ARBITRATORS AND ARBITRABILITY

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INTRODUCTION

For years arbitrability was a troublesome issue in the courts because they tended to rule on the merits of a dispute while clothing the decision in the guise of arbitrability. In 1960 the Supreme Court rejected this approach and decided that henceforth federal courts should not deny an order to arbitrate a particular grievance "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[1] Since then the lower federal courts have quite faithfully followed the Supreme Court's directive. Litigants still contend that particular issues are not arbitrable, but counsel now direct their arguments away from the merits of the dispute.[2]

It was always true, of course, that the parties could argue the question of arbitrability before the arbitrator and there were many cases in which arbitrators decided that they did not have jurisdiction of a particular subject. Did the *Trilogy* change all this?[3] What have arbitrators been doing with claims of non-arbitrability since the summer of 1960? That is the question which this article seeks to answer.

As of April, 1962 eighty-three post-*Trilogy* arbitrability decisions by arbitrators were found in the reports.[4] In twenty-four of the cases the issue was ruled non-arbitrable. This figure is somewhat deceptive, however, because fifteen of the twenty-four cases went off on procedural points—usually failure to comply with the time limitations imposed by the contract—and did not involve a challenge to the arbitrator's right to consider the substantive issue in a case which was properly before him.

Forty-five of the eighty-three cases involved a claim that the arbitrator had no authority to consider the substantive issue which was before him. These cases ran the gamut from contracting-out, to

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1. United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582-83 (1960).

2. Pacific N.W. Bell Tel. Co. v. Communications Workers, 51 L.R.R.M. 2405 (9th Cir. 1962).

3. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

4. The search included the Bureau of National Affairs LA Series, the Commerce Clearing House ARB series and the loose-leaf summary of arbitration awards issued by the American Arbitration Association.

wages, to discipline and discharge, to seniority, to insurance, to retirement, to scheduling, to plant-closing, to an interesting series of cases in which the company sought to bring an issue to arbitration which the union claimed was solely within its province.

Little is to be gained from a statistical analysis of the cases, both because the statistics are so unsatisfactory to begin with, and because there is more than one way of classifying certain cases. To flavor the situation one must dip into the cases. In order to do this some kind of a classification scheme is necessary. One which permits the entire spectrum to be put on display includes the following five groupings: (1) the cases involving procedural defects, (2) the substantively non-arbitrable cases, (3) claims of arbitrability despite alleged express provisions to the contrary, (4) arbitrability despite a silent contract and (5) employer grievances. It will be apparent that there is overlap among these classifications. The only reason for presenting the substantively non-arbitrable and employer grievance cases separately, for instance, is to give them emphasis.

Perhaps it would be well at the outset to mention a semantic difficulty which often seems to frustrate the arbitrator. It is evidenced by the following quotation from *J-M Poultry Packing Co.*:

> The word "arbitrable" means subject to the decisions of an arbitrator. Therefore the word "non-arbitrable" must be the negative of "arbitrable," or not subject to the decision of an arbitrator. If this is so, then how can an arbitrator decide that a matter is not arbitrable after he has subjected the matter to a complete hearing and a decision? Obviously, if a matter is non-arbitrable, the arbitrator is prevented from making a decision and arbitrating. Yet when an arbitrator decides a matter is not arbitrable after he has heard the case and evaluated the questioned term, he is doing the very thing he decided he could not do. A most untenable and unusual position for any logical and reasonable arbiter to take.[5]

It is quite true, as the arbitrator suggests, that it makes little sense to talk about a case being non-arbitrable after that very case has been been fully heard and a decision rendered. More will be said about this later.

I. The Procedural Cases

By far the largest single category of cases which have been ruled to be non-arbitrable involved procedural defects of one sort or another. The term must be used loosely, however, and so used it covers a substantial amount of territory. The easiest and most obvious group of cases involved situations in which one side or the other failed to comply with the time limitations for arbitration set forth in the

5. 36 Lab. Arb. 1433 (1961).

contract.[6] The other cases grow more complex. In one, the union demanded that the company negotiate with it on job descriptions and the arbitrator held that the demand was in the wrong forum.[7] In another the company moved some machinery from one plant to another and the union claimed the right to represent the employees at the new plant despite the fact that another union had been certified by the National Labor Relations Board at the new plant. The arbitrator refused to hear the grievance on the ground that it had already been determined by an appropriate federal agency.[8]

