter & Gamble Ind. Union v Procter & Gamble Mfg. Co. 312 F2d 181, 186 (CA2 1962), cert denied, 374 US 830, 10 L Ed 2d 1053, 83 S Ct 1872 (1963). Nolde concedes as much by limiting its claim of nonarbitrability to those disputes which clearly arise after the contract's expiration. Brief for Petitioner 22.

[1b] Our holding in John Wiley & Sons is instructive on this matter. There we held that a dispute over employees' rights to severance pay[6] under an expired collective-bargaining agreement was arbitrable even though there was no longer any contract between the parties. In their expired agreement, the parties had agreed to submit to arbitration:

> " 'any differences, grievance or dispute between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application, or enforcement.' " 376 US, at 553, 11 L Ed 2d 898, 84 S Ct 909.

[430 US 252]

The Court had little difficulty interpreting that language to require the arbitration of the Union's post-termination severance-pay claim since that claim was

> "based solely on the Union's construction of the . . . agreement in such a way that . . . [the Employer] would have been required to discharge certain obligations notwithstanding the expiration of the agreement." Id., at 555, 11 L Ed 2d 898, 84 S Ct 909.

We thus determined that the parties' obligations under their arbitration clause survived contract termination when the dispute was over an obligation arguably created by the

6. The parties also disagreed over such matters as seniority rights, welfare security benefits, discharges and layoffs, and vacations. 376 US, at 554 n 7, 11 L Ed 2d 898, 84 S Ct 909.

expired agreement. It is true that the Union there first sought to arbitrate the question of post-contract severance pay while the agreement under which it claimed such benefits was still in effect. But that factor was not dispositive in our determination of arbitrability. Indeed, that very distinction was implicitly rejected shortly thereafter in Piano Workers v W. W. Kimball Co. 379 US 357, 13 L Ed 2d 541, 85 S Ct 441 (1964), revg 333 F2d 761 (CA7 1964), on the basis of John Wiley & Sons, supra and Steelworkers v American Mfg. Co., supra.[7] We decline to depart from that course in the instant case, for, on the record before us, the fact that the Union asserted its claim to severance pay shortly after, rather than before, contract termination does not control the arbitrability of that claim.

The parties agreed to resolve *all* disputes by resort to the mandatory grievance-arbitration machinery established by their collective-bargaining agreement. The severance-pay dispute, as we have noted, would have been subject to resolution under those procedures had it arisen during the contract's term. However, even though the parties could have so provided,

[430 US 253]

there is nothing in the arbitration clause that expressly excludes from its operation a dispute which arises under the contract, but which is based on events that occur after its termination. The contract's silence, of course, does not establish the parties' intent to resolve post-termination grievances by arbitration. 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.

[6, 7] By their contract the parties clearly expressed their preference for an arbitral, rather than a judicial, interpretation of their obligations under the collective-bargaining agreement. Their reasons for doing so, as well as the special role of arbitration in the employer-employee relationship, have long been recognized by this Court:

> "The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. . . . 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." Warrior & Gulf Nav. Co. 363 US, at 582, 4 L Ed 2d 1409, 80 S Ct 1347.

Indeed, it is because of his special experience, expertise, and selection by the parties that courts generally defer to an arbitrator's interpretation of the collective-bargaining agreement:

7. In W. W. Kimball Co., the Seventh Circuit found that a dispute over seniority rights under an expired collective-bargaining agreement was nonarbitrable. There the dispute did not arise, nor were arbitration proceedings or an action to compel the same instituted, during the life of the agreement. 333 F2d, at 762–763.

"[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction

[430 US 254]

of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." Enterprise Wheel & Car Corp. 363 US, at 599, 4 L Ed 2d 1424, 80 S Ct 1358.

While the termination of the collective-bargaining agreement works an obvious change in the relationship between employer and union, it would have little impact on many of the considerations behind their decision to resolve their contractual differences through arbitration. The contracting parties' confidence in the arbitration process and an arbitrator's presumed special competence in matters concerning bargaining agreements does not terminate with the contract. Nor would their interest in obtaining a prompt and inexpensive resolution of their disputes by an expert tribunal. Hence, there is little reason to construe this contract to mean that the parties intended their contractual duty to submit grievances and claims arising under the contract to terminate immediately on the termination of the contract; the alternative remedy of a lawsuit is the very remedy the arbitration clause was designed to avoid.

[8, 9] It is also noteworthy that the parties drafted their broad arbitration clause against a backdrop of well-established federal labor policy favoring arbitration as the means of resolving disputes over the meaning and effect of collective-bargaining agreements. Congress has expressly stated:

> "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." 29 USC § 173(d) [29 USCS § 173(d)].

In order to effectuate this policy, this Court has established a strong presumption favoring arbitrability:

> "[T]o be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery
>
> [430 US 255]
>
> of arbitration. . . . [a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." Warrior & Gulf Nav. Co. supra, at 582–583, 4 L Ed 2d 1409, 80 S Ct 1347.

[10] The parties must be deemed to have been conscious of this policy when they agree to resolve their contractual differences through arbitration. Consequently, the parties' failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an intent to have arbitration obligations cease with the agreement, affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship. In short, where the dispute is over a provision of the expired agreement, the presumptions favor-

ing arbitrability must be negated expressly or by clear implication.

[1c] We therefore agree with the conclusion of the Court of Appeals that, on this record, the Union's claim for severance pay under the expired collective-bargaining agreement is subject to resolution under the arbitration provisions of that contract.[8]

Affirmed.

SEPARATE OPINION

Mr. Justice **Stewart,** with whom Mr. Justice **Rehnquist** joins, dissenting.

When a dispute arises between two parties, that dispute is to be settled by the process of arbitration only if there is an

[430 US 256]

agreement between the parties that the dispute will be settled by that means. Yet the Court today says that a union-employer dispute must be settled by arbitration even though the dispute did not even arise until after the contract containing an agreement to arbitrate had been terminated by action of the Union, and the employer had closed its business. I think this conclusion is neither required by existing precedent nor based upon any realistic appraisal of the contracting parties' intent.

Our cases, to be sure, have established the importance of arbitration in resolving disputes arising under collective-bargaining agreements and in thereby maintaining peaceful labor relations. A collective-bargaining agreement erects a system of industrial self-government; grievance and arbitration provisions in such an agreement make that collective-bargaining process continuous: "Arbitration is the means of solving the unforeseeable 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." Steelworkers v Warrior & Gulf Nav. Co. 363 US 574, 581, 4 L Ed 2d 1409, 80 S Ct 1347.

But the duty to arbitrate can arise only upon the parties' agreement to resolve their contractual differences in the arbitral forum. And the presumptive continuation of that duty even after the formal expiration of such an agreement can be justified only in terms of a web of assumptions about the continuing nature of the labor-management relationship and the importance of having available a method harmoniously to resolve differences arising in that relationship. See generally id., at 578, 4 L Ed 2d 1409, 80 S Ct 1347.

Those assumptions are wholly inapplicable to this case. The closing of the bakery by the employer-petitioner necessarily meant that there was no continuing relationship to protect or preserve. Cf. John Wiley & Sons v Livingston, 376 US 543, 11 L Ed 2d 898, 84 S Ct 909; Howard Johnson Co. v

8. Certiorari was neither sought, nor granted, on the question of the arbitrator's authority to consider arbitrability following referral, and we express no view on that matter. Similarly, we need not speculate as to the arbitrability of post-termination contractual claims which, unlike the one presently before us, are not asserted within a reasonable time after the contract's expiration.

