The Question of Arbitrability - The Role of the Arbitrator, the Court, and the Parties

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LABOR LAW SYMPOSIUM


by
Russell A. Smith*

I. INTRODUCTION

THE UNITED States Supreme Court, in the necessarily uneven distribution of the wealth of its legal resources, has dealt generously with the labor lawyers of the country. In this field, which is relatively new, one can think off-hand of a substantial number of "landmark," if not epochal, decisions, which have had a major impact in shaping labor relations law. Consider, for example, the series of decisions which first invited, then curtailed, subjection of unions to the Sherman Act; Jones & Laughlin, which gave life to the Wagner Act; Thornhill and its progeny, which stirred, then

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1 Of special importance were Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945); United States v. Hutcheson, 312 U.S. 219 (1941); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940); Coronado Coal Co. v. UMW, 268 U.S. 295 (1921); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1919); and Lowe v. Lawlor (The "Danbury Hatters' Case), 208 U.S. 274 (1908). The law review and other literature on this subject is extensive. Of the more recent contributions, see Report of the Attorney General's National Committee to Study the Anti-trust Laws 297 (1955); Chamberlin, The Economic Analysis of Labor Power (1958); Cheit, Public Policy Toward Trade Unions: Anti-monopoly laws, 9 Lab. L.J. 705 (1958); and Cox, Labor and the Antitrust Laws—A Preliminary Analysis, 104 U. Pa. L. Rev. 252 (1955).


3 Thornhill v. Alabama, 310 U.S. 88 (1940), was the starting point. It was followed by a succession of decisions of which the following are probably the most significant:
dissipated, the hopes of trade unionists for a solid constitutional basis for picketing; the "pre-emption" cases, marking out the boundaries of federal-state action; the Youngstown\(^6\) and Steelworkers\(^8\) cases, showing the limit and breadth of national "emergency" dispute powers; the Chicago River\(^7\) case, which vitalized the grievance settlement processes provided by the Railway Labor Act; and Lincoln Mills,\(^6\) which laid the foundation for a federal law concerning the labor agreement. The Court's June 1960 trilogy of


decisions in *Warrior & Gulf* and companion cases, which provide the background for this Article, must be counted an important addition to this group.

In a talk before the Cleveland Bar Association in March 1961, I strove, as others have done before and since, to assess these cases. I attempted to report on how judges had been reacting to the decisions as they continued to confront issues of "arbitrability." I also suggested that the impact of the decisions might be "more noticeable in the areas of collective bargaining and contract administration, including arbitration, than in the arena of the courts," but, lacking any concrete evidence to present on this matter, I indulged in the familiar process of speculation.

In this Article I would like to continue this effort for the following three reasons. *First*, there is now somewhat more "evidence" to report than was available in March; *second*, my opinion remains unchanged that the "big three" decisions "are extremely significant"; *third*, they offer an excellent, if not unique, opportunity to explore and test the policy assumptions and the practical consequences of legal doctrine.

**II. THE PROBLEM**

It is unnecessary to review more than briefly the central issue posed in the 1960 cases. The problem was how to delineate the roles of the court and the arbitrator with respect to the issue of "arbitrability." The problem arises out of the fact that in this country the arbitration of labor disputes rests on the consent of the parties, except in the case of railroads and airlines subject to the Railway Labor Act, who are bound to use the statutory "adjustment board" procedures, or some mutually acceptable substitute, to settle grievances. We do not have, as in Europe, a system of "labor courts" with broad jurisdiction over labor disputes arising out of the application of labor agreements. Here, in industry generally, labor management need not agree to submit such disputes to arbitration, although it is national policy to encourage them to do so. Where there is an agreement to arbitrate, the arbitrator's authority derives from the

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agreement, and his jurisdiction is therefore limited to those matters which the parties by their agreement have entrusted to him for decision.

This means, according to traditional analysis, that the arbitrator cannot, except by special stipulation, be the final judge either of the existence of a contractually binding agreement to arbitrate, or of the scope of his authority under such an agreement. Under our law, these issues may be finally determined only by courts of competent jurisdiction, since only these tribunals are empowered to enforce agreements. It follows that if the arbitration agreement gives the arbitrator jurisdiction to decide issue A but not issue B, and does not give him authority to decide his own jurisdiction, but he nevertheless assumes authority to decide issue B, his award in this respect is ultra vires and will not be enforced by a court.

These simple and clear-cut propositions are easy to formulate and unquestionably sound in legal theory. Where a valid agreement to arbitrate carefully defines the issue or issues to be decided in the specific case (as under a carefully drawn submission agreement), there is usually no occasion for a problem of "arbitrability" to arise. Typically, however, the grievance arbitration process rests on the provision in the collective bargaining agreement which makes arbitration the terminal point of the grievance procedure. Typically, also, the arbitration clause contains broad "jurisdictional" language, e.g., authority in the arbitrator to decide "disputes arising out of the interpretation and application of this agreement" (meaning the collective bargaining agreement). While many arbitration clauses contain exceptions and limitations, the clause must, nevertheless, of necessity be broad in scope as compared with a narrow and specific submission agreement.

This fact makes it possible for a party opposing arbitration of a particular dispute (normally the employer) to contend that the dispute is not arbitrable if the labor agreement, properly construed, contains no applicable commitment by that party on the basis of which the moving party's claim could be sustained. In numerous instances, courts, accepting this analysis, have either stopped arbitration ad limine or have set aside arbitration awards. However, inevitably, this kind of disposition has required them to interpret some provision or provisions of the labor agreement and has thus involved the judiciary in the "merits" of the underlying dispute. Yet, it is the arbitrator's interpretation of the provisions of the agreement for which the parties supposedly bargained when they agreed upon the arbitration process.
This was the kind of problem which was posed in *Warrior & Gulf* and companion cases, and in many prior state and lower federal court decisions.\(^1\) The problem was to give proper scope to the arbitration process and yet to take account of the fact that ultimately, in the absence of agreement otherwise, the question of arbitrability of a specific issue is for the courts. Some writers accused the courts of improper and even capricious interference with the arbitration process.\(^2\) Whether, on the whole, these charges were warranted, prior to *Warrior & Gulf*, is a debatable issue. It is my impression that intervention by the courts occurred principally when the claim made by the party seeking arbitration had to rest on an express provision of the labor agreement which, on its face, did not appear to support the claim, or on an obligation said to be implicit, even though not expressed, in the agreement. Illustrative of the former was the famous *Cutler-Hammer* decision\(^3\) by the New York courts, in which it was held that an express contractual commitment by the employer to meet and discuss with the Union “the payment of a bonus” could not support a grievance, following such discussion, based on the employer’s refusal to pay a bonus. Illustrative of the latter were the cases in which the courts held against the arbitrability of the employer’s contracting out of work of a kind which would be performed by bargaining unit employees, where the agreement contained no specific provision on this subject.

Perhaps the most usual, and certainly the most plausible, judicial approach in denying arbitrability was to say, as did the New York Court of Appeals in *Cutler-Hammer*, that the contract was “so clear . . . and so untenable any other interpretation that we are obliged to hold that there is no dispute as to the meaning of the . . . provision and no contract to arbitrate the issue tendered.” Judge Fulk dissented on the ground that “reasonable men” could differ concerning the interpretation of the bonus provision, but he also conceded that a “claim may be ‘so unconscionable or a defense so frivolous’ as to justify the court in refusing to order the parties to proceed to arbitration,” which is perhaps simply another way of stating the principle subscribed to in the majority opinion. Un-

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\(^2\) See some of the comment cited supra note 10.

fortunately, but understandably, what is not clear or non-frivolous to one judge may be clear and frivolous to another. The opportunity this and other more interventionist approaches present for judicial interference with the arbitration process is the only thing about this subject which is clear and non-frivolous.

This general problem of the role of the judiciary in relation to the arbitration process was destined to reach the Supreme Court in view of the decision in *Lincoln Mills*. The Court there held that an agreement to arbitrate labor disputes arising out of a labor agreement is specifically enforceable as a matter of federal right under Section 301 of the Taft-Hartley Act, notwithstanding state common law to the contrary. A federal substantive law concerning the labor agreement was to be developed by the courts in the exercise of their resources of “judicial inventiveness.” The 1960 decisions brought the issue of “arbitrability” into sharp focus, as a federal question, and presumably we now have the answer.

III. Warrior & Gulf and Its Companion Cases

*Warrior & Gulf* was a “contracting out” case. The grievances, brought by the United Steelworkers, protested the contracting out of certain maintenance work of a kind clearly encompassed within the definition of the bargaining unit. There was a layoff situation at the time the grievances were filed, and, in part, this was due to the contracting out of the work in question. The labor agreement was silent on the subject of contracting out; however, it may be assumed that it contained “recognition,” wage, and seniority provisions. The labor agreement also contained a “no strike” provision. The arbitration clause excepted matters which are “strictly a function of management,” but otherwise was unusually broad. It stated:

> Should differences arise between the Company and the Union or its members . . . 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 in the following manner [referring to the grievance and arbitration procedure].

In a suit by the Union under Section 301 to compel arbitration, the district court granted the Company’s motion to dismiss, holding that the agreement did not “confide in an arbitrator the right to review the defendant’s business judgment in contracting out work” and that contracting out was “strictly a function of management” within the meaning of the exclusionary language of the arbitration clause.

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The court of appeals affirmed. The Supreme Court reversed. Thus, the Company was forced to arbitrate and that arbitration has now been completed. The arbitrator was asked to decide, first, whether the issue of his own jurisdiction and authority was before him despite the Supreme Court’s decision. He evidently concluded that he still had the issue, for he considered it and held that the Union’s claim presented an arbitrable question under the contract. On the merits, he partially sustained the union, although the opinion amply illustrates the difficulty of determining precisely what kinds of limitations on sub-contracting may be implied.

The arbitrator, J. Fred Holly, upon an extensive review of the “1952 bargaining history” on the subject, between the parties, concluded that the parties “jointly recognize a limitation on contracting out,” and considered that he found support for this in the testimony of Company witnesses and in the Company brief as indicating the following possible limitations:

1. Where the contracting out is in bad faith.
2. Where the purpose of contracting out is to subvert the Union.
3. When it is costlier and less convenient to have the work done elsewhere.
4. When the contracting out is less efficient.
5. When Company employees and facilities are presently available to do the work.