Most of the procedural cases which did not involve the question of time limitations imposed by the contract were ruled to be arbitrable. A grievant who accepted workmen's compensation and then sought reinstatement had his grievance heard despite the company's claim that he was not entitled to process his grievance after accepting compensation for injuries and disability of a permanent nature.[9] A dispute over holiday pay for Good Friday, which happened to be the day after the expiration of the old contract and before the signing of the new contract, was ruled arbitrable though the company argued that there was no contract in effect at the time.[10] Two grievances were held to be arbitrable although it was alleged that employees failed to to follow the normal procedure of first complying with the order and then grieving.[11] Two others were allowed although there was some contention that the grieving employee had accepted a proposed settlement at an earlier stage in the grievance procedure.[12] A union was held not to be estopped from processing a grievance on the ground that it had failed to disclose relevant information within its possession at an earlier step in the grievance procedure.[13] And the withdrawal of a first grievance was held not to bar arbitration of the same grievance when it was presented once again several months later.[14] Finally, striking employees were given standing, over the company's protest, to process their seniority claims after their jobs had been filled by replacements following a strike.[15]

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6. *Cf.* Artistic Weaving Co., CCH 61-2 ARB #8595, and Celanese Plastics Co., 36 Lab. Arb. 1029 (1961).

7. *In re* Magnavox Co., 35 Lab. Arb. 237 (1960).

8. *In re* H. H. Robertson Co., 37 Lab. Arb. 928 (1962).

9. United States Borax & Chem. Corp., CCH 61-2 ARB #8558.

10. American Arb. Ass'n's Summary of Awards, #24-19 (March 15, 1961).

11. Mansfield Tire & Rubber Co., CCH 61-1 ARB #8266; *In re* Publisher's Ass'n, 37 Lab. Arb. 62 (1961).

12. Baur Bros. Bakery, 36 Lab. Arb. 1422 (1961); Air Reduction Co., CCH 61-3 ARB #8739.

13. Tennessee Prod. & Chem. Corp., CCH 61-1 ARB #8247.

14. American Arb. Ass'n's Summary of Awards, #26-20 (May 15, 1961).

15. *In re* Dynamic Mfg., Inc., 36 Lab. Arb. 635 (1960).

II. Non-Arbitrable on Substantive Grounds

Unlike the procedural cases, which are, with rare exceptions, relatively uninteresting and non-controversial, the cases in which a substantive issue has been ruled to be non-arbitrable are fascinating. One of the first evokes strong memories of the much discussed *Cutler-Hammer* decision.[16] In the latter case the contract contained a clause stating that the Company would meet with the Union early in July 1946 to discuss payment of a bonus for the first six months in 1946. The parties did meet and discuss the bonus, but they were unable to agree. The union then sought to compel the company to arbitrate. The court turned down the request because, "If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate. . . ."[17] A dissenting opinion suggested that reasonable men could differ as to the meaning of the clause in question.[18] Prolonged criticism of the *Cutler-Hammer* decision was capped by the statement of the Supreme Court in the *American Manufacturing* case that such a decision "could only have a crippling effect on grievance arbitration."[19]

The case which brings *Cutler-Hammer* to mind involves the *Hughes Tool Co.*[20] In that case the arbitrator was asked the following question: "Is the matter of 'negotiating a general wage revision of base rates only' a proper issue to be resolved by the grievance procedure and arbitration under the terms of the Agreement . . .?" The contract between the parties provided that "either party may open this [wage] section . . . for the purpose of negotiating a general wage revision of base rates only by giving written notice . . . ." The union served notice of its desire to negotiate a general wage increase, the parties met and made some progress, but were ultimately unable to reach an agreement. The union then sought to file a general grievance under which the issue would have been submitted to arbitration. In support of its contention the union noted that a grievance was defined as "a dispute, a claim or difference between the Employer and an employee or the Union, arising out of the terms of this Agreement," that grievances were subject to arbitration, and that the contract contained a binding no-strike clause. The company, on the other hand, argued that the negotiation of a general wage increase was not subject to the grievance procedure, that the contract specifically forbade the arbitrators to "add to, subtract from, change or modify" any provision of

16. IAM v. Cutler-Hammer, Inc., 271 App. Div. 917, 67 N.Y.S.2d 317 (1947) *aff'd* 297 N.Y. 519, 74 N.E.2d 464 (1947).

17. *Id.* at 918, 67 N.Y.S.2d at 318.

18. *Id.* at 918, 67 N.Y.S.2d at 319.

19. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566-67 (1960).

20. 36 Lab. Arb. 1125 (1960).

the agreement, and that the arbitration board could not act on the union's request without modifying the present agreement.