Hotel Employees, 417 [430 US 257] US 249, 41 L Ed 2d 46, 94 S Ct 2236. And the Union's termination of the contract, thereby releasing it from its obligation not to strike, foreclosed any reason for implying a continuing duty on the part of the employer to arbitrate as a quid pro quo for the Union's offsetting, enforceable duty to negotiate rather than strike. See Boys Markets, Inc. v Retail Clerks, 398 US 235, 26 L Ed 2d 199, 90 S Ct 1583.

Although for these reasons no continuing duty to arbitrate can be presumed in this case in the interest of maintaining industrial peace, it might nevertheless rationally be argued that the arbitration agreement was a term or condition of employment that the employer could not unilaterally change without first bargaining to impasse. See 29 USC § 158(a)(5) [29 USCS § 158(a)(5)]. The trouble with that argument is that the National Labor Relations Board has rejected the notion that arbitration is a term or condition of employment that by operation of statute continues even after the contract embodying it has terminated. The Board, instead, has viewed arbitration as an obligation that arises solely out of contract, and is favored but not statutorily required as a dispute-resolving mechanism. See Hilton-Davis Chemical Co. 185 NLRB 241 (1970). See also Gateway Coal Co. v Mine Workers, 414 US 368, 38 L Ed 2d 583, 94 S Ct 629.

It is clear, therefore, that neither federal labor law nor the interest of maintaining industrial peace can serve to explain the Court's conclusion that the presumption of arbitrability extends to the facts of this case.

I realize that our decisions have broadly held that doubts as to arbitrability under an arbitration clause are to be resolved in favor of arbitrability. See Warrior & Gulf Nav. Co., supra. But those cases involved arbitration clauses that were undoubtedly in force at the time the dispute first arose, and arbitration was invoked to resolve issues arising during the continuing course of the employer-employee relationship. (See, e.g., Piano Workers v W. W. Kimball Co. 379 US 357, 13 L Ed 2d 541, 85 S Ct 441, where a dispute over the rights of employees to preferential hiring at a new plant commenced before the contract at [430 US 258] the old plant had expired.) The question here, by contrast, is whether the presumption of arbitrability survived even when the contract providing for arbitration had terminated and the rights in dispute, though claimed to arise under the contract, ripened only after the contract had expired and the employment relationship had terminated.

For the reasons I have expressed, I think there was no agreement to arbitrate this dispute. The Union had, of course, a clear cause of action under § 301 of the Labor Management Relations Act to seek judicial redress against the employer for its failure to meet its severance-pay obligations to the employees. The Union did, in fact, bring just such a lawsuit in this case. If the Court of Appeals had addressed the merits of the litigation, as I believe it should have done, this controversy would have been settled long ago.

I respectfully dissent from the opinion and judgment of the Court.

ute in force at the time this policy was written * * * did not forbid the cancellation of an insurance policy with or without notice, where the default in payment of premium has existed for over six months." The Missouri Supreme Court, in considering a question like the one presented here, after reviewing the Kansas statutes and the Kansas court decisions, said: "We therefore hold that the courts of Kansas have, in effect, declared that the statute in question has no application whatever to a policy after the premium thereon has remained in default for a period of more than six months. . . ." Atkinson v. Metropolitan Life Ins. Co., 234 Mo.App. 357, 131 S.W. 918, 920 (1939). We find nothing in the policy provisions which could extend the coverage beyond the six-month period. At the time of default the net cash value of each policy was $11.11, which would purchase a maximum of twenty-one days of extended insurance. Mrs. Miner asserts that the insurance company lacked authority to deduct the amount of the indebtedness against the policy in determining its cash value; that it failed to give the notice required by the policy prior to voiding the policy for failure to pay the loan, and that in any event the policy remained in effect for the face amount less the indebtedness—assuming that the extended insurance provisions of the policies were available to the policyholder.[2]

[2] Liability on the policy terminated because of failure to pay premiums when due and not for default in loan obligations. The policy provided that in determining net cash value, the loan indebtedness should be deducted. It was stipulated that the net cash value of the policies after deducting the loan was $11.11, which would purchase extended term insurance for a maximum period of twenty-one days on each policy from March 17, 1968. Under the policy provisions, this method of determining "net cash value" available for purchase of extended insurance after default was proper. K.S.A. 40–428(a) (v), (vi); Bach v. Western States Life Ins. Co., 51 F.2d 191 (10th Cir. 1931); 6 Couch on Insurance 2d, Sec. 32:242, p. 476. No benefit accrued to the insured.

Reversed and remanded with instructions to enter judgment for the defendant.

AMANDA BENT BOLT COMPANY, Amanda, Ohio, Plaintiff-Appellant,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 1549, et al., Defendants-Appellees.

No. 71–1130.

United States Court of Appeals,
Sixth Circuit.

Dec. 14, 1971.

Action under Labor Management Relations Act to vacate an arbitration award. The United States District Court for the Southern District of Ohio, Joseph P. Kinneary, J., entered order for summary judgment in favor of defendant, and plaintiff appealed. The Court of Appeals, Harry Phillips, Chief Judge, held that where no-strike clause was an important part of collective bargaining contract and when 28 employees violated the provision they were subject to discharge and agreement did not prohibit company from rehiring any employee who had been discharged for cause and loss of seniority was in accord with express language of contract, award of arbitrator granting employees reinstatement with full seniority was con-

2. The application for insurance and the policies, by typewritten insertion, stated that there was "no extended insurance."

trary to terms of collective bargaining contract and was beyond scope of arbitrator's authority.

Judgment reversed and case remanded with directions.

1. Labor Relations ⚿411, 476

General rule is that arbitration as a means of settling labor disputes is favored and that courts refuse to review merits of an arbitration award, seeking to effectuate the policy that labor disputes should be resolved by arbitration.

2. Labor Relations ⚿463

Where no-strike clause was an important part of collective bargaining contract and when 28 employees violated the provision they were subject to discharge and agreement did not prohibit company from rehiring any employee who had been discharged for cause and loss of seniority was in accord with express language of contract, award of arbitrator granting employees reinstatement with full seniority was contrary to terms of collective bargaining contract and was beyond scope of arbitrator's authority. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a); 9 U.S.C.A. § 10.

Joseph M. Millious, Columbus, Ohio, Mayer, Tingley, Hurd & Emens, Columbus, Ohio, on brief, for appellant.

John A. Fillion, Detroit, Mich., Stephen I. Schlossberg, Detroit, Mich., Ray E. Schmidt, Dayton, Ohio, on brief, for appellees.

Before PHILLIPS, Chief Judge, and WEICK and CELEBREZZE, Circuit Judges.

PHILLIPS, Chief Judge.

This is an action under § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), seeking to vacate an arbitration award.

Appellant Amanda Bent Bolt Company ("the Company") entered into a collective bargaining contract with the appellee labor union containing a no-strike clause. The contract provided that employees striking in violation of the no-strike clause were subject to discharge and that employees discharged for cause would lose their seniority. Twenty-eight employees engaged in a wild cat strike in violation of the no strike clause. All striking employees were discharged by the company.

The Union processed the grievances of the employees according to the established contract procedure, which called for arbitration. The arbitrator awarded the employees reinstatement with full seniority.

The company filed this action to vacate the award on the ground that the arbitrator exceeded his authority by granting relief which contradicted the express terms of the collective bargaining agreement. The District Court entered an order for summary judgment in favor of the Union.

We reverse.

[1] The District Court correctly stated the general rule that arbitration as a means of settling labor disputes is favored and that courts refuse to review the merits of an arbitration award, seeking to effectuate the policy that labor disputes should be resolved by arbitration. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424; United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409; United Steelworkers v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403; United Steelworkers v. Caster Mold & Machine Co., 345 F.2d 429 (6th Cir.).