He added that, according to the Union’s view, there are other situations in which contracting out is clearly improper, and, on the other hand, “that there are eleven types of subcontracting that are proper.” “These conclusions,” said the Arbitrator, “place the Arbitrator in an unusually difficult position.” He stated that, “in order to properly evaluate the practice of subcontracting, it is necessary to analyze specific contracts or instances of contracting out,” but that, since the grievance before him was “general,” and the testimony was “general,” he found such a review of specific instances “difficult and largely impossible.”

He appeared, however, to place the burden upon the Company of justifying any challenged instance of contracting out, and this, he said, the Company had failed to do. “This situation demands an explanation of the failure of the Company to replace employees in what had been described as a ‘normal’ size workforce and at the same time to increase the dollar volume of work contracted out. In the absence of proof that work was properly contracted out, the Arbitrator can only conclude that at least one type of improper contracting out occurred between the dates of the protested layoffs and the filing of the grievance.”

“Having reached this conclusion,” said the Arbitrator, “what relief is available?” The Union sought (1) a restoration of seniority rights for laid-off employees, (2) pay for those laid-off employees who were deprived of the right to do work contracted out since the filing of the grievance, and (3) pay for such laid-off employees, “as if they had done the work for all jobs (if any) contracted to other firms for any reason not specifically approved in Section VI” of the Union’s brief. He held (1) that his jurisdiction did not extend to events subsequent to the filing of the grievance, and that, accordingly, he was “not empowered to grant relief on subsequent events,” (2) that he “does not possess the authority to order the parties to accept his criteria for contracting out and to require them to examine all past instances of contracting out in the light of these standards,” since “to do this, the Arbitrator would be guilty of legislating where the parties have not legislated,” but (3) that there were “firm grounds for advancing the seniority of those employees who were laid off in December 1956 and January 1957.” His award advanced “the layoff dates” of those employees who were laid off in December 1956 and January 1957 to August 22, 1958, the date of the grievance, since, in his view, “some” contracting out was improper between December 1956 and the date of the grievance, and “it naturally follows that some employees were entitled to recall and this would have provided seniority rights for at least two additional years.”

His concluding paragraph shows his evident feeling of frustration:

Finally, the Arbitrator is well aware of the fact that this holding does
In *American Mfg.* the question was whether the Company was required to submit to arbitration a grievance based on its refusal to reinstate an employee who had suffered an industrial injury. In a consent decree settlement of a workmen's compensation claim, the employee had been awarded a lump sum payment plus costs on the basis that he had incurred a permanent partial disability of twenty-five per cent. The employee's subsequent demand for reinstatement was predicated on a statement by his physician (who had supported the earlier claim of permanent partial disability) that the employee "is now able to return to his former duties without danger to himself or to others." Contractually, the demand was based on a provision in the seniority article of the labor agreement which recognized "the principle of seniority as a factor in the selection of employees for promotion, transfer, layoff, re-employment, and filling of vacancies, where ability and efficiency are equal." The arbitration clause was "standard," in that it permitted arbitration of "any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement." The district court and court of appeals refused to require the Company to arbitrate, although disagreeing on the basis of decision. The district court used an estoppel theory. The court of appeals held that this did not go to the question of arbitrability, but it examined the cited seniority provision and concluded that the grievance was "a frivolous, patently baseless one" and hence not within the arbitration clause. Again, the Supreme Court disagreed and ordered arbitration. At the completion of the arbitration proceedings, the arbitrator apparently awarded the employee's reinstatement, but without back pay!

In the *Enterprise* case, the grievance sought the reinstatement of certain employees who had been discharged because they left their jobs in protest against the discharge of a fellow-employee. The Company refused to arbitrate the grievance, but was ordered to do so by a federal district court. The arbitrator's decision reduced the penalty of discharge to ten days' disciplinary layoff, and ordered the grievants' reinstatement with back pay adjusted for the ten-day penalty. The decision was handed down five days after the

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parties' collective agreement had expired. The Company refused to comply with the award on the ground, inter alia, that the arbitrator lacked the authority to make an order for back pay for any period subsequent to the expiration date of the labor agreement, or for reinstatement. The district court directed the Company to comply with the award. The court of appeals reversed, on the ground urged by the Company. The Supreme Court, however, upheld the authority of the arbitrator.

The decisions in these cases, as distinguished from the majority opinions by Mr. Justice Douglas, were concurred in by seven justices. Mr. Justice Whittaker dissented and Mr. Justice Black did not participate. In view of the nature of the grievances involved in these cases, and the ultimate decision on the questions of arbitrability or authority, it is apparent that the cases indicate a strong federal policy favoring liberal interpretation of arbitration clauses on the issue of the arbitrator's jurisdiction and a highly restricted role for the courts.

I have no difficulty with the decisions in *Warrior & Gulf* and in *American Mfg.*, since I think they were right even if *Cutler-Hammer* and associated approaches were taken as the property standards for judicial determination of the question of whether arbitration should be ordered with respect to a particular claim. The arbitration clause in *Warrior & Gulf* was extremely broad, but, even if it had been of the "standard" variety, the claim that the agreement gave rise to an implied limitation on the right to contract out was not "patently frivolous" or "clearly untenable." The same is true of a claim for reinstatement insofar as based on the broad seniority clause contained in the American Manufacturing agreement. Even a decision, as in *Enterprise*, that the arbitrator has jurisdiction to order reinstatement of an employee after the expiration of the underlying labor agreement is not patently wrong if the agreement did not expressly prohibit such an order. The prime difficulty with *Enterprise* is that we don't know that this was the basis of the arbitrator's decision.

The extremely broad scope of the decisions is best revealed, indeed, by the result in *Enterprise*, for, of the three, this is the case in which the conclusion concerning the arbitrator's authority was the most dubious. The issue here was not the "arbitrability" of the grievances as originally filed, while the labor agreement was in effect. Clearly, they were arbitrable. The question was whether the arbitrator had authority to grant a remedy of back pay and reinstatement effective beyond the expiration date of the agreement. The arbitrator's opinion apparently did not indicate clearly whether his asserted authority was based on what the Court refers to as "the requirements of enacted legislation" or on a construction of the agreement, itself. However, said the Court, "a mere ambiguity... is not a reason for refusing to enforce the award." The Court apparently would have held that the arbitrator had exceeded his jurisdiction if his award had been predicated on "the law" rather than on the agreement. But the Court said that since the award might have been based on the arbitrator's reading of the agreement, it had to be upheld, because "it is the arbitrator's construction which was bargained for." Thus, the award was deemed to be within the arbitrator's jurisdiction even though, in fact, he may have based it on his construction of the agreement, and even though the Court did not have before it evidence of that very interpretative process for which the parties, supposedly, bargained. This is going pretty far! I take it the case means that an award rendered without any supporting opinion at all must be upheld if it could have been based on an interpretation of the agreement, except only if the agreement, or some other clear and persuasive evidence, revealed clearly his lack of authority in the premises.

Beyond this, it is quite clear, as noted infra, that the Court intended to repudiate *Cutler-Hammer* and associated approaches to the question of judicial determination of arbitrability, and to prescribe, as a matter of federal law, a much more restrictive role for the courts.
I find in the decisions (read with the opinions) certain propositions, express or implied.

The first proposition is that the question of arbitrability of a specific claim under a valid general agreement to arbitrate is still, ultimately, a question for the courts unless the parties have expressly given the arbitrator jurisdiction to make a binding determination of this question.

This is made clear in a footnote to the majority opinion in *Warrior & Gulf.* The proposition is also clearly stated in the concurring opinion of Justices Brennan and Harlan. The important point about this is that, despite the Court's general disposition toward broad arbitral jurisdiction, it is unwilling to read the "standard" type of arbitration clause as intended to confer upon the arbitrator the authority to decide with finality his own jurisdiction. The decision on this point could have been otherwise, of course, since the arbitration clause is itself a part of the labor agreement, and it could be said that since the arbitrator has jurisdiction of disputes concerning the interpretation and application of the agreement, he can determine finally whether the particular claim or grievance involves such a dispute. This kind of "bootstraps" approach, however, was more than the Court was willing to swallow. I consider sound this interpretation of the standard arbitration clause, since I doubt that the parties expect through such a clause to invest the arbitrator with this kind of final authority.

The second proposition is that, although the ultimate question of arbitrability is for the court, the court should abjure a decision against arbitrability of a dispute whenever the moving party claims, although in vague and general terms, a violation of the labor agreement, unless the labor agreement clearly, expressly, and specifically gives the adverse party the right to perform the act complained of, or unless there is forceful and clear evidence, either within or apart from the labor agreement, that the parties intended to exclude the issue from the arbitration process.

This is an interpretation both of the results in the three cases and

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Footnote 7 reads:
It is clear under both the agreement in this case and that involved in *American Mfg. Co.,* 362 U.S. 564, 80 S. Ct. 1343, the question of arbitrability is for the courts to decide. Cf. Cox, *Reflections Upon Labor Arbitration,* 72 Harv. L. Rev. 1482, 1508-09. 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.

Footnote 21 "To be sure, since arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute. In this sense, the question of whether a dispute is 'arbitrable' is inescapably for the court."
of certain expressions in the majority and concurring opinions. I rely primarily on what is said in the majority opinion in American Mfg., and particularly, on the following:\textsuperscript{22}

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

The Union claimed in this case that the company had violated a specific provision of the contract. The company took the position that it had not violated that clause. There was, therefore, a dispute between the parties as to 'the meaning, interpretation and application' of the collective-bargaining agreement. Arbitration should have been ordered.

I also rely upon the following observations made in the opinion in Warrior & Gulf:\textsuperscript{23}

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 to an interpretation that covers the asserted dispute.

A specific 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. . . . 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.

This second proposition is the crux of the decisions, for it is this ruling, if correctly stated, which represents the Court's new contribution to arbitration law. The Cutler-Hammer and associated judicial approaches are formally rejected. Consequently, a claim of violation of the labor agreement which is arguably so lacking in

\textsuperscript{22} 363 U.S. at 568-69.
\textsuperscript{23} 363 U.S. at 582, 588. It should be noted, further, that the court relied, at least to some extent, upon the broad no-strike clause contained in the contract. The Opinion states (at 583):

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 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. . . .
merit as to be patently frivolous or untenable is to be ordered to arbitration, and, if arbitrated and upheld, is not to be reversed, unless there is clear and specific evidence that the parties did not intend that such a claim should be arbitrated. It appears that the practical effect of this principle is to give the arbitrator jurisdiction to decide with finality the issue of arbitrability, as well as the merits of the underlying claim, in most cases. The courts remain available to a party contesting the arbitrator's jurisdiction, but doubts about the scope of the arbitration clause are to be resolved in favor of the arbitration process. To justify judicial intervention, the intention of the parties to exclude a matter from this process must be expressed in clear and unambiguous language in the labor agreement, the arbitration submission (if there is one), a collateral agreement, or conceivably, in overwhelmingly convincing parol evidence.