In a carefully written decision, the arbitrator held that the issue of a general increase was not subject to arbitration. He noted that the contract referred to "negotiating" a general revision of base rates, and did not provide for the referral of unresolved issues arising out of the negotiations to the grievance procedure. Even if one assumed that the no-strike clause would prevent a stoppage in connection with the negotiation of a general increase (a point on which the arbitrator did not rule), he thought it did not necessarily follow that the union had the right to demand arbitration.

Since the Supreme Court decisions in the *Steelworker* cases had just come down when the *Hughes Tool* case was presented, counsel for both sides naturally argued the impact of those decisions before the arbitrator. After commenting that the *Steelworker* cases dealt with the power of federal courts rather than with the discretion of arbitrators, the arbitrator said:

> The parties elected to resolve this dispute through arbitration, and the decision rests upon the judgment of a majority of the three Arbitrators selected to hear the case. In exercising that judgment we should not, in my opinion, be influenced by any calculation of what a court might do if confronted by the same problem. The dominant theme of the Supreme Court decision referred to above is that courts typically lack the specialized knowledge, experience, and insight to deal wisely with these types of problems. Whether either this assumption, or the corresponding one that arbitrators typically possess such expertise, is correct is, to put it mildly, a question on which there is considerable disagreement. In any case, the doctrine enunciated in the Supreme Court decisions places added responsibility upon arbitrators generally. The temptation to uphold claims of arbitrability solely on the ground that a court would do so in like circumstances must be resisted; for to yield would be to abdicate the assumed independence of judgment based on specialized knowledge and experience upon which the Supreme Court doctrine is predicated.[21]

It is true that the grievance clause in the *Cutler-Hammer* contract committed the parties to the arbitration of *any* dispute as to the meaning, performance, non-performance or application of the provisions of the agreement. Nevertheless, there is a substantial similarity between the cases. Of course, the alleged evil in *Cutler-Hammer* was not that the court was wrong on the substantive issue of whether the parties ever intended to submit the bonus issue to arbitration, but that it decided that issue at all rather than referring it to an arbitrator. Presumably the parties had agreed to submit any issue to arbitra-

21. *Id.* at 1129.

tion and the court had taken this issue away from the arbitrator. "In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for."[22]

An interesting sidelight on the *Hughes* case is that there is certainly language in the Supreme Court's decision in the *American Manufacturing Co.* case which would lead one to believe that when a contract contained a strong no-strike clause the court thought the grievance clause ought to be interpreted very liberally. It said, "There is no exception in the 'no-strike' clause and none therefore should be read into the grievance clause, since one is the *quid pro quo* for the other."[23] Perhaps, as the arbitrator admitted in the *Hughes* decision, "the court would have ruled that the issue was arbitrable."[24] In a quite similar case the California District Court of Appeal did in fact rule that the issue was arbitrable.[25] The contract contained a reopening clause "limited to the negotiating of an increase of five (5) cents per hour." The union gave proper notice and met with the company, but the parties were unable to reach an agreement. The union then successfully sought an order from the state court compelling arbitration. The company refused to appear, claiming that the issue was not arbitrable. In the absence of the company, the arbitrator heard the case and awarded a five cent increase. The union then sought enforcement of the award, and the company claimed that the arbitrator had exceeded his jurisdiction. The court enforced the award, and appeared to adopt the following language, used by the arbitrator:

> The Employer knew the Union's intentions. It knew, or should have known, that the arbitration clause was so broad as to cover such a dispute as has arisen. It knew, or should have known, the law, herein elucidated, that a dispute arising out of an agreement permitting the contract to be reopened for a limited purpose, while the no-strike clause remains in effect, is subject to arbitration if negotiations fail, not only as to the arbitrability of the claim itself, but also as to the merits of the claim."[26]

There is not necessarily any inconsistency between the *Hughes Tool* decision and the case decided by the California state court, since there appears to be a substantial difference in the wage clauses under consideration. In the latter case the rather unusual clause limiting the parties to "the negotiating of an increase of five (5) cents per hour" could imply that the parties intended the negotiations to be concerned

22. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960).

23. *Id.* at 567.

24. 36 Lab. Arb. 1125, 1129 (1960).

25. Broadway-Hale Stores v. Retail Clerks, 14 Cal. Rptr. 821 (Ct. App. 1961).

26. *Id.* at 823.

only with the question of whether there was to be no increase or a five-cent increase. This kind of issue would be much more susceptible to arbitration, even in the thinking of the parties, than the open-end wage negotiation clause.