> Nevertheless "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. * * * [H]is award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have

no choice but to refuse enforcement of the award." United Steelworkers v. Enterprise, *supra*, 363 U.S. at 597, 80 S.Ct. at 1361.

Section 6.2 of the collective bargaining agreement in the present case provides as follows:

"The Union, its officers, agents, members, and employees covered by this agreement agree that for the duration of this Agreement there shall be no strikes, sitdowns, slowdowns, stoppages of work, boycott or any unlawful acts that interfere with the Company's operations or production or sale of its products. Any violation of this provision may be made the subject of disciplinary action, including discharge."

Section 4.1 provides that:

"The right to hire, lay off, promote, demote, transfer, discharge for cause, maintain discipline require observance of Company rules and regulations and maintain efficiency of employees is the sole responsibility of the Company. . . ."

Section 8.5 provides that employees shall lose their seniority if discharged for cause.

The decision of the arbitrator contains the following findings:

"It is conceded that an unauthorized work stoppage occurred on the morning of August 13, 1969, which was not condoned, sanctioned or encouraged by either the Local Union or International Officers. On the contrary, the evidence establishes without contradiction that both the Local Union Officers and International Representatives disapproved of the work stoppage and urged the participants to return to work.

* * * * * *

"The evidence clearly demonstrates that the unauthorized work stoppage occurred. The evidence establishes that the work stoppage had been planned by at least some employees on the previous evening. The action on the part of the employees who engaged in the work stoppage was in clear violation of the restrictive provisions of the contract.

* * * * * *

"The fact remains that the employees unequivocally violated the prohibition against strikes or work stoppages. The contract violations and acts of disciplinary action including discharge are explicitly authorized by the agreement.

* * * * * *

"In the judgment of the arbitrator, all of the employees who engaged and participated in the illegal work stoppage on August 13, 1969, were equally culpable and subject to the discharge penalty of the contract."

The first paragraph of the award of the arbitrator is as follows:

"1) The arbitrator finds that the twenty-eight individual grievants who were among those who engaged and participated in a work stoppage on August 13, 1969, were in clear violation of the language of Article VI which prohibits strikes or work stoppages and authorizes the company to take appropriate disciplinary action by reason of such contract violations, including the application of discharge penalties."

The arbitrator also stated the limitations on his own authority, saying:

"Inasmuch as the parties have seen fit to empower the Company to discharge employees who engage in a wildcat strike or work stoppage, the arbitrator is precluded and in fact is expressly prohibited, from substituting his judgment for that of the parties. . . . [T]his arbitrator is bound by the provisions of the contract; he is prohibited from adding to, subtracting from or modifying any of its terms."

In the face of the findings, the arbitrator proceeded to hold that all twenty-eight discharged employees are entitled to reinstatement with full seniority. This conclusion is based upon the fact that on August 29, 1969, the company sent a letter to all employees involved in

the strike, confirming their discharge and stating that an application for re-employment as new employees, with the loss of all seniority, would be considered by the company. The arbitrator concluded that:

> "[N]otwithstanding the grievants' violation of the contract in engaging in a work stoppage, and the fact that the company was authorized to consider the penalty of discharge, such action was not, in fact, taken; the notice of discharge coupled by the proposal to re-employ the grievants as new hirees was a punitive measure at variance with the contract provisions and the established disciplinary concepts."

He also said:

> "[T]he arbitrator is frank to acknowledge that he regards the indiscriminate application of the discharge penalty to all employees who engaged and participated in work stoppage without consideration of other factors including the degree of their participation is unusually harsh and severe."

[2] We hold that award of the arbitrator is contrary to the terms of the collective bargaining contract and was beyond the scope of his authority. Section 5.5 of the contract expressly provides that: "The arbitrator shall have no power to add to, subtract from or modify any of the terms of this agreement."

Nowhere in the agreement is the company prohibited from rehiring any employee who has been discharged for cause. The loss of seniority was in accord with the express language of the contract. For purpose of emphasis we requote from United Steelworkers v. Enterprise, *supra:* "[H]is award is legitimate only so long as it draws its essence from the collective bargaining agreement." 363 U.S. at 597, 80 S.Ct. at 1361.

The Federal Arbitration Act, 9 U.S.C. § 10, provides for the vacating of an arbitration award if the arbitrator exceeds his powers.

The no-strike clause was an important part of the collective bargaining contract. When twenty-eight employees violated this provision, they were subject to discharge. The determination of the penalty was reserved to the company and was not the prerogative of the arbitrator.

The judgment of the District Court is reversed. The case is remanded with directions to set aside the award of the arbitrator and for further proceedings not inconsistent with this opinion.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

FINISHLINE INDUSTRIES, INC., formerly B-Y Manufacturing, Inc., Respondent.

No. 71-1207.

United States Court of Appeals, Ninth Circuit.

Dec. 3, 1971.

Proceeding on petition by National Labor Relations Board to enforce order requiring employer to cease unfair labor practices and for certain other relief. The Court of Appeals, Duniway, Circuit Judge, held that action of employer in telling its employees to withdraw from a sheet metal workers union and to join a carpenters union if they wanted continued employment with employer was an unfair labor practice where employees at time they were told to transfer were represented by sheet metal workers union, and where employer had entered into a contract with such union.

Enforcement in accordance with opinion.

1. Labor Relations ⚷385

Action of employer in telling its employees to withdraw from a sheet metal workers union and to join a carpenters

evidence had been introduced which would overcome the presumption. This charge is in conflict with the law as announced by this Circuit in the Mims opinion. The trial court erred in its charge by permitting effect to be given to the presumption of sanity after it had disappeared. This error rises to the level of obvious and substantial errors which this Court may notice under the plain error rule in order to prevent a clear miscarriage of justice. Mims supra. See Sykes v. United States, 5th Cir. 1966, 373 F.2d 607, cert. denied 386 U.S. 977, 87 S.Ct. 1172, 18 L.Ed.2d 138; Doyle v. United States, 9th Cir. 1966, 366 F.2d 394; Goforth v. United States, 1959, 106 U.S.App.D.C. 111, 269 F.2d 778.

The judgment of the district court is reversed and the cause is remanded.

Reversed and remanded.

Curtis M. HARRIS et al., Plaintiffs-Appellants,

v.

CHEMICAL LEAMAN TANK LINES, INC., Defendant-Appellee.

No. 30532

Summary Calendar.*

United States Court of Appeals, Fifth Circuit.

Jan. 7, 1971.

Class action by employees against employer to vacate joint labor-management committee decision and to recover damages resulting from employer's action in allegedly failing to compensate employees pursuant to collective bargaining agreement. The United States District Court for the Northern District of Texas, at Fort Worth, Leo Brewster, J., granted summary judgment for employer and employees appealed. The Court of Appeals held that under collective bargaining agreement providing that any grievance not satisfactorily adjusted by employer and union shall be filed with grievance committee and in event of deadlock at grievance committee the grievance should be referred to arbitrator, where decision of grievance committee with respect to alleged failure of employer to compensate employees pursuant to collective bargaining agreement was unanimous, hearings did not breach duty of fair representation by failing to take case to arbitration, nor could union's decision not to sue be equated with bad faith.

Affirmed.

1. Appeal and Error ⟹826

Appeal from summary judgment for employer in suit by employees seeking to vacate joint labor-management committee decision would be placed on the summary calendar. U.S.Ct. of App. 5th Cir. Rule 18, 28 U.S.C.A.

2. Federal Civil Procedure ⟹184

Suit by employees against employer in which employees sought to vacate joint labor-management committee decision and to recover damages resulting from employer's action based upon that decision was properly brought as a class action. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

3. Labor Relations ⟹760

Unions were not indispensable parties to class action by employees against employer to vacate labor-management committee decision and to recover damages resulting from employer's action based upon that decision.