The third proposition is that the labor agreement is sui generis, and has at least these characteristics:

1. "It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate" (from the opinion in Warrior & Gulf, citing Shulman, "Reason, Contract and Law in Labor Relations.")

2. "It calls into being a new common law—the common law of a particular industry or of a particular plant" (again from the opinion in Warrior & Gulf).

3. It is "an effort to erect a system of industrial self-government," and thus has "institutional characteristics" (from the same opinion, this time citing Cox, "Reflections Upon Labor Arbitration.").

These characteristics move Mr. Justice Douglas in Warrior & Gulf to some flights of unfeigned enthusiasm in describing the arbitration process and the role of the arbitrator: "Arbitration is the means of solving the foreseeable 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 following language from the opinion shows how respectful he is of arbitrators and their task:

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. The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective-bargaining agreement

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although 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.\(^2\)

One may wonder why the Justice elected to essay these ventures into industrial jurisprudence and philosophy. Certainly, he need not have done so simply to support the results reached in these cases. Did he consider that the lower court judges are more likely to heed the lesson of the decisions if their supposed state of unenlightenment in the area of labor relations is met head-on by a dissertation designed to improve their understanding? Did the Justice intend to lay down as a matter of federal substantive law some definite principles concerning the nature of the agreement, the interpretation of certain kinds of provisions of the agreement, and the role of the arbitrator in implementing the agreement? Are arbitrators, indeed, now required, or at least invited, in adjudicating a grievance, to take account of "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?"

I have mixed reactions about these expressions in the Justice's opinions. I certainly agree that the labor agreement is not just an ordinary contract, and, therefore, the emphasis upon this point and upon the "industrial self government" characteristics of the agreement is sound. But I am a little distressed with many of the sweeping generalizations of the opinion. I am afraid some theoreticians of industrial relations may take them as gospel, and teach their students that the labor agreement and the arbitration function are everything the Justice says they are. The fact is, this may not be so, at least in many contexts, or even generally. Both remain the product of bargaining, and it seems dubious that the Court did intend to rule that parties are incompetent to make of them what they will. Undeniably, however, the thrust of the opinions is to give the labor agreement and the arbitration process a status in law somewhat detached from its putative contractual base. This is probably a good

\(^2\) 363 U.S. at 581-82.
jurisprudential development; however, we need to be careful in its delineation lest real damage be done to the collective bargaining relationship.

IV. IMPACT OF THE 1960 DECISIONS ON THE JUDICIARY

A brief examination of the impact of the 1960 decisions on the judiciary is pertinent, since the “proof of the pudding,” in the case of appellate decisions, is in their “eating” below. I have checked most of the cases in which the question of arbitrability has been raised since the decisions were handed down. Most courts have apparently taken them to heart and have felt constrained, although in some instances grudgingly and with serious misgivings, to permit or require arbitration to proceed without judicial intervention, and have upheld awards despite challenges going to the jurisdiction of the arbitrator. Without extending this Article unduly, I cannot

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applicable time limitations;\textsuperscript{22} the finality of managerial determination of a job evaluation question;\textsuperscript{24} and the availability of arbitration in lieu of litigation against a union which has breached a no-strike provision.\textsuperscript{25}

In most instances, the question arose on a petition to require or stay arbitration. In some, however, the question was whether an arbitration award was valid and enforceable. There seems to be no apparent differentiation between the courts' approaches to these two types of cases, although some distinction might well be justified. In some instances, the courts sustained the arbitrability of claims based on generalized assertions that the employer had violated its obligations, express or implied, under the labor agreement.\textsuperscript{26} In others, the court was confronted with specific provisions excluding certain areas from arbitral jurisdiction, and, perforce, had to interpret these provisions or else leave them to the arbitrator for interpretation.\textsuperscript{27}

The "subcontracting" cases present a problem of special interest. Some sharply contrasting views are represented by the cases decided since Warrior & Gulf. In International Tel. & Tel. Co. v. Local 400,

\textsuperscript{22}Vulcan-Cincinnati, Inc. v. United Steelworkers of America, 173 N.E.2d 709 (Ohio App. 1960). It was held that the failure to file a grievance within the stated time limits released the employer from any obligation to arbitrate. But cf. United Steelworkers of America Inc. v. Zweig & Sons, 42 C.C.H. Lab. Cas. ¶ 16934 (N.D. Ind. 1961).

\textsuperscript{24}Connecticut Union of Telephone Workers, Inc. v. Southern New England Tel. Co., 148 Conn. 192, 169 A.2d 646 (1961). The contract contained a definite procedure for job evaluation and provided that the decision at the last stage of such procedure was final. The contract also included provision for arbitration of "any dispute or controversy concerning the true intent and meaning of a provision of this Contract, or a question as to the performance of any obligation hereunder." The Court, citing Warrior & Gulf, held that the determination of the arbitrability of a particular dispute is a function of the court, and that in this instance the dispute lay outside the area of arbitrability.

\textsuperscript{25}Sinclair Ref. Co. v. Atkinson, 290 F.2d 312 (7th Cir. 1961); Vulcan-Cincinnati, Inc. v. United Steelworkers of America, 289 F.2d 103 (6th Cir. 1961); Drake Bakeries, Inc. v. American Bakery Workers Union, 287 F.2d 155 (2d Cir. 1961), opinion withdrawn after rehearing in Drake, 43 C.C.H. Lab. Cas. ¶ 17166 (1961).

\textsuperscript{26}See, for example, the "subcontracting" cases, supra note 29; also Proctor & Gamble Independent Union v. Proctor & Gamble Mfg. Co., 43 C.C.H. Lab. Cas. ¶ 17050 (E.D.N.Y. 1961).

\textsuperscript{27}IUEW v. General Elec. Co., 283 F.2d 147 (1st Cir. 1960) (holding non-arbitrable a grievance which relied upon an alleged "local understanding," where the contract specified that any such local understanding had to be in writing and signed by the parties in order to be the basis of an arbitration proceeding); Hammond Newspaper Guild v. Hammond Publishing Co., 43 C.C.H. Lab. Cas. ¶ 17159 (N.D. Ind. 1961)—holding that a grievance protesting the performance of "unit" work by executives was arbitrable, since an exclusionary provision in the arbitration clause had to be interpreted; R.C.A. v. Association of Professional Eng'ring Personnel, 42 C.C.H. Lab. Cas. ¶ 16902 (3d Cir. 1961)—holding that a grievance involving merit increases was arbitrable even though the agreement contained a provision which denied the arbitrator any authority to change an existing wage rate or to establish a new rate (this provision, said the Court, "is not clear"); Local 95, Office Employees Union v. Nekoosa-Edwards Paper Co., 287 F.2d 452 (7th Cir. 1961)—holding that the question whether grievant had sufficient skill and seniority for a job was arbitrable even though certain provisions in the contract appeared to vest complete discretion in the employer to determine all questions of job qualifications.
ARBITRABILITY

IUEW, the Court of Appeals for the Third Circuit summarily and quite properly ruled that a grievance protesting the contracting-out of work was arbitrable under a "standard" type of arbitration clause, since there was no specific exclusion of the matter from arbitration, and there was no claim of the existence of any collateral background showing that subcontracting was an unchallengeable managerial prerogative. In Local 725, Operating Engineers Union v. Standard Oil Co., a federal district court in North Dakota concluded that subcontracting was not arbitrable on the grounds (1) that the arbitration clause in question was not as broad as that in Warrior & Gulf, and (2) that the limitations imposed by the contract on the arbitration process were much less vague and indefinite than the "management functions" provision in Warrior & Gulf. Actually, in my judgment, the court's conclusion was predicated basically on rather extensive Company evidence concerning past Union attempts to incorporate into the contract a specific limitation on subcontracting. This evidence was pretty impressive. Whether it was sufficient, coupled with the other grounds relied upon by the court, to distinguish it from Warrior & Gulf seems to be doubtful, although, as has been already indicated, I interpret the 1960 decisions as leaving it open to the courts to decide against arbitrability if there is clear and convincing evidence, either within or without the labor agreement, that the parties have left the matter within the area of managerial discretion.

There is one decision by a federal district court in Wisconsin on the "subcontracting" issue that appears clearly incorrect in its interpretation of Warrior & Gulf. In a suit brought by the Union for

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29 186 F. Supp. 895 (D.N.D. 1960). The agreement contained a broad "no-strike" provision. The arbitration clause provided, in pertinent part, as follows:

Section 8. Subject to the limitations set forth in the last two paragraphs of this Section 8, if any question concerning the interpretation or application of any of the terms or provisions of this Agreement is not settled as a result of negotiations between the Refinery Manager, or those designated by him, and the Union, within a period of fifteen (15) calendar days or within an extension of that time mutually agreed upon, the Union or the Company may refer the question for arbitration. . . .

It is understood and agreed, however, that proposals to add to or change this Agreement shall not be arbitrable and that no proposal to modify, amend or terminate this Agreement, as well as any matter or subject arising out of or in connection with such proposal, may be referred for arbitration under this Section.

Questions concerning any liability or obligation of the Company which require the construction or interpretation of any statute or law; for example but not by way of limitation, Fair Labor Standards Act, Workmen's Compensation Laws, Labor Management Relations Act, and Social Security Laws, shall not be eligible for processing under the grievance procedure.

a declaratory judgment concerning the right of the employer to contract out janitorial work where the contract contained no arbitration provisions, and the Court therefore obviously had to interpret the contract, it held that the recognition, seniority, and no-lockout provisions of the contract prohibited the subcontracting and that this was a result dictated as a matter of law, by *Warrior & Gulf*. After a necessarily incomplete search of arbitration decisions (incomplete since relatively few are reported) I found one case in which the arbitrator appears to have read the Supreme Court's decision in like fashion. The arbitrator stated, "Where the Agreement does not allow contracting out, the employer may not unilaterally contract out work within the job classifications covered by the Agreement," citing *Warrior & Gulf*. The error in the approach, of course, is that the Supreme Court did not purport to rule on the merits of the "subcontracting issue." Certainly an arbitrator, so far as the Court is concerned, is free to decide this issue either way.