4. Labor Relations ⟹416

Individual employee who claims violation by his employer of the collective bargaining agreement is bound by the terms of that agreement as to the method

* [1] Rule 18, 5th Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al., 5th Cir., 1970, 431 F.2d 409, Part I.

of enforcing his claim, and where exclusive grievance procedure has been agreed upon, employee must pursue that route before seeking relief in court, and failure to exhaust contractual remedies will constitute a defense by the employer.

5. Labor Relations ⚷218

Where responsibility for processing disputes under labor agreement is vested solely in the union, employee must rely upon union to exhaust contractual remedies in his behalf, and to enforce compliance with those remedies by the employer.

6. Labor Relations ⚷221

In its role as the exclusive agent for all employees in the bargaining unit, union has power to sift out frivolous grievances, to abandon processing of a grievance which it determines in good faith to be meritless, and to settle disputes with the employer short of arbitration.

7. Labor Relations ⚷221

Union may not arbitrarily refuse to process meritorious grievance or process it in a perfunctory manner.

8. Labor Relations ⚷416

Upon breach of union's duty fairly to represent all of its employees, employee may bypass contractual remedies and maintain suit against the employer.

9. Labor Relations ⚷221

If grievance procedures have been exhausted by the union, the individual grievant is ordinarily bound by a resulting adverse decision which is "final" and "binding" on the parties to the contract, and court will refuse to review merits of such a decision. Labor Management Relations Act, 1947, § 203(d), 29 U.S.C.A. § 173(d).

10. Labor Relations ⚷482

The union or the employer, as parties to labor agreement, may sue to vacate a final award on the ground that the issue submitted was not "arbitrable" under the contract or that the arbitrator exceeded the scope of the submission. Labor Management Relations Act, 1947, § 203(d), 29 U.S.C.A. § 173(d).

11. Labor Relations ⚷221

Under collective bargaining agreement providing that any grievance not satisfactorily adjusted by employer and union shall be filed with grievance committee and in event of deadlock at grievance committee the grievance should be referred to arbitrator, where decision of grievance committee with respect to alleged failure of employer to compensate employees pursuant to collective bargaining agreement was unanimous, hearings did not breach duty of fair representation by failing to take case to arbitration, nor could union's decision not to sue be equated with bad faith.

12. Labor Relations ⚷482

In absence of issue of fact either as to breach of duty of fair representation by the union or as to substantial inadequacy of the grievance procedure, employees may not step into the shoes of the union to sue to vacate award of grievance committee. Labor Management Relations Act, 1947, § 203(d), 29 U.S.C.A. § 173(d).

Robert Stahala, Garrett & Stahala, F. R. Sears, Sears, Parker & Quisenberry, Fort Worth, Tex., for plaintiffs-appellants.

Maurice Bresenhan, Jr., Houston, Tex., Ringe, Peet & Mason, Philadelphia, Pa., Wm. L. Keller, Allen Butler, Clark, West, Keller, Sanders & Ginsberg, Dallas, Tex., for defendant-appellee.

Before WISDOM, COLEMAN, and SIMPSON, Circuit Judges.

PER CURIAM:

In this case we adopt as the opinion of this Court the Memorandum Opinion of the Honorable Leo Brewster, United States District Judge, filed July 22, 1970, cf. Lomax v. Armstrong Cork Company et al., 5 Cir., 1970, 433 F.2d 1277.

The judgment of the District Court, accordingly, is

Affirmed.**

** Memorandum Opinion hereto appended.

MEMORANDUM OPINION

(Number and Title Omitted)

(Filed: July 22, 1970)

Plaintiffs bring this class action against defendant, Chemical Leaman Tank Lines, Inc., as individuals and on behalf of all other employees of defendant designated as "single-man operators" similarly situated. Defendant is engaged in the commercial transporting of chemicals and is a party to a collective bargaining agreement with plaintiffs' bargaining representatives, Local Unions 728 and 47, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.[1]

Plaintiffs seek to vacate a joint labor-management committee decision. In addition, they seek damages resulting from defendant's action, based upon that decision, in allegedly failing to compensate plaintiffs pursuant to the collective bargaining agreement, Article XVII, as follows:

"Section 1. Driver's Pay will be as follows from the effective date of this agreement:

"Single-man operations: Twenty-two and one-tenth (22 1/10%) per cent of the gross freight rate not including special charges or hourly rates."

In October of 1968, plaintiffs filed grievances with their local unions, contending that, since January 24, 1968, their employer had increased some of the gross freight rates charged to customers but had failed to pay plaintiffs the stated per cent of the increased rates. Under Article VI of the collective bargaining agreement, "any controversy which might arise" is to be considered first by employer and the local union. Section 3 of Article VI provides:

"If the grievance is not satisfactorily adjusted by this means, the grievance will be properly filed with the established Grievance Committee and such other grievance machinery of the Southern Conference Motor Freight Agreements shall be used, provided, however, that in the event of a deadlock at the Southeast-Southwest Joint Area Committee, at the request of either party, the grievance shall be referred to the arbitrator." [2]

Settlement of the dispute as to the proper rates failed at the local level of the grievance procedure. At that point, the unions presented plaintiffs' grievances to the Southern Conference of Teamsters Tank Line Committee, composed of three representatives chosen by the employer and three by the local unions. In effect, the grievances protested an earlier decision of the Tank Line Committee rendered on January 24, 1968, concerning a collective bargaining agreement between a different employer and a different union but containing a provision identical to that involved in the instant case. Neither plaintiffs nor defendants were present at the hearing on that date which terminated in the following decision:

"Effective this date, January 24, 1968, the percentage of the gross line haul revenue is spelled out in the contract to be based on the tariff in effect at the present time. And in the future, if a tariff is reduced, the drivers covered will suffer no reduction in gross line haul revenue. And if the tariff is increased, the drivers will receive no increase as a result."

1. The agreement became effective on October 1, 1967 and expired on March 15, 1970.

2. Section 4 of Article VI defines the authority of the arbitrator as follows:

"The arbitrator shall have the authority to apply the provisions of the Agreement and to render a decision on any grievance properly coming before him but he shall not have the authority to amend or modify this Agreement or to establish any terms or conditions of this Agreement. * * * Both parties agree to accept the decision of the Arbitrator as final and binding. * * *"

Plaintiffs appeared and presented their views at the hearing of their grievances by the Tank Line Committee on October 16, 1968. Following the hearing, the Committee voted unanimously to apply the January 24th decision as to the meaning of the contract provision. Plaintiffs thereafter filed this suit to set aside the award.

[2] This action is before the Court on the respective motions of plaintiffs and defendant for summary judgment. Jurisdiction exists by virtue of Section 301(a) of the Labor Management Relations Act, 29 U.S.C.A., Section 185(a). Smith v. Evening News Association, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962). This suit was properly brought as a class action, and the plaintiffs will fairly and adequately represent the interests of the class.

Plaintiffs contend that the Tank Line Committee was empowered only to interpret and apply provisions of the labor agreement and that the decision to freeze the freight rate percentages amounted to a modification or amendment of the contract in excess of its authority. Plaintiffs further allege that the local unions breached their duty of fair representation owed to plaintiffs by refusing to take the grievances to arbitration and by refusing to bring this suit, knowing that the decision was invalid. On that basis, plaintiffs assert the right to maintain suit in their own behalf.

Defendant alleges in its answer that plaintiffs have failed to state a claim upon which relief may be granted and have failed to join the local unions as indispensable parties, in view of the allegations of breach of the duty of fair representation. In its motion for summary judgment, defendant contends that the unions processed the grievances to final and binding decision and that plaintiffs are, in effect, seeking to relitigate the merits of that decision.