Another question of considerable interest, and obvious importance, is whether arbitration, in lieu of litigation, is the contractually appropriate and required method of resolving a claim made by the employer that the union has breached the no-strike clause of the labor agreement. Here, the sixth and seventh circuits have held that the employer's claim of violation, and for damages by way of relief, do not involve kinds of issues which are subject to arbitration under the grievance arbitration clause, and the judges of the second circuit are equally divided on the point. With some misgivings, I suggest that such a claim, as three of the second circuit judges believe, does present an issue which should be permitted to go to arbitration, under the authority of the *Warrior & Gulf* and companion cases, at least if the grievance and arbitration provisions of the labor agreement permit grievances to be filed against the union.

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41 Vulcan Rivet & Bolt Corp. and United Steelworkers of America, C.C.H. Lab. Arb. Awards, 1961-1962, ¶ 8475 (1961). Cf. Volunteer Elec. Co-op. and IUEW, 36 L.A. 787, C.C.H. Lab. Arb. Awards, 1961-1962, ¶ 8417, in which L. Drew Redden, Chairman of the Arbitration Board stated that while *Warrior & Gulf* "removes any doubt concerning the arbitrability of this issue in cases where the collective bargaining agreement contains a 'no strike' clause, and may tend to put an end to arbitration decisions holding that management has an absolute right to contract work out in the absence of an express prohibition in the collective bargaining agreement, it is not felt that it will have a substantial impact in the majority of cases. This conclusion results from the impression of the writer that most arbitrators already conceive that there are limits to the power of the company to contract out work" (emphasis added).

Mr. Redden continued: "The decision certainly is not authority for concluding that subcontracting is a violation of the collective bargaining agreement per se. On the contrary, it actually does nothing to disturb the rule that the one who maintains that contracting work out is a violation of a contract containing no express provision against such activity must demonstrate that the violation exists."

42 See cases cited in note 35 supra.

At the same time, it is seriously doubted that the parties to the typical collective bargaining agreement contemplated that the arbitration process was to be used to enforce a no-strike agreement, and it would be no surprise to find some arbitrators rejecting jurisdiction.

Still another problem of substantial interest, of a very different nature, is whether, with respect to contracts which could be the subject of federal jurisdiction under Section 301 of the Taft-Hartley Act, the state courts are ousted of jurisdiction, and, if not, whether they remain free to apply any aspects of local law. *Lincoln Mills* declared quite clearly that federal law was to be developed under Section 301 and was to be controlling. This does not, of itself, mean that state courts lose jurisdiction of litigation concerning labor agreements, but they must apply federal substantive law, at least if they can find out what it is. The California Supreme Court, in *Posner v. Grunwald-Marx, Inc.*, recently had before it the question of judicial jurisdiction over arbitrability issues. The court indicated that it was adopting the federal view, as expressed in *Warrior & Gulf* and associated cases, but not necessarily all the implications of these decisions, thus appearing to reserve the right to disagree in some respects. However, the court was developing or applying California law only. It considered that it was not bound to apply federal substantive law since there was no showing that the employer was engaged in interstate commerce. Subsequently, a California lower court, purporting to follow *Posner*, held that Section 301 of Taft-Hartley does not oust state courts of jurisdiction to handle arbitrability issues, but that state courts must apply the substantive law developed by the federal courts. The issue, an intriguing one, was whether the union, after a vain effort to obtain a wage increase pursuant to a "wage opener" in the labor agreement, could arbitrate the matter.

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44 The opinion by Mr. Justice Douglas states, 353 U.S. at 456-57:

> The question then is, what is the substantive law to be applied in suits under Sec. 301 (a)? We conclude that the substantive law to apply in suits under Sec. 301 (a) is federal law, which the courts must fashion from the policy of our national laws. . . . The range of judicial inventiveness will be determined by the nature of the problem. . . . Federal interpretation of the federal law will govern, not state law. . . . But state law, if compatible with the purpose of Sec. 301, may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.

45 Broadway-Hale Stores, Inc. v. Retail Clerks Union, 43 C.C.H. Lab. Cas. ¶ 50345 (Calif. App. 1961). It should be noted, however, that the Court was declaring California law in a case in which there was no claim that the federal law was controlling. As stated in the opinion, "This federal rule is not binding on this court in the instant case because petitioner failed to allege that the employer was engaged in interstate commerce. Moreover, the trial court found the employer's allegation (in an affirmative defense) that it was engaged in interstate commerce to be false."
The court upheld an award of a five per cent hourly wage increase. An Alabama court, while implying acceptance of the proposition that it is bound by federal substantive law in suits for breach of a labor agreement, held it was not compelled to grant specific enforcement of the arbitration clause, since this is a matter of remedy, and the remedy is prohibited by Alabama law,\footnote{Byars v. National Dairy Products Corp. Div., 42 C.C.H. Lab. Cas. \textbf{16858} (Ala. 1961).} a result which I suggest is highly dubious.

At least one judge has indicated a complete lack of enthusiasm for the Warrior \& Gulf trilogy. In Volunteer Elec. Co-op. v. Gann,\footnote{41 C.C.H. Lab. Cas. \textbf{16137} (Tenn. App. 1960).} the Tennessee courts were asked to decide whether, under a “standard” type arbitration clause, the employer could be required to arbitrate the layoff of certain employees. The trial court held that the contract gave management “full discretion” in the matter, and that there was no issue to be arbitrated. This was prior to Warrior \& Gulf. The Tennessee Court of Appeals, subsequent to Warrior \& Gulf, reversed “under what we believe to be a mandate of controlling federal decision in this field.” In a concurring opinion Judge Hale indicated his profound distaste for this state of affairs, stating that “in my humble judgment the U. S. Supreme Court was in grievous error” and that its decisions “represent only the ipse dixit of the Supreme Court, supporting by neither reason nor authority,” and that, in requiring the arbitration even of frivolous claims, the decisions are “blows to the independence of the judiciary, a further evisceration of the Tenth Amendment, and another long step down the road toward state socialism, so roundly condemned by critics of the ‘Warren Supreme Court’.”

This completes the survey of judicial reaction to the 1960 decisions. I conclude that the Supreme Court’s adjudications have probably had a substantial impact in reducing judicial intervention with the arbitration process, but have not put the issue completely to rest. There cannot, in fact, be any final or neat delineation of the roles of the judge and the arbitrator so long as, under our law, the ultimate issue of arbitrability is for the courts to decide. One weakness, however, in the Supreme Court’s approach, insofar as it was elucidated, lay in a failure to differentiate between the pre- and post-arbitration posture of the problem. Both the process of arbitration, and preservation of the ultimate authority of the courts, would be best served if the courts would never (or at least hardly ever) intervene prior to arbitration. Experience shows that the issue of “arbitrability”
can safely be left to competent arbitrators in the first instance with assurance of a careful treatment of the problem. Moreover, if the challenge to the arbitrator’s jurisdiction is made following the award, the court will at least have the benefit of the arbitrator’s thinking, and the arbitration process will not have been interrupted before it began. Perhaps legislation will be necessary to produce this kind of differentiation, although I should suppose that the Supreme Court, in its role of developing applicable federal law under Section 301, could develop such a rule.

V. IMPACT OF THE 1960 DECISIONS ON COLLECTIVE BARGAINING

I should have supposed, even without checking, that management, and perhaps even unions, have found much that is disturbing about these cases, especially some of the dicta contained in the opinions. Management may question whether they are any longer “safe” against unwanted and, as they would say, improper arbitral intrusions on their authority insofar as they have relied on a “reversed rights” theory of the labor agreement or a general type of “management rights” clause. It seems as if some would be strongly tempted to try to amend their agreements to write in detailed and very specific provisions defining subject matter reserved within the area of managerial discretion, and concerning which there is to be no arbitral jurisdiction. Yet, there are doubtless countervailing considerations. One is the risk that elaborate specification of reserved rights may fortify the argument that some matter not specified is subject to grievance and arbitration under the contract. Another is the risk that to press for inclusion of such provisions, and to fail, may become relevant and, for the employer, damaging “background” in the thinking of some arbitrator or judge. Still another is the obvious point that the bargaining price or quid pro quo might be thought to be too high. I have previously suggested the possibility that “a more viable alternative might be a management effort to write into the contract an arbitration clause which, although cast in general terms, might be specific enough to enable or induce courts, consistently with the 1960 decisions, to decide against arbitrability in particular cases.” I also suggested speculation about the efficacy of clauses which might be worded as follows:

Example 1. There may be submitted to arbitration any dispute involving a claim alleging a violation of any provision or provisions of this agreement, provided the claim does not involve an unreasonable, capricious, or clearly untenable interpretation of the agreement. [Perhaps the word “frivolous” could be added.]
Example 2. There may be submitted to arbitration any dispute involving a claim alleging a violation of any provision or provisions of this agreement, provided the subject matter of the claim is specifically treated by the provision or provisions cited in support of the claim.

Example 3. [A "standard" arbitration clause, to which is appended the following:] "Provided, however, that, if the Company contends that this agreement contains no obligation, express or implied, which could support the claim, arbitration shall not proceed until there has been a judicial determination that the agreement does import such obligation."

Example 4. It is agreed that management retains all rights of decision which are not circumscribed by some specific provision or provisions of this agreement.

Needless to say, these suggestions have succeeded in provoking discussion, but I could detect nothing resembling a consensus.

For some time, various management groups and lawyers have pondered what, if anything, to do about the contract in order to "meet the problem" of the 1960 decisions. Certain of these groups have issued advisory publications on the subject. However, with all deference to their efforts, I thought it might be interesting, and perhaps profitable, to take my own sampling of private opinion. For this purpose, about seventy-five lawyers were selected, mostly representing management, in addition to a few industrial relations vice-presidents, who are persons of very considerable competence and experience in handling collective bargaining matters, and who, I felt, would give my inquiries thoughtful consideration and would respond with candor. They were assured their answers would be kept in confidence, in that they would not be identified. Frankly, I envisaged the possibility that the answers received might be more indicative of "the facts of life" about managerial reflection on our subject than is revealed by the publications of specific management associations or groups. My correspondents were asked to respond to the following inquiries:

(1) Whether managements, as a result of the Supreme Court's decisions, have considered that it would be desirable, if possible, to try to negotiate changes in the arbitration, management functions, or other clauses; and, if so, what kinds of changes have been considered desirable;

(2) Whether any such changes have actually been proposed to unions in negotiating contract revisions, and, if so, what kinds of changes have been proposed;

Model Arbitration Clauses to Protect Management Rights, published by the Labor Relations and Legal Department, Chamber of Commerce of the United States (1961); Arbitration—A New Direction?, Industrial Relations Memo No. 136, published by Industrial Relations Counselors, Inc. (1960).
ARBITRABILITY

I received about fifty replies; most of them being detailed, thoughtful, and frank, to a degree beyond my fondest expectations. A verbatim reproduction of these statements would be most interesting and valuable; however, this would be beyond the scope of this Article. I am unable to give you this. The most I can do is to indicate, in general terms, the kinds of reactions I received, and to append to this Article, with identification of source, some of the specific comments and suggestions, especially of contract provisions proposed or considered desirable.

The replies indicate that there has been no uniform pattern of reaction to the 1960 decisions on the question of the desirability of trying to negotiate “tightening” provisions into the agreement. With some exceptions, the larger companies, especially those with extensive experience in umpire arbitration systems, appear not to be greatly disturbed by the decisions, and to be disinclined to seek ameliorating contract changes. One representative of a very large multi-plant company stated that if they were just beginning their relationship with the union, “prudence might demand that we attempt to include certain safeguards in the contract.” However, he stated, the parties have had an arbitration procedure in their contracts for many years, resulting in “several thousand Umpire decisions, and this has created a body of case law which furnishes the parties with a relatively predictable answer to most of our day-to-day problems, including the probable limits of the arbitrator’s authority.” Moreover, he quoted my correspondent further, “basically deems it undesirable to settle labor relations administration matters in the courts.” One law firm which has a large practice representing companies of substantial size indicates that they, together with other management attorneys, met to discuss the desirability of redrafting arbitration clauses, and “arrived at nothing constructive except to recommend a publicity campaign urging labor arbitrators to continue to exercise self-restraint in approaching the issue of arbitrability.” The smaller companies and their representatives seem on the whole, again with some exceptions, to be more concerned—in some instances, very much so.

The range of general reaction is wide indeed. There is, at one end of the spectrum, the benign, casual, or perhaps, sophisticated approach already indicated, particularly on the part of some of the representatives of the larger firms with wide arbitration experience. In part this is based upon the feeling that their contracts already
give them substantial protection against undue infringement upon the managerial functions they wish to preserve. In part it is based upon their preference for arbitration over strike action or litigation. As another reaction is that, while the 1960 decisions may make arbitration a more risky venture, it would be unwise to make moves which would look toward judicial intervention as the solution to the problem. As stated by the industrial relations vice-president of a large company, “arbitration is basically an extra-legal process and once it gets into the courts much of its value is lost.” One of my correspondents, who represents, typically, rather small companies, is so firmly convinced of the value of the arbitration process that he favors “having the issue of arbitrability determined by the arbitrator” in all cases, as a matter of principle. (I should add that he doesn't have much company in this view.) At the other end of the spectrum, however, is the “alarmist” view, which is held by many. To these people, the decisions open up frightening prospects of uncontrollable union infringement, through arbitration, upon basic managerial

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50 A member of a law firm with an extensive practice in the automotive parts industry writes:

I think that to be factual I would have to say that the three Supreme Court decisions . . . have had no particular effect in the areas listed in your letter. I think that the reason for this is that in the companies with which I work and which have arbitration clauses, the problem of litigating any question arising from arbitration clauses has fortunately never arisen. On a few rare occasions companies have mildly considered attempting a court review, either of the arbitrability of a particular question, or of the merits of an arbitrator’s decision. I do not recall any occasion in my experience where either the company or the Union refused to arbitrate a question in direct violation of the established contractual grievance procedure. In other words both the companies and the Unions with which I have had experience have used the arbitration process as the final and binding decision on all matters arising under the contract which were matters subject to arbitration. There has been no serious attempt to enlist the support of a court, either to frustrate or to carry out the agreed on arbitration system. To the extent that I have talked to other persons, such as labor lawyers, company officials, or Union officials, their experience tends to parallel mine. In fact the only comment I have ever heard on the subject is an expression of relief at the fact that we have never in this area fallen into the unfortunate habit which prevails in some parts of the east, and particularly in New York State, where a great volume of arbitration questions has been submitted to the court.

A member of a large eastern law firm writes:

I think that the general feeling is that Warrior & Gulf has made it even more important to have capable, impartial arbitrators; but most companies are willing to take their chances on final and binding arbitration because it provides a means for finally settling employee grievances.

51 See comment in note 50 supra. Another eastern attorney, who counsels companies and also does a substantial amount of arbitrating, writes:

From my own experience in negotiating contracts, whether it be a Labor Union Contract or a Commercial Contract, I do not like to see the arbitrator’s jurisdiction restricted. Rather, I believe that the parties basically prefer to have an arbitrator rule on the problems that may arise rather than have the matter drag through the Courts or the Labor Board.
functions, and every effort must be made to confront the problem and do something about it.\footnote{The following comments are illustrative:}

The "returns" which I have received on the question of whether managements have actually proposed, or will propose, contract changes to try to meet the problem, as they view it, of the 1960 decisions, likewise reveal varying reactions. In many instances, the ultimate decision seems to be not to press the matter. The reasons given include (a) the fear of introducing additional complications
into the bargaining process, (b) the concern that a successful attempt to write into the contract detailed reservations of management rights, or detailed limitations on the subjects of possible arbitration, might, as one individual puts it, "broaden rather than narrow the scope of arbitrability by raising a presumption in its favor for the named exceptions," and (c), as another of my correspondents states it, "the fear of being turned down and that it will be held against them later—preferring to take their changes on their present contracts." On the other hand, a substantial number of my correspondents indicate that contract changes have been or will be proposed. The degree of success with the unions has not been outstanding, apparently, but in some instances contract changes have been made.

My "returns" also show a considerable range of thought, among those who are seriously concerned, about the substantive implications of the 1960 decisions, and how to meet the problem in terms of contract provisions. As might be supposed, the question of "management rights" (how they are or may be affected, whether a "management rights" clause is now indispensable, and, if so, how it should be phrased) is a matter of general interest. The most usual reaction is that such a clause is more essential now than ever before, and that it should be both general and specific, with a detailed specification of matters reserved for managerial decision. These people

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53 This is a rather common reaction. Thus, one very knowledgeable management attorney states that, as a lawyer, he had to advise a certain client that, in view of the Warrior & Gulf and companion decisions, "despite contract legislative history and consistent practice, we might be obliged to submit to an arbitrator’s review and veto power our subcontracting decisions; that the only way to provide us with complete protection in this area was to secure the union’s agreement that there be included in the contract, particularly in its arbitration clause, a provision acknowledging that questions relating to subcontracting were not to be arbitrable.” However, he said, “having done our duty as lawyers, we then undertook to offer a judgment as negotiators. We said to our client that it was impossible to conceive that the union would consent to a positive exclusion from the contract, or its arbitration clause, grievances relating to subcontracting. We further said that were we to make such a proposal, the company would have to reconcile itself to a willingness to take a strike over the union’s anticipated refusal to agree to our demand, for having made the proposal we would be bound to see it to a successful conclusion in order to avoid having our own 'implied' argument subsequently turned against us.” The ultimate bargaining tactic determined upon was to let the union, as it had in the past, continue to press for the inclusion of a specific provision limiting subcontracting, and for management to continue to reject any such proposal.

Others of my correspondents seem to have felt similar concern about the possible adverse implications of "contract legislative history," and thus have advised or followed the tactic of letting the union make the proposals in the area. The logic of this approach would suggest that, tactically, neither party, in an area of uncertainty as to the nature or extent of existing, or pre-existing limitations on the managerial prerogative, would make a specific proposal unless the party considering the proposal is prepared to make sure it is successful. This is obviously an unsatisfactory state of affairs in view of the very real difficulty which arbitrators have in determining what, if any, implied limitations exist with respect to the exercise of a function such as subcontracting. If subcontracting, for example, is a real problem to either party, it should be put on the bargaining table, and, if possible, resolved.
obviously feel that the so-called "reserved rights" or "every right we haven't given away we still retain" approach has been seriously undermined. Some management representatives, however, still believe this latter approach to be sound, and would still exclude from the agreement any kind of "management rights" clause, despite the pertinent and, to them, disturbing dictum expressed in the majority opinion in *Warrior & Gulf*. Among the more interesting specific suggestions received concerning the "management rights" clause, the following should be included:

1. Use a broad clause, coupled with a detailed list of reserved rights. Include a provision to the effect that management will exercise its reserved rights in good faith and not arbitrarily or capriciously. Place in the arbitration clause a provision limiting the arbitrator's authority, when the exercise of a reserved right is challenged, to a determination whether the Company acted in good faith, or arbitrarily or capriciously.56

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54 Illustrative is the following comment:
One further comment—neither as lawyer nor negotiator have I ever been overly fond of management clauses. More often than not, I think they represent traps for management. I should prefer to think that since, in the nature of things, the company ordinarily initiates action, its action is not challengeable except on the basis of some contractual provision, express or reasonably implied. To bargain with the union over the right to initiate action has always seemed to me more a limitation than a freedom on this exercise. (A New York attorney).

55 A "management rights" clause which was negotiated by one of my correspondents for an insurance company provides:
The Company has and retains the exclusive right to manage and control its business, except as all such rights are clearly and specifically limited by this agreement. The Company agrees that it will exercise all such rights in good faith and for legitimate business purposes and not arbitrarily or capriciously or for the purpose of discriminating unfairly against or in favor of individual agents, except that promotions to positions excluded from this agreement shall rest in the sole and unfettered discretion of the Company. Included in such rights, this enumeration being merely by way of illustration and not by way of limitation, are the following

12. Rules and regulations for the conduct of agents in their relationship with the Company, other agents, the public, policyholders and prospects.
13. To change at any time Company business practices, and Company policies and rules including practices, policies and rules relating to the above matters.