[3] The unions are not indispensable parties in a suit by an employee against the employer but may be sued separately for an alleged breach of duty. Vaca v. Spies, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967); Serra v. Pepsi-Cola General Bottlers, D.C.Ill., 248 F.Supp. 684 (1965). The complaint may not be dismissed on that basis. Whether plaintiffs, themselves, have standing to bring this suit is a different question.

While Smith v. Evening News Association, supra, established that jurisdiction exists in this Court to entertain a suit by an individual employee regarding personal rights under Section 301(a), clarification of standing requirements was left to subsequent cases. The problem is that of "striking a meaningful balance, consistent with existing labor policy, between individual rights and the continued effectiveness of the collective bargaining process. Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers of America, v. N. L. R. B., 5 Cir., 368 F.2d 12, 18 (1966).

[4] The individual employee who claims a violation by his employer of the collective bargaining agreement is bound by the terms of that agreement as to the method of enforcing his claim. Vaca v. Spies, supra, 386 U.S. at p. 184, 87 S.Ct. 903; Miller v. Spector Freight Systems, 1 Cir., 366 F.2d 92 (1966).[3]

[5] Where responsibility for processing disputes under a labor agreement is vested solely in the union, the employee must rely upon the union to exhaust contractual remedies in his behalf, and to enforce compliance with those remedies by the employer. Broniman v. Great Atlantic & Pacific Tea Co., 6 Cir., 353 F.2d 559 (1965); Black-Clawson Co., etc. v. International Ass'n of Mach., 2 Cir., 313 F.2d 179 (1962).[4]

3. Where the parties have agreed upon an exclusive grievance procedure, the employee must pursue that route before seeking relief in court, and failure to exhaust his contractual remedies will constitute a defense by the employer. Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965).

4. Where only the parties to the labor agreement are given the power to invoke

[6] The processing of disputes through contractual channels is considered part of the continuing process of collective bargaining, by which the labor agreement is given meaning and content. United Steelworkers, etc. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 581, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). The employee has gained bargaining strength through representation by his union but has surrendered his right to make "the law of the Job", and his interests are subordinated to those of the bargaining unit as a whole.[5] Thus, in its role as the exclusive agent for all employees in the bargaining unit, the union has the power to sift out frivolous grievances,[6] to abandon processing of a grievance which it determines in good faith to be meritless,[7] and to settle disputes with the employer short of arbitration.[8]

[7, 8] The employee has protection in the statutory duty of the union fairly to represent all its employees. Ford Motor Co. v. Huffman, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1952). The union may not arbitrarily refuse to process a meritorious grievance or process it in a perfunctory manner. Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370 (1969). Upon proof of breach of this duty by the union, the employee may by-pass contractual remedies and maintain suit against the employer.[9]

[9] Assuming that grievance procedures have been exhausted by the union, the individual grievant is ordinarily bound by a resulting adverse decision which is "final" and "binding" on the parties to the contract. Boone v. Armstrong Cork Co., 5 Cir., 384 F.2d 285 (1967); Haynes v. United States Pipe & Foundry Co., 5 Cir., 362 F.2d 414 (1966). "Final adjustment by a method agreed upon by the parties" being the declared goal of federal labor policy,[10] courts will refuse to review the merits of such a decision.[11]

[10] The union or the employer, as parties to the labor agreement, may sue to vacate a final award on the ground that the issue submitted was not "arbitrable" under the contract [12] or that the arbitrator exceeded the scope of the submission.[13] Courts have not allowed an individual attack on a final award, however, except on the grounds of fraud, deceit or breach of the duty of fair representation or unless the grievance procedure was a "sham, substantially inadequate or substantially unavailable." [14]

the grievance machinery, an individual may not sue to compel arbitration. Black-Clawson Co., etc. v. International Ass'n of Mach., supra.

5. Comment: Federal Protection of Individual Rights under Labor Contracts, 73 Yale L.J. 1215, 1226 (1964).

6. Vaca v. Spies, supra, 386 U.S. at p. 191, 87 S.Ct. 903.

7. O'Sullivan v. Getty Oil Co., D.C.Mass., 296 F.Supp. 272 (1969); White v. General Baking Co., D.C. New Jersey, 263 F.Supp. 264 (1964).

8. Simmons v. Union News Co., 6 Cir., 341 F.2d 531 (1965), cert. denied, 382 U.S. 884, 86 S.Ct. 165, 15 L.Ed.2d 125 (1965); Hildreth v. Union News Co., 6 Cir., 315 F.2d 548 (1963), cert. denied 375 U.S. 826, 84 S.Ct. 69, 11 L.Ed.2d 59 (1963).

9. See Vaca v. Spies, supra, as to the remedies available, against the union for breach of the duty of fair representation.

10. Section 203(d), Labor Management Relations Act, 29 U.S.C.A., Section 173(d).

11. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); United Steelworkers, etc. v. Warrior & Gulf Nav. Co., supra; United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960).

12. United Steelworkers, etc. v. Warrior & Gulf, supra, 363 U.S. at p. 582, 80 S.Ct. at p. 1352, 4 L.Ed.2d at p. 1417.

13. United Steelworkers of America v. Enterprise Wheel & Car Corp., supra, note 9, 363 U.S. at p. 597, 80 S.Ct. at p. 1361, 4 L.Ed.2d at p. 1428.

14. Humphrey v. Moore, supra; Bieski v. Eastern Automobile Forwarding Co., 3 Cir., 396 F.2d 32 (1968); Rothlein v. Armour & Co., 3 Cir., 391 F.2d 574 (1968). In the Rothlein and Bieski cases, conflicting interests of the union

In Acuff v. United Papermakers & Paperworkers, 5 Cir., 404 F.2d 169 (1968),[15] the union sued to compel arbitration by the employer. The court ordered arbitration and retained jurisdiction until the award was entered. Individual employees then sought to have the award set aside, alleging the right to intervene based upon "inadequate representation" by the union under Rule 24 (a), F.R.Civ.Proc. In dismissing the appeal from the district court's denial of the motion to intervene, the Fifth Circuit held that the union's failure to obtain a favorable award or to sue to vacate the unfavorable award could not be equated with "inadequate representation." In absence of an irreconcilable conflict of interest among employees of breach of duty of fair representation, the employees could not intervene. While the grounds upon which the employees sought to vacate the award were not revealed by the Court's opinion, that decision is dispositive of the instant case.

[11] Here, the record conclusively refutes plaintiffs' contention that the local unions breached their duty of fair representation by failing to take the case to arbitration. Arbitration was available only if the Joint Committee deadlocked. Since the decision was unanimous, there was no provision for further appeal within the contractual framework, and the decision was final. As to failure of the unions to institute this suit on behalf of plaintiffs, there is no allegation as to discrimination or other improper conduct. The good faith of the union's decision not to sue cannot depend solely upon a later determination by this Court that the award was invalid, nor can plaintiffs equate the union's failure to challenge the award with bad faith.

Plaintiffs do not allege that bad faith or conflicting interests of the unions played any part in the decision of the Joint Committee, itself. As to adequacy of the proceedings, plaintiffs contend only that they were not present at the hearing on January 24, 1968. This contention is immaterial. The January 24th hearing involved a different contract between different parties, and the decision on that date was applied in plaintiff's case because the contract provisions involved were identical.

[12] The Court is of the opinion that plaintiffs have failed to raise a genuine issue of fact, either as to breach of duty of fair representation by the union or as to substantial inadequacy of the grievance procedure. In the absence of such an issue, plaintiffs may not step into the shoes of the union to sue to vacate the award of the grounds alleged. As the Court observed in Acuff v. United Papermakers & Paperworkers, supra, at p. 171:

> "It would be paradoxical in the extreme if the union, which is authorized to decide whether a grievance is to be pursued to the arbitration stage at all, could not be authorized to assume full responsibility for a grievance it did pursue, without the intervention of the individual union members immediately concerned."