The arbitration clause of the contract included the following:
The Arbitrator shall have no power to add to, subtract from or modify or change any of the provisions of this agreement, nor any practice, policy or rule of the Company. His power shall be limited to deciding whether the Company has violated the express terms of this agreement, and he shall not imply obligations and conditions binding upon the Company from this agreement, it being understood that any matter not specifically set forth herein remains within the reserved rights of the Company. In any case in which it is alleged that the Company has exercised its rights arbitrarily or capriciously, or for the purpose of discriminating unfairly against or in favor of individual agents, the power of the arbitrator shall be limited to deciding whether or not the Company's action was in fact taken in good faith and for legitimate purposes, or was taken arbitrarily and capriciously or for the
2. Include among the specifically reserved rights the right to make
inter-plant transfers of work, to open new plants and freely select em-
ployees for such plants, to improve work methods, and to install new
machinery.  

Another interesting view expressed holds that management must
rely more on the arbitration clause, and upon specific exclusions of
arbitral jurisdiction therein, rather than upon broad or detailed
"management rights" clauses, to obtain protection against improper
usurpation of authority by the arbitrator. As stated by one writer:

It has been my conclusion, apparently shared by the clients with
whom I have spoken and other management representatives, that man-
agement must carefully limit the definition of a grievance and care-
fully describe the function of an arbitrator in order to avoid challenge
to functions which management considers should be its prerogative.
Expansion of the management rights clause would not seem to limit
the arbitrability of any issue, although of course it might cause an
arbitrator to sustain a management determination. . . .

There is a fairly good theoretical basis for this view, quite apart from
the obvious point, perhaps in part psychological, that specific re-
strictions on arbitral jurisdiction are likely to be scrutinized very
carefully both by arbitrators and by courts. A "management rights"
provision, however detailed, must be read in the light of the other
provisions of the agreement, and of the legal basis of the collective
bargaining relationship, and is thus more likely to contain ambigui-
ties than carefully drawn provisions excluding specific subject matter
from arbitral jurisdiction. A distinctly minority opinion expressed
grave skepticism about the practicality of attempts to negotiate into
the arbitration clause specific exclusionary provisions. One writer
expressing this view states that any such provision "can become
excessively cumbersome and still not accomplish what is desired," and
that, in his experience, trying to negotiate such provisions "led to
needless arguments, frequently about rather ridiculous hypothetical
situations." Certain of the specific suggestions made by those who
take the more prevalent view including the following:

1. Limit the arbitrator's authority to the interpretation and applica-
tion of "those limitations upon management functions in the form of

purpose of discriminating unfairly against or in favor of individual agents,
and the arbitrator shall have no power to substitute his judgment or discre-
tion for that of the Company as to the reasonableness of the exercise of any
such rights or of any practice, policy or rule of the Company.

My correspondent sent me an arbitration decision involving a challenge to Company
action in requiring insurance agents to surrender their collection books to the Company
every Thursday afternoon. It is quite clear that the arbitrator, in rejecting the grievance,
took account of the limitations on his power.

Some of the types of "management rights" clauses advocated, and, in certain
instances, in effect, are set out in Appendix A.
rates of pay, wages, hours of work, and other conditions of employment as set forth in the express terms of this Agreement."

2. Provide that a grievance must specify the particular contract provision or provisions alleged to have been violated.

3. Provide that the arbitrator's award, "in conformity with his jurisdiction" (or, alternatively, "provided it is within the jurisdiction and authority vested in him pursuant to this agreement") shall be final and binding.

4. Provide for judicial review of the question of arbitrability and perhaps other grounds for judicial review.\(^{57}\)

5. Exclude from the arbitrator's jurisdiction any claims based on the location or relocation of plants and the scheduling of production.

6. Do not include a provision permitting the Company to file a grievance. (This suggestion is made as a means of avoiding the possibility of having to arbitrate instead of litigate the Union's violation of its no-strike pledge.)

7. Provide that, where a question of arbitrability is raised before the arbitrator, he must decide this issue only, and that if the claim is held arbitrable, it must be presented to a different arbitrator for a decision on its merits.\(^{58}\)

8. Resist any union proposal to insert in the contract a provision permitting the arbitration of grievances based upon an alleged "past practice."

9. Provide that the arbitrator shall have the authority only to decide whether a specific, express provision of the contract has been violated, and shall not have the authority "to supplement or modify this contract by reference to any 'industrial common law' or 'Federal labor policy,' or any source or concept other than the contract as written by the parties," and that, he "shall utilize only such methods and standards of interpretation as would be used by a court of law in the State of _______ in construing an ordinary commercial contract."

It need hardly be added that some of these proposals seem to be both ridiculous and obviously impossible of achievement in collective bargaining as a practical matter.\(^{59}\)

Most of my correspondents who think something must or should

\(^{57}\) A proposal made by one Company (and rejected by the Union) included the following provision in the arbitration clause:

The decision of the arbitrator, provided it is within the jurisdiction and authority vested in him pursuant to this agreement, shall be final and binding upon the parties. The arbitrator's decision shall always be subject to review and challenge by appropriate action in a court or administrative tribunal of competent jurisdiction on the ground that it was outside of his authority or jurisdiction, made without due process, nor supported by substantial evidence, or that it was arbitrary and capricious.

\(^{58}\) One correspondent states:

I am firmly of the belief that it is wrong to permit an arbitrator to determine arbitrability and then to permit him to hear and decide the case. As a matter of economics and as a matter of pride an arbitrator can't help but be influenced in favor of arbitrability.

\(^{59}\) Some detailed grievance and arbitration provisions advocated, and in certain instances in effect, are set out in Appendix B.
be done to meet the problem of the 1960 decisions advocate attention both to the "management rights" and to the arbitration clauses. Other specific suggestions include the following:

1. Eliminate any "preamble" or "purpose" clause, on the theory that such provisions may induce the arbitrator to "roam."
2. Include in the contract a "complete agreement" or "wrap up" clause, which will provide, illustratively, that the instant agreement supersedes "all prior agreements and understandings, oral or written, express or implied, between the parties" and "shall be the sole source of any and all rights or claims which either party may assert against the other in arbitration hereunder.
3. Include the usual broad provision by which each party waives the right to bargain on matters not covered by the contract, or, except through proper recourse to the grievance procedure, on matters covered by the contract.
4. Limit seniority rights of employees to the existing plant and location, or to any new plant within some stated area of proximity to the existing plant (presumably in order to avoid claims of rights to jobs in a new plant in a different area).
5. Resist any attempt by the union to write into the contract an express limitation on the right to contract out work; do not propose the inclusion of a specific provision reserving the right to contract out work unless management is prepared to take a strike to force its inclusion; if such a provision is to be proposed, be sure that it gives management the right to make the decision on "economic" grounds, among others.

Still another view, held by several of my correspondents, is that the only really effective way of dealing with the issues presented by the 1960 decisions is either to eliminate arbitration altogether from the agreement or else to make it wholly "voluntary" in the sense that a grievance may be submitted to arbitration only if the parties specifically agree on the submission. Persons taking either position realize, of course, that the union, in the event it accepts either proposal, will have to be accorded the right to strike on an unsettled grievance.

While there is some evidence of concern over what is described by one of my correspondents as "the developing theories or 'common law' of arbitrators," and with the Supreme Court's apparent support for "wide angle" approaches to the interpretative process, a number of my correspondents indicate that they have not detected a tendency on the part of arbitrators to be influenced in their philosophies or approaches by the 1960 decisions. Perhaps some cynic might say all this means is that "roving" arbitrators simply continue their peregrinations, comforted, now, by what Mr. Justice Douglas said. However, this is not what my correspondents mean, at least not
all of them. They say, in effect, that responsible arbitrators continue to be responsible. Indeed, one lawyer reports that arbitrators are "now more circumspect in their reasoning and language to retain at least the aura of the judicial approach."

Another rather interesting reaction, expressed by several of my correspondents, is that management has more reason to be disturbed by certain recent judicial decisions on substantive issues than by the 1960 decisions on arbitrability. Mention is made in this connection of the Glidden and Oddie decisions, in which it was held that where a plant is closed down in one area and another is opened in a different, and even distant, area, the employees in the closed plant have individual contractual rights of re-employment at the new location. Perhaps, if substantive issues of this kind are decided in this fashion by the courts, we will witness a switch of positions as between management and labor on the relative advantages of litigation and arbitration!

This completes the survey of managerial reaction to the 1960 decisions. The views of union representatives or their lawyers were not solicited since it was taken for granted that, generally speaking, they would applaud at least the results in the cases if not all the expressions in the majority opinions. It is obvious, however, that union and management negotiators face some common problems and may have some common interests. If, as indicated by a number of my management correspondents, to propose a specific provision and to fail to gain its acceptance involves a substantial risk that some arbitrator will rely on this record in support of a reading of the contract in a manner adverse to the interests of the proposer, the same can be said of union proposals which are not accepted. The union obviously is concerned with the question whether arbitration, in lieu of strike action, shall be the exclusive method of settling grievances. The union likewise may become increasingly interested in the availability of judicial review if, as some of the more recent court decisions indicate, there should be a developing tendency toward a liberal construction of the labor agreement.

VI. Conclusion

The 1960 decisions correctly, at least in my judgment, limited the role of the courts in reviewing questions of arbitrability. This should presumably strengthen the arbitration process by giving it a more secure legal base. Yet there is evidence that to some extent, at least,

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the process has been, or will be, weakened through contractual limitations on the arbitrator’s authority. The parties should face up honestly and realistically again to the basic question of whether arbitration of grievances is preferable to the alternatives of strike action or litigation. Arbitrators should exert some degree of self-restraint in the exercise of their authority to decide their own jurisdiction and in the determination of the merits of an issue. While, of necessity, their decisions often both rely upon, and in turn become, a type of “industrial common law,” arbitrators should not take as “gospel” all of the “romanticisms” to be found in the majority opinions in the 1960 cases. They should remember that their responsibility, essentially, is to perform the task which the particular parties who have employed them had in mind, and that the nature of the authority conferred upon the arbitrator can vary from one contract and its related industrial environment to another.

The basic point to be made, I believe, is that the 1960 decisions place increased responsibility both upon the parties and upon the arbitrator with respect to the arbitration process. The parties can strengthen it or weaken it, since they control its very existence. The arbitrator can add stature to the process, and help to preserve and strengthen it, if he will exercise his authority with a genuine sense of professional obligation. I take the view that the process is the best available method for resolving differences which arise during the life of the labor agreement. I hope both the parties and arbitrators will exercise their responsibilities to see that this, now commonly accepted view, is preserved.