The motion for summary judgment filed by the plaintiffs will be denied, and the one filed by the defendant will be granted. It is so ordered, and judgment will be entered accordingly.

Signed, this 22nd day of July, 1970.

s/ Leo Brewster

Judge

cast doubt upon the adequacy of the grievance procedures. Under the circumstances, the Third Circuit in each case closely examined the decision reached by the private decision-making body as to whether it had jurisdiction over the dispute. Humphrey v. Moore involved the additional element of breach of the duty of fair representation.

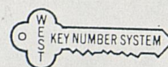
15. Cert. denied, 394 U.S. 987, 89 S.Ct. 1466, 22 L.Ed.2d 762 (1969).

Auburn, a maximum-security institution to Eastern, a medium-security institution; (2) to enroll Lunz in the vocational plumbing school at Eastern; and (3) to cause the reasons, if any, given in Lunz's prison records for his earlier transfer from Eastern to be expunged. The prison officials took this appeal from Judge Wyatt's denial of their motion to set aside the default judgment. Judge Wyatt has stayed his order pending the outcome of this appeal.

Since that time, Lunz has been transferred to the Clinton Correctional Facility, a maximum-security prison, where he enrolled in a plumbing course. While the transfer to a maximum-security rather than a medium-security institution might ordinarily be enough of a deviation from the district court's order to keep the controversy alive, *cf. Preiser v. Newkirk,* 422 U.S. 395, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975), appellee's counsel advised us at oral argument that Lunz no longer wants to return to Eastern. Moreover, Lunz's counsel advised us that he and his client see nothing injurious in the prison records and do not pursue the claim for expungement. We therefore find that appellee has voluntarily abandoned his claims for transfer to Eastern and expungement of the reason for his initial transfer.

Appellee is apparently satisfied with his present location and conditions of incarceration. Appellants certainly cannot complain if the appellee remains in the very status in which they have placed him. The controversy that must remain alive throughout the course of appellate review if there is to be a justiciable dispute is lacking here. Accordingly, we need not consider appellants' claim that the district court abused its discretion in denying their motion to set aside the default which resulted from their failure to file a timely answer to Lunz's complaint. The proper disposition in such a case is to vacate the judgment of the district court and remand with instructions to dismiss the case as moot. *Board of Regents of the University of Texas System v. New Left Education Project, et al.,* 414 U.S. 807, 94 S.Ct. 118, 38 L.Ed.2d 43 (1973); *Robb v. New York Joint Board, Amalgamated Clothing Workers of America,* 506 F.2d 1246 (2d Cir. 1974); *Wirtz v. Local Unions 410, 410A, 410B & 410C, International Union of Operating Engineers,* 366 F.2d 438 (2d Cir. 1966).

Vacated and remanded.



Edward T. CANNON,
Plaintiff-Appellee,

v.

CONSOLIDATED FREIGHTWAYS CORP. and Teamsters Local 710,
Defendants-Appellants.

No. 74–2081.

United States Court of Appeals,
Seventh Circuit.

Heard Sept. 17, 1975.

Decided Oct. 28, 1975.

Suit was instituted pursuant to Labor Management Relations Act. The United States District Court for the Northern District of Illinois, Eastern Division, Frank J. McGarr, J., entered judgment in favor of plaintiff, and defendants appealed. The Court of Appeals, Cummings, Circuit Judge, held that union did not breach its duty to fairly represent employee before joint grievance committee by failing to raise defense that sobriety rule upon which discharge of employee was based was improperly promulgated, even though rule was not produced to writing, where existence of rule was known to employee, and consequences of refusal to comply therewith were not only explained to employee but employee was offered a second chance to comply with rule prior

to time he was discharged; further, merits of employee's grievance before committee were not subject to judicial review under circumstances of case.

Reversed with directions.

1. Labor Relations ⚷219, 765

Breach of a union's duty to fairly represent a member of collective bargaining unit occurs when union's conduct toward member is arbitrary or discriminatory and, to establish same, it must be shown that conduct was intentional, invidious and directed at member.

2. Labor Relations ⚷221

Union did not breach its duty to fairly represent employee before joint grievance committee by failing to raise defense that sobriety rule upon which discharge of employee was based was improperly promulgated, even though rule was not reduced to writing, where existence of rule was known to employee, and consequences of refusal to comply therewith were not only explained to employee but employee was offered a second chance to comply with rule prior to time he was discharged. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

3. Labor Relations ⚷221

Proof that union may have acted negligently or exercised poor judgment with respect to its representation of employee before joint grievance committee was not in itself sufficient to support employee's claim of unfair representation against union. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

4. Labor Relations ⚷483

Refusal of courts to review merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. Labor Management Relations Act, 1947, §§ 203(d), 301(a), 29 U.S.C.A. §§ 173(d), 185(a).

5. Labor Relations ⚷483

Judicial deference to an arbitration award under a collective bargaining agreement is founded upon desire to effectuate decision of union and company to employ arbitration and upon belief that circumstances surrounding arbitration insure fair treatment to individual employee. Labor Management Relations Act, 1947, §§ 203(d), 301(a), 29 U.S.C.A. §§ 173(d), 185(a).

6. Labor Relations ⚷479

A court may review and set aside an arbitration award under a collective bargaining agreement if grievance is not arbitrable, indicia of fairness are absent, award is arbitrary or capricious, or procedural process is tainted by fraud or deceit. Labor Management Relations Act, 1947, §§ 203(d), 301(a), 29 U.S.C.A. §§ 173(d), 185(a).

7. Labor Relations ⚷477

Merits of ruling made by joint grievance committee in respect to discharge of employee were not subject to judicial review where decision of committee was final under collective bargaining agreement, and employee, who failed to prove that union breached its statutory duty of fair representation, did not otherwise challenge fairness of committee's action nor question its authority under agreement. Labor Management Relations Act, 1947, §§ 203(d), 301(a), 29 U.S.C.A. §§ 173(d), 185(a).

8. Labor Relations ⚷483

That district court would have interpreted collective bargaining agreement differently than joint grievance committee did not give court power to reverse decision of committee with respect to merits of employee's grievance. Labor Management Relations Act, 1947, §§ 203(d), 301(a), 29 U.S.C.A. §§ 173(d), 185(a).

Raymond J. Kelly, Jr., Chicago, Ill., for defendants-appellants.

J. S. Krakauer, Seymour Schriar, Sidney Z. Karasik, Chicago, Ill., for plaintiff-appellee.

Before FAIRCHILD, Chief Judge, CUMMINGS, Circuit Judge, and GRANT, Senior District Judge.*

CUMMINGS, Circuit Judge.

This suit was filed under Section 301(a) of the Labor Management Relations Act (29 U.S.C. § 185(a)). Plaintiff was an employee of defendant Consolidated Freightways Corporation of Delaware ("Consolidated") and a member in good standing of defendant Local Union No. 710 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the "Union"), the bargaining representative of Consolidated's truck drivers, including the plaintiff. Consolidated, an interstate shipper, employed plaintiff as an over-the-road truck driver at its Waukegan, Illinois, office.