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62 A term used by Professor Paul Hays in discussing the decisions. Hays, The Supreme Court and Labor Law, October Term, 1959, 60 Colum. L. Rev. 901 (1960).
APPENDIX A

Selected "Management Rights" Clauses

Clause A

The management of the business and plant and the direction of the working forces, including, but not limited to, the right to hire, suspend or discharge for just cause, assign or transfer employees, adopt new or changed methods of performing the work, prescribe reasonable general plant rules and the right to relieve employees from duty because of lack of work, or for other legitimate reasons, and to contract out work, is vested exclusively in the Company, and the Company retains all rights that it legally had, subject to the restrictions of law or a specific provision of this Agreement.

In the exercise of its rights, however, whether here enumerated, or here or elsewhere retained, the Company agrees not to discriminate against any member of the Union and to exercise its prerogatives for legitimate business reasons.

Clause B

The management of the Company's shipyard and the direction of the working forces, the right to subcontract work, the right to hire, suspend or discharge employees for cause, or transfer, and the right to relieve employees from duty because of lack of work, is vested exclusively in the Company, subject to the terms of this Agreement.

Employees of sub-contractors of the Company performing work in the shipyard, (which work at the time of signing this Agreement is being performed by employees of the Company in job classifications covered by this Agreement), shall be paid not less than the minimum wage rates of such job classifications as provided in this Agreement. The foregoing requirement shall not, however, be applicable to sub-contracts to which the Company is committed prior to the execution of this Agreement.

Clause C

A. The Company retains the right to direct the working forces, including the right to hire, suspend or discharge for proper cause, or transfer, the right to establish and maintain work standards, and the right to relieve employees from duty because of lack of work or for other legitimate reasons. The foregoing, however, shall be exercised subject to the provision of this Agreement, including arbitration.

B. The Company shall have the exclusive right to manage the business and plants and to decide on all matters pertaining to the products to be manufactured, location of plants or operations, production schedules, methods and means of manufacture, processes and materials to be used; including the right to introduce new and improved methods or facilities and to change existing methods or facilities. Insofar as a grievance relates solely to the exercise by management of one of the exclusive rights of management recognized in this paragraph B, such grievance shall not be arbitrated or otherwise litigated. It is understood, however, that whenever it is claimed that an act of management pursuant to this paragraph B
results in a violation of some other provision of this Agreement, such claim of violation of another provision of this Agreement, but not this paragraph B, shall be subject to the grievance procedure of this Agreement, including arbitration.

Clause D

Management shall continue to retain all rights held prior to the execution of this Agreement, except as specifically modified by the Agreement; including, but not limited to, the right to:
- prescribe operating and safety rules,
- establish or change the consist of working crews,
- institute measures designed to increase efficiency,
- assign work to outside contractors for economic reasons,
- establish working schedules,
- manage and direct the working force,
- institute measures designed to increase efficiency,
- establish and administer incentive plans, or
- extend, limit, or curtail the operations or
- to shut down completely when in its discretion it may deem it advisable so to do.

It is understood that all management rights other than those specifically surrendered by this Agreement are not subject to arbitration.

Clause E

Except to the extent expressly abridged by a specific provision of this Agreement, the Company reserves and retains, solely and exclusively, all of its inherent rights to manage the business, as such rights existed prior to the execution of this or any previous agreement with the Union or any other Union.

Without limiting the generality of the foregoing, the sole and exclusive rights of the Company which are not abridged by this Agreement include, but are not confined to, the right to determine, and from time to time redetermine, the number, location, and types of its operations, and the methods, processes, and materials to be employed; to discontinue processes or operations; or to discontinue their performance by employees of the Company and to contract out any or all such processes or operations; to determine the number of hours per day or per week operations shall be carried on; and to select and determine the number and types of employees required and to assign work to such employees, subject only to the requirement that they be properly compensated therefor.

The exercise by the Company of any of its exclusive rights shall not be subject to arbitration hereunder, except with respect to a claim that such right was exercised in bad faith for the purpose of damaging the Union.

Any policies and practices unilaterally adopted and followed, continued or discontinued, by the employer pursuant to its right to manage the business are not subject to arbitration under this Agreement, with respect to their application, interpretation, continuance or discontinuance, unless (a) any such policy or practice expressly contravenes a specific provision of this Agreement, or (b) the parties have expressly agreed on such policy or practice and have formally adopted it as part of their Agreement, or (c) the
parties expressly agree to submit to arbitration a specific issue with respect to such a policy or practice.

Clause F
(from the 1961 American Motors-UAW contract)

MANAGEMENT RIGHTS CLAUSE

The parties to this agreement recognize that they are engaged in a common endeavor in which each of them has separate and distinct responsibilities which both of them are obligated to meet in a manner consistent with their mutual overriding responsibility to the community as a whole. The Union recognizes and respects the obligation of management to obtain for the Company’s stockholders a reasonable return on their investment and to assure the continued growth and prosperity of the Company. The Company recognizes and respects the obligation of the Union to help its members to protect and advance their welfare and to obtain for themselves and their families a fair share of the fruits of their labor. Both parties recognize that they can best fulfill their separate obligations to stockholders and employees, respectively, by conducting their relations with each other on a cooperative basis that will make it possible to offer consumers a growing volume of high quality products at reasonable prices.

To achieve these ends, each party recognizes that it must respect the proper functions of the other. The Union recognizes the right of management to maximum freedom to manage consistent with due regard for the welfare and interests of the employees.

Specifically, the Union agrees, in order to clarify its recognition of management functions belonging exclusively to the Company, not to request the Company to bargain with respect to the following:

1. Any change or modification of management rights clauses contained in the several working agreements with the respective local unions.
2. The right to determine the products to be manufactured, their design and engineering, and the research thereon.
3. The right to determine all methods of selling, marketing, and advertising products, including pricing of products.
4. The right to make all financial decisions including but not limited to the administration and control of capital, distribution of profits and dividends, mortgaging of properties, purchase and sale of securities, and the benefits and compensation of non-union-represented personnel, the financing and borrowing of capital and the merger, reorganization or dissolution of the corporation, together with the right to maintain the corporation’s financial books and records in confidence. This right includes the determination of general accounting procedures, particularly the internal accounting necessary to make reports to the owners of the business and to government bodies requiring financial reports.
5. The right to determine the management organization of each producing or distributing unit and the selection of employees for promotion to supervisory and other managerial positions.

The Company agrees, in order to clarify its recognition of functions belonging exclusively to the Union, not to request the Union to bargain
with respect to any matter involving the internal affairs, procedures, or 
practices of the Union, including, but without limitation, such matters as 
the amount or manner of levying initiation fees, dues, assessments and fines, 
election or appointment of Union officers, stewards, committeemen, mem-
bers of Union Committees or Union representatives, delegates to conven-
tions or other Union functions, the individuals holding such positions, 
procedures for formulation of demands, for deciding upon strike action or 
other concerted action, and for ratification of agreements; provided, how-
ever, that this shall not preclude the Company from bringing to the at-
tention of, and discussing with, the Union any matter which has bearing 
on relations between them.

None of the foregoing shall be deemed to modify or limit any right 
secured to either the Company or the Union in the National Economic 
Agreement or the several Local Working Agreements.

The Union hereby agrees to relieve the Company from any obligation to 
bargain or negotiate with respect to any of the matters mentioned in the 
preceding paragraphs as matters with respect to which it will not request 
the Company to bargain.

The Company recognizes, however, that decisions made pursuant to the 
exercise of the management rights set forth above may have impact upon 
employees. The Company, therefore, recognizes that it is a proper function 
and a right of the Union to bargain, and the Company agrees that it will 
discuss and bargain in good faith with the Union at the latter's request, 
with respect to the impact of such decisions upon wages, hours, and other 
terms and conditions of employment or upon the convenience, welfare, in-
terests, health, safety, security and dignity of employees and their families. 
The Company will continue its past practice of advising and consulting 
with the Union in advance of the effectuation of decisions having an impact 
upon such matters. The Company further agrees that it will refrain from 
assigning to unrepresented employees operations or functions presently per-
formed by represented employees at the same location.

Insistence by the Company upon full compliance with this agreement 
and with the management rights clauses in the said several Working Agree-
ments shall not be an objective of or reason or cause for any strike, slow-
down, work stoppage, walk-out, picketing, or other exercise of force or 
threat thereof by the Union or any of its members; nor shall insistence by 
the Union upon full compliance with this agreement and the provisions of 
the National Economic Agreement or the several Local Working Agree-
ments be an objective of or reason or cause for any lockout, or punitive, dis-
criminatory or disciplinary action or other exercise of force or threat against 
any employee; provided, however, that nothing in this paragraph shall be 
deemed to modify or limit any right secured to either the Company or the 
Union in such agreements.

This Management Rights Clause shall remain in full force and effect, as 
long as the Progress Sharing Plan as set forth herein or as hereafter amended 
shall not have been terminated.
APPENDIX B

Selected Grievance and Arbitration Provisions

Clause I

33. Should grievances arise between the Company and the Union, or between the Company and any employee or employees, concerning the meaning or application of any of the provisions of this Agreement resulting from an alleged violation of this Agreement, there shall be no strike or lock-out on account of such differences but an earnest effort shall be made to settle such differences immediately in the following manner:

FIRST STEP—(Employee-Committeeeman to Foreman)

36. The written grievance shall briefly and specifically set forth the facts relied upon and the relief requested.

SECOND STEP—(Committee Chairman and Company Representative)

39. The written appeal shall specify the respects in which the Agreement is claimed to have been violated, the relief requested, and shall briefly and specifically set forth the facts and reasons relied upon to justify a reversal or modification of the appealed answer.

FOURTH STEP—(Arbitration)

48. Immediately upon selection of the arbitrator, copies of the grievance and all written appeals and answers at each step of the processing and a copy of the Agreement shall be submitted to him in a letter written jointly by the parties requesting a hearing be held at a mutually convenient time and place.

49. If a work standard or a dispute about a wage rate for a classification established by the Company during the term of the Agreement is appealed to arbitration, the arbitrator selected shall be a qualified Industrial Engineer.

50. Sometime after the arbitration appeal has been received but at least 5 days before the arbitration hearing the parties will meet and endeavor to stipulate as many facts and issues as possible relative to the grievance. Such stipulation as may be agreed upon shall be jointly signed and presented to the arbitrator prior to the arbitration hearing.

51. The arbitrator shall have only the functions set forth herein. His authority is confined to the interpretation and application of those limitations upon management functions in the form of rates of pay, wages, hours of work and other conditions of employment as set forth in the express terms of this Agreement.

52. He shall have no power to establish or change provisions of this Agreement, or to establish or change the bargained wage rates except as specifically provided for under the Special Procedure (Wage Rates). This shall not preclude the arbitration of any individual’s rate grievance within the established wage rate structure.
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Clause II

X GRIEVANCES

A. Should any employee or employees believe the Company has violated any of the provisions of this Agreement, he may initiate a grievance which shall be processed in the following order:

1. Between the aggrieved employee or employees together with the Department Committeeman and the Foreman of the department or departments involved; if not settled, then,
2. Between the Shop Committee Chairman, Department Committeeman and the Shop Superintendent; if not settled, then,
3. Between the Shop Committee Chairman, Co-Chairman and the Personnel Director. Grievances carried to this step must be reduced to writing which shall specify the particular section of the Agreement, if any, asserted to have been violated, the relief requested, the date the grievance is claimed to have occurred, and the date it was first presented. Answer must be given in writing. If not settled, then,
4. Between representatives of [the Union] and the Company management.

B. All alleged grievances must be presented promptly and in any event must be presented in writing in step three (3) within thirty (30) days of their asserted occurrence or they will be deemed waived. Grievances presented in any step shall be acted upon by Company representatives within three (3) working days after presentation, except when additional time is required by the Company for investigation, in which event the Union will be notified and a reasonable extension of time will be granted.

C. Grievances not settled in any step shall be presented to the next succeeding step within five (5) days after the appropriate Company representative communicates his decision to the employee or his Committeeman, or, if there has been an extension of additional time as permitted by paragraph B, within five (5) days of the expiration of such extension.

D. No Shop Chairman or Committeeman shall leave his job or department for the purpose of handling grievances or for any other purpose under this Agreement without first notifying his Foreman. Should the Foreman be unavailable, the Chairman or the Committeeman shall leave a note at the Foreman's desk establishing the location of his visit. Such Shop Chairman or Committeeman also shall notify the Foreman of the department to be visited by him that the purpose of his visit is to discuss with an employee in said department a matter arising under this Agreement.

XI ARBITRATION

Should a grievance alleging a violation of any provision of this contract fail of settlement under the procedure provided for in Article X, it may be submitted to arbitration as herein provided:

A. Within one (1) week of the failure of settlement of such a grievance in step four (4) of the grievance procedure the Union may institute arbitration by notifying the Company and the American Arbitration
Association at Chicago, Illinois, in writing, of its desire so to do. The procedure of the American Arbitration Association shall then be utilized promptly for the selection of an Arbitrator, whose decision, if in accordance with the provisions hereof, shall be final and binding.

B. The expenses of the Arbitrator shall be borne equally by the Company and the Union. Each party shall bear its own expenses.

C. Arbitrators are to be bound by the following rules:
   1. The Company has all rights which it had at common law except those expressly limited by this Agreement.
   2. The parties recognize that from time to time they may utilize the grievance procedure for discussion of matters of believed mutual interest and matters concerning or related to wages, hours and working conditions which are not covered by any provision hereof. Such discussion or treatment does not make a matter arbitrable.
   3. No arbitration award shall be retroactive more than thirty (30) days beyond the date upon which the grievance was first presented to management in written form.
   4. If the Arbitrator finds that a claim for relief is based upon circumstances which are not provided for under the Agreement, he shall so find and dismiss the arbitration.
   5. Company's resistance of or defense against grievances or arbitrations on the grounds that employees were engaged in an illegal strike, stoppage, slow-down or suspension of work shall not waive the Company's right to pursue other legal avenues of relief. Company's failure or refusal to arbitrate an arbitrable grievance shall not waive the Union's right to pursue other legal avenues of relief.

Clause III

Arbitration Clause

1. The arbitration procedure hereinafter provided for shall extend only to those issues which are arbitrable under this Agreement. In order for a grievance to be arbitrable, (a) it must have been properly and timely processed through the grievance procedure; (b) it must genuinely involve the interpretation or application of a specified provision or provisions of this Agreement; (c) it must not rest on any alleged understanding, practice, or other matter not part of this Agreement; and (d) it must not require the arbitrator, in order to rule in favor of the grievance, to exceed the scope of his jurisdiction under this Agreement.

2. The issue of arbitrability may be determined by the mutual agreement of the parties with respect thereto; or by a court in an action to stay or compel arbitration; or by an arbitrator, but only if the parties shall specially agree to the submission of that issue to an arbitrator.

3. Either the Company* or the Union may elect to seek arbitration of any arbitrable issue, and in that event shall proceed as follows:
   (a) Within fifteen (15) calendar days from the date of disposition of the grievance [or employer-raised question] in the final step of the

* Provision should be made in the grievance procedure for a procedure by which the Company may raise (preferably in the final step of the grievance procedure) questions for discussion, which, if not satisfactorily settled, may be arbitrated as here provided.
grievance procedure, the party desiring arbitration shall so notify the other party in writing, stating the issue proposed to be submitted to arbitration, the provision or provisions of the Agreement on which the claim rests or out of which the dispute arises, and the relief or remedy sought.

(b) As soon as possible after receipt of such notice, the parties shall meet for the purpose of drafting the submission agreement and selecting an arbitrator. If the parties are unable thus to select an arbitrator, they shall jointly request FMCS to furnish a panel of five names from which the parties shall attempt to agree upon an arbitrator, utilizing, if necessary, the method of alternating strike-offs (the party seeking arbitration striking the first name), unless one party objects to all of the names on the panel, in which event an additional panel of names shall be requested and the parties shall proceed as above.

(c) If a question is raised concerning the arbitrability under the Agreement of the issue sought to be arbitrated, and such question is not otherwise decided, the parties by mutual agreement may submit this issue alone to an arbitrator selected as provided above, and his decision on such issue shall be final and binding. If in favor of arbitrability, such decision shall be followed by a hearing on the merits of the issue as soon as another arbitrator can be selected and a hearing arranged. The fact that a claim or dispute has been handled under the grievance procedure shall not preclude either party from raising the question of arbitrability with respect to such claim or dispute.

4. The arbitrator's jurisdiction to make an award shall be limited by the submission and confined to the interpretation or application of specific provisions of this Agreement. The arbitrator shall not have jurisdiction to make an award which has the effect of amending, altering, enlarging, or ignoring any provision of this Agreement, nor shall he have jurisdiction to determine any grievance on the basis of alleged practice or to determine that the parties by practice or implication have amended or supplemented this Agreement, unless the parties shall expressly submit to him the issue as to whether such an agreement by practice or implication was made. The arbitrator's award so made shall be final and binding.

5. The entire fee and expenses of the arbitrator shall be borne jointly by the parties.

Clause IV

Grievance Procedure

SECTION 1. A 'grievance,' as the term is used in this Agreement, means any dispute involving the proper application or interpretation of this Agreement.

SECTION 2. Step 1: The aggrieved employee, together with a representative of the Union if he so desires, shall attempt to settle the grievance by discussing it with his Foreman. Any grievance not so presented within seven (7) calendar days of the occurrence complained of shall be conclusively deemed to have been waived, and thereafter such grievance may not be presented for consideration or made the basis for any action under this agreement or otherwise.
SECTION 3. Step 2. If the Foreman does not dispose of the grievance to the satisfaction of the Union within three (3) calendar days of the time it is presented to him, the Union may, within five (5) calendar days thereafter, appeal the matter by reducing the grievance to writing and presenting it to the Plant Superintendent. Within seven (7) calendar days of the presentation of the written grievance, the Plant Superintendent shall answer the grievance in writing.

Arbitration Procedure

SECTION 1. If the grievance is not settled to Union’s satisfaction in accordance with the procedures set out in Article VIII, it may, within fourteen (14) calendar days from the date of the Plant Superintendent’s decision or the expiration of the time to render such a decision, give written notice of its desire to submit such grievance to arbitration.

SECTION 2. Company agrees to submit to arbitration, under the terms of this Article, only grievances which satisfy all of the following conditions:

(a) The grievance was filed in writing during the life of this Agreement and processed in the manner and within the time limits prescribed in Article IX and Section 1 of this Article.

(b) The grievance involves either (1) a specific claim of a violation by Company of an express provision of this Agreement, which raises a bona fide issue regarding the proper application or interpretation of such provision; or (2) a claim by an employee that he has been discharged or otherwise disciplined without just cause.

(c) The written grievance or notice of desire to arbitrate designates specifically the section or sections of this Agreement alleged to have been violated.

SECTION 3. If the grievance satisfies all of the conditions prescribed by Section 2 of this Article, Company and Union shall, within fourteen (14) calendar days after Company’s receipt of Union’s notice of desire to arbitrate, select an arbitrator, either by mutual agreement or by jointly requesting the Federal Mediation and Conciliation Service to submit a list of five (5) arbitrators. Within five (5) working days after the receipt of such list, Company and Union shall eliminate four (4) names therefrom by alternately striking one. The person whose name remains on the list shall serve as the sole arbitrator for such grievance. Unless the parties mutually agree otherwise, only one grievance shall be heard by an arbitrator, and grievances shall be submitted to arbitration in the order in which they are appealed to arbitration. The arbitrator, when so selected, shall proceed as soon as practicable to hold a hearing. Each party shall pay its own expenses of arbitration, and the expenses and fee of the arbitrator shall be divided equally between Company and Union.

SECTION 4. The sole function and jurisdiction of the arbitrator shall be to determine whether Company or Union is correct with reference to the application or interpretation of the identified contract provision in the respect alleged in the written grievance and/or notice of desire to arbitrate. The arbitrator shall have no power to change, amend, modify, supplement, fill in, or otherwise alter in any respect whatsoever this agreement or any part thereof, and the express terms of this agreement shall be the sole source of rights and/or obligations adjudicated or declared by the
arbitrator. The decision of the arbitrator, within the limits prescribed by this Article, shall be final and binding on all parties. Any case referred to the arbitrator on which he has no power to rule shall be referred back to the parties without a decision.