On March 5, 1970, in St. Louis, Missouri, plaintiff had an accident while driving an empty Consolidated tractor and trailer. When plaintiff returned to the St. Louis terminal to report the accident, Robert Weber, defendant's Freight Operations Manager in St. Louis, asked plaintiff to take a sobriety test. Plaintiff refused even after Weber warned him that if he did not take the test, he could be fired. On the day after the accident, when in Chicago, plaintiff telephoned John Kelly, a business agent of the Union, and informed him of what transpired in St. Louis. Kelly told plaintiff that he should have called him from St. Louis and should have taken the sobriety test. Six days later, plaintiff received Consolidated's letter discharging him for refusing to submit to a sobriety test. Plaintiff then contacted Kelly, who twice asked M. L. Jones, the manager of Consolidated's Waukegan terminal, to put Cannon back to work. When these efforts failed, Kelly filed a grievance on March 16th with the Joint Grievance Committee, consisting of three union and three management representatives, on plaintiff's behalf. After a hearing where plaintiff was represented by Kelly, the grievance was denied on the basis of an informal rule that the refusal to submit to a sobriety test was a presumption of drunkenness.[1]

Thereafter plaintiff filed suit in district court alleging that the Union breached its duty of fair representation in failing to raise the defense that "he was being discharged by virtue of the consequences of refusing to take a [sobriety] test which consequences had not been adequately made known to him beforehand," and that the Grievance Committee decision violated the collective bargaining agreement in that the rule had not been properly promulgated.[2] Accordingly, plaintiff sought reinstatement with back pay without loss of benefits (such as pension and seniority rights) plus $50,000 punitive damages and reasonable attorneys' fees.

Pursuant to a motion of the Union and over objection of Consolidated, on January 22, 1973, the district court dismissed the Union with prejudice and without costs. On April 25, 1973, Consolidated moved for summary judgment on the ground that plaintiff failed to prove a breach of the Union's duty of fair representation because the district court had

* Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

1. Article 44 of the National Master Freight Agreement, in effect at the time of the accident, provides:

   "The Employer shall not discharge nor suspend any employee without just cause, but in respect to discharge or suspension shall give at least one (1) warning notice of the complaint against such employee to the employee * * * except no warning notice need be given to an employee before he is discharged if the cause of such discharge is * * * drunkenness."

   The contract provision contained no reference to the sobriety test. A new agreement, effective April 1, 1970, provided in Article 46 that "Refusal to take a sobriety test shall establish a presumption of drunkenness."

2. In the complaint, plaintiff alleged violations of Article 44 of the National Master Freight Agreement and Article XXIII of the Labor contract between the Union and Consolidated. Plaintiff no longer relies on Article XXIII. Article 44 is discussed *infra*.

dismissed the Union with prejudice and lacked jurisdiction to rehear a final and binding grievance decision. On July 2, 1973, the district court handed down a brief memorandum opinion and order denying the motion for summary judgment, holding that plaintiff was still free to attempt to prove a breach of the duty of fair representation by the Union because the court's January 22, 1973, order "did not constitute a merits determination. All that it represents is a final determination that a subsequent legal action may not be maintained by the plaintiff against the union for the events involved in this lawsuit. Plaintiff is still free to attempt to prove a breach of the duty of fair representation by the union in the instant action." The court also held that although its scope of review of grievance decisions was limited, it had jurisdiction to consider the legality of the grievance decision.

After a two-day trial in March 1974, the district court delivered an oral opinion adverse to Consolidated. The court held that the Union failed to represent plaintiff adequately in the grievance proceedings because it did not argue that the sobriety rule had been improperly promulgated. Having found that the Union breached its duty of fair representation, the court considered the merits of the breach of contract claim and concluded that the Grievance Committee's decision was invalid because it was not shown that plaintiff knew or should have known of the consequences of his refusal to take the sobriety test. It ordered the plaintiff reinstated with back pay and with restoration of his seniority and pension rights; because no malice was found in Consolidated's conduct, other relief was denied. We reverse.

This appeal presents two questions: whether the Union breached its duty of fair representation and whether the district court exceeded its authority in reviewing the merits of the Grievance Committee's ruling.

I

[1] "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes,* 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed.2d 842. To prove arbitrary or discriminatory treatment, the plaintiff must show that the Union's conduct was intentional, invidious and directed at that particular employee. *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 301, 91 S.Ct. 1909, 29 L.Ed.2d 473; *Desrosiers v. American Cyanamid Co.,* 377 F.2d 864 (2d Cir. 1967). Our review of the record satisfies us that the Union did not breach its duty of fair representation in this case.

The union business agent, John Kelly, made two efforts to convince Consolidated to rehire Cannon because of plaintiff's long record of satisfactory service. When the efforts failed, Kelly instituted grievance proceedings. As the district court found, Kelly was "bent on doing a good job" in representing the plaintiff before the Committee. What transpired at the hearing demonstrates that Kelly made a good faith effort to plead plaintiff's case.

At the March 30th grievance hearing, Consolidated's representative read the letter terminating Cannon and the affidavit of R. G. Weber, its Freight Operations Manager in St. Louis. The affidavit stated that Cannon had refused to take a sobriety test and concluded "I explained the consequences if he [Cannon] refused to take the test and again offered him the opportunity to take the test. He refused the second time and I terminated him." Statements of two other St. Louis witnesses confirming Weber's account were read into the hearing record.[3]

For plaintiff, Kelly argued to the Joint Committee that it was unlikely that anyone would have been drinking at 11:00 A.M. when the St. Louis accident

3. At the trial, plaintiff admitted Weber had informed him that a refusal to take the sobriety test could result in his termination.

occurred. He also noted that the police had not arrested plaintiff for being under the influence of alcohol and commented that Consolidated's truck might have had equipment defects. Kelly summed up as follows:

> "I also advised them that Mr. Cannon had 18 years with this company, he had a good safety record, and to the best of my knowledge, as long as I have been handling the barn, I had never heard any charges of intoxication against him while he was working, and in my opinion this fellow ought to be put back to work and compensated for all the time he lost."

[2] Subsequently, plaintiff told the Joint Committee that he didn't think he had to take the sobriety test and that he had not been drinking. Thereafter, the Joint Committee announced that the grievance was denied.[4] Nothing in the record indicates that the Union's handling of the grievance was arbitrary or discriminatory. *Vaca v. Sipes, supra.* Plaintiff does not dispute that Kelly acted without malice or prejudice towards Cannon, but argues that the failure of the Union to raise the defense that the rule was improperly promulgated constitutes a *per se* breach of the duty of fair representation. We disagree.

At the Joint Grievance Committee hearing, Kelly admitted that he knew of the existence of that body's unwritten rule that an employer has the right to demand a sobriety test where the employee may have been intoxicated. In denying the grievance, the Joint Committee obviously credited Weber's affidavit that he had explained to plaintiff the consequences of his refusal to take the test and then offered him a second chance to take it before terminating him. Therefore, it is immaterial that the sobriety rule was not reduced to writing.[5]

[3] Further, since the Joint Committee must have believed Weber's account of the St. Louis incident rather than plaintiff's, we fail to see how the Union breached its duty to represent plaintiff by not arguing to the Joint Committee that the sobriety rule should have been formally promulgated. At most, the failure to raise the defense was an act of neglect or the product of a mistake in judgment. However, "proof that the union may have acted negligently or exercised poor judgment is not enough to support a claim of unfair representation." *Bazarte v. United Transportation Union,* 429 F.2d 868, 872 (3d Cir. 1970). Therefore, the Union adequately discharged its duty of fair representation. *Humphrey v. Moore,* 375 U.S. 335, 350, 84 S.Ct. 363, 11 L.Ed.2d 370.

II

[4–6] It is well settled that "the refusal of courts to review the merits of

4. In August 1970, plaintiff filed a charge with the Thirteenth Region of the National Labor Relations Board, claiming that the Union had violated Section 8 of the National Labor Relations Act (29 U.S.C. § 158). However, the Regional Director refused to issue a complaint, stating as follows:

> "From the investigation, the evidence shows that the Union did, in fact, process your grievance and that the Union's failure to process your grievance as far as you desire, or to achieve the result you desire, was due to its judgment of the merits of your grievance, and not to unfair, arbitrary or discriminatory reasons. I am, therefore, refusing to issue a complaint in this matter."

Plaintiff did not perfect an appeal from the ruling of the Regional Director.

5. Plaintiff contends that the last paragraph of Article 44 of the National Master Freight Agreement required the sobriety rule to be written. That paragraph provides as follows:

> "Uniform rules and regulations with respect to disciplinary action may be drafted for each state but must be approved by the Joint State Committee for such state and by the Joint Area Committee. Such approved uniform rules and regulations shall prevail in the application and interpretation of this Article."

It should be noted that the first part of this paragraph is not mandatory. Also, there has been no showing that the sobriety test rule fits into the category of "Uniform rules and regulations with respect to disciplinary action." In any event, the interpretation of this Article was for the Joint Committee rather than the judiciary.

an arbitration award is the proper approach to arbitration under collective bargaining agreements."[6] *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596, 80 S.Ct. 1358, 1360, 4 L.Ed.2d 1424. Any other rule would thwart the federal policy encouraging settlement of industrial strife through means chosen by the parties. *Id.*; see 29 U.S.C. § 173(d).[7] This judicial deference to the arbitrator's decision is founded upon the desire to effectuate the decision of the union and company to employ arbitration and upon the belief that the circumstances surrounding arbitration insure fair treatment to the individual employee. Of course, a court may review and set aside an award if the grievance is not arbitrable (*Local 81, American Federation of Technical Engineers v. Western Electric Co., Inc.*, 508 F.2d 106 (7th Cir. 1974); *Los Angeles Newspaper Guild Local 69 v. Hearst Corp.*, 504 F.2d 636 (9th Cir. 1974), certiorari denied, 421 U.S. 930, 95 S.Ct. 1656, 44 L.Ed.2d 87), or the arbitrator exceeds his contractual authority. *International Ass'n of Machinists, District 8 v. Campbell Soup Co.*, 406 F.2d 1223 (7th Cir. 1969), certiorari denied, 396 U.S. 820, 90 S.Ct. 57, 24 L.Ed.2d 70; *Torrington Co. v. Metal Products Workers Union, Local 1645*, 362 F.2d 677 (2d Cir. 1966). Similarly, the court can review the award when the indicia of fairness are absent. For example, in *Vaca v. Sipes, supra*, the Court held that review was appropriate where the union breached its duty of fair representation. Other courts have recognized that the arbitrator's decision can be set aside where it is arbitrary or capricious (*Mogge v. District 8, International Ass'n of Machinists*, 454 F.2d 510, 513 (7th Cir. 1971); *Yellow Cab Co. v. Democratic Union Organizing Committee Local 777*, 398 F.2d 735, 737 (7th Cir. 1968), certiorari denied, 393 U.S. 1015, 89 S.Ct. 619, 21 L.Ed.2d 561), or where the process is tainted by fraud or deceit. *Margetta v. Pam Pam Corp.*, 501 F.2d 179, 180 (9th Cir. 1974); *Bieski v. Eastern Automobile Forwarding Co.*, 396 F.2d 32, 37 (3d Cir. 1968).

[7, 8] None of these circumstances is present in this case. The plaintiff has failed to prove a breach of the duty of fair representation; he does not otherwise challenge the fairness of the Grievance Committee's action nor question its authority under the contract. Under the collective bargaining agreement, the decision of the Grievance Committee is final. Therefore, the district court erred in considering the merits of the grievance. See *Local 13, International Longshoremen's & Warehousemen's Union v. Pacific Maritime Ass'n*, 441 F.2d 1061 (9th Cir. 1971), certiorari denied, 404 U.S. 1016, 92 S.Ct. 677, 30 L.Ed.2d 664; *Haynes v. United States Pipe & Foundry Co.*, 362 F.2d 414 (5th Cir. 1966). That the district court would have interpreted the contract differently than the Joint Grievance Committee does not give the court the power to reverse the Committee's decision. See *United Steel Workers v. Enterprise Wheel and Car Corp., supra*, 363 U.S. at 599, 80 S.Ct. 1358; *Local 7–644 Oil, Chemical & Atomic Workers International Union v. Mobil Oil Co.*, 350 F.2d 708, 712 (7th Cir. 1965), certiorari denied, 382 U.S. 986, 86 S.Ct. 563, 15 L.Ed.2d 474.

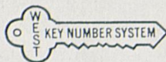
Because the plaintiff has not demonstrated the Union's breach of the duty of fair representation and because the district court exceeded its authority in re-

6. Section 301(a) of the Labor Management Relations Act (29 U.S.C. § 185(a)) confers jurisdiction on district courts over breaches of collective bargaining contracts. See *United Electrical Etc. v. Honeywell, Inc.*, 522 F.2d 1221, 1224 (7th Cir. 1975). Under that provision the court below of course had jurisdiction of this action whether or not there was a breach of the Union's duty of representation. However, absent such a breach, it was not empowered to review the merits of this award.

7. This statement of Congressional policy provides:

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

viewing the merits of the Joint Committee's decision, the judgment is reversed with directions to dismiss this action with prejudice.[8]



UNITED STATES of America, Appellee,

v.

Richard ANGLADA, Defendant-Appellant.

No. 229, Docket 75–1226.

United States Court of Appeals, Second Circuit.

Argued Sept. 18, 1975.

Decided Oct. 16, 1975.

Defendant was convicted in the United States District Court for the Southern District of New York, John M. Canella, J., of conspiring to distribute and of distributing heroin, and he appealed. The Court of Appeals, Feinberg, Circuit Judge, held that where there was no evidence of prior drug selling by defendant or of a previously formed intent to commit crime and, instead, Government relied on propensity or willingness as evidenced by defendant's ready response to inducement, but defendant denied any profit on deal, and testified that informer, who was his girl friend's brother, took 45 minutes to an hour trying to convince defendant to do him a favor by getting some drugs for him, whether any part of defendant's testimony was to be believed and, if so, whether propensity was nevertheless present was for jury and should have been submitted in respect to claim of entrapment.

Reversed and remanded.

1. Criminal Law ⇔739.1(1)

Submission of entrapment issue, though requiring some evidence of inducement, is not required if uncontradicted proof establishes that accused was "ready and willing without persuasion" and "awaiting any propitious opportunity to commit the offense."

2. Criminal Law ⇔739.1(1)

Trial judge must consider evidence in light most favorable to defendant in deciding whether a jury question is raised with respect to entrapment.

3. Criminal Law ⇔739.1(2)

Where there was no evidence of prior drug selling by defendant or of a previously formed intent to commit crime and, instead, Government relied on propensity or willingness as evidenced by defendant's ready response to inducement, but defendant denied any profit on deal, and testified that informer, who was his girl friend's brother, took 45 minutes to an hour trying to convince defendant to do him a favor by getting some drugs for him, whether any part of defendant's testimony was to be believed and, if so, whether propensity was nevertheless present was for jury and should have been submitted in respect to claim of entrapment.

4. Criminal Law ⇔739.1(1)

To extent that evidence implied propensity to commit crime, argument was for Government to make to jury on submission of entrapment issue.

5. Criminal Law ⇔37(4)

There is no iron clad rule that reluctance that indicates a lack of propensity to commit crime must continue throughout transaction in order for entrapment to take place.

6. Witnesses ⇔308

Since there was no apparent connection between state drug charge used by informer to justify his assertion of privilege against self-incrimination and incident on which his testimony was sought in respect to entrapment issue, trial

8. In view of this disposition, we do not reach other points raised by Consolidated.