In another interesting line of cases arbitrators have had to face the same question which plagued Saul Wallen a few years ago in the *Coca-Cola* case.[27] Mr. Wallen had been asked to decide whether the company's right to discharge was restricted in the absence of a contract clause to that effect. The contract contained the usual recognition, seniority, grievance and arbitration clauses, but no express limitation on the company's power to discharge. Despite this fact Wallen ruled that ". . . the meaning of the contract, when viewed as a whole, is that a limitation on the employer's right to discharge was created with the birth of the instrument. Both the necessity for maintaining the integrity of the contract's component parts and the very nature of collective bargaining agreements are the basis for this conclusion."[28]

The Wallen decision was the subject of a later comment by Archibald Cox to the following effect:

> There is little force to the argument that the implication of a clause limiting discharges to cases of just cause is necessary to preserve the integrity of a seniority clause or grievance procedure. The integrity of the seniority and grievance clauses would not be affected by the arbitrary and capricious discharge of a junior employee who had no grievance. They can be enforced by implying an undertaking not to discharge a man for the purpose of evading seniority or preventing the prosecution of the grievance.
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> Mr. Wallen's reliance upon "the very nature of collective bargaining agreements" cuts much deeper. He thereby asserts that a company which signs a collective bargaining agreement automatically assumes some obligations and submits certain management actions to the jurisdiction of the arbitrator even though the agreement says nothing about them. The dissenting member of the arbitration board spoke the truth when he protested that the majority "have taken a contract which contained no language which could possibly be construed as a limitation on the Company's right of discharge and have implied a very stringent limitation of that right," but this assertion did not meet the basic contention that employees had rights cognizable by the arbitrator in addition to those which the contract expressly gave them.[29]

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27. Coca-Cola Bottling Co., reprinted in COX, CASES ON LABOR LAW 583 (4th ed. 1958).

28. *Id.* at 586.

29. Cox, *Arbitration in Light of the Lincoln Mills Case*, in National Academy of Arbitrators, Arbitration and the Law 24, 48 (McKelvey ed. 1959).

One of the recent cases involved the *American Oil and Supply Co.*[30] The contract did not include any language on discharge. The arbitrator said:

> The Union argues that it is an implied clause and that unless such an implied clause is read into the agreement, the other clauses such as those dealing with seniority, holidays and vacations are rendered meaningless. The Union may be correct in this, although the vacation clauses do provide for partial vacation pay for those employees who leave or who are discharged. However, this contention would possibly be more relevant if the issue had to do with the unreasonable denial of holiday pay, vacation rights or seniority standing. If the employer had juggled seniority lists or eliminated holiday pay by strategic firings and rehirings, the arbitrator would be called upon to interpret the expressed provisions of the seniority or holiday clauses. Possibly he might then impute some restrictions on the right of the employer to defeat the purpose of these provisions by arbitrarily discharging employees. This is not the situation in the present case. No claim is made that the employer has violated these or any other expressed provisions of the agreement.[31]

Within a year after the above decision another arbitrator had a chance to rule on the same issue—could an employee carry his discharge to arbitration in the absence of a clause in the contract restricting the company's right to discharge? In the *General Portland Cement Co.*[32] case the arbitrator said:

> It has been justifiably said "protection against arbitrary discharge is possibly the most important single benefit which the worker secures from trade unionism." It does more than anything else to make him a free citizen in the plant. Without commenting at length on this statement, where the working agreement is silent on the matter of discipline the very nature of the working agreement, absent a clear proviso to the contrary, makes clear an implied understanding that the Company does not have the unilateral right to discipline or discharge an individual without such action being subject to challenge by the Union as to whether the Company's action was for just cause. It is clear, for example, that the seniority provision of the working agreement would, in the final analysis, have little meaning if employees could be discharged promiscuously by the Company. This is true for the reason that an individual that otherwise could be discharged without just cause and rehired the following day, as a result of the Company's action would thereby lose all of his seniority and related rights and be sent back to the foot of the seniority roster. The same observation could be made in varying degrees as regards many other valuable rights earned by em-

30. 36 Lab. Arb. 331 (1960).

31. *Id.* at 332.

32. CCH 62-1 ARB #8172.

> ployees under the terms of the working agreement. While the Impartial Arbitrator has generally followed the concept that the Union has only those rights bargained for and specifically set out in the contract, for the reasons set forth above he believes that in this instance there existed an implied agreement to the effect that management intended to discharge only for cause and that the Union does have the right to grieve, to process the grievance, and to have the matter determined on its merits by arbitration.[33]

The remaining substantive issues which were held to be non-arbitrable represent distinctly different factual situations. In one an employee filed a grievance asking for recovery on account of damage done to his eyeglasses when a defective grinding machine shattered. The arbitrator held that this was not a problem arising out of the terms of the agreement, that the company had consistently denied all such claims in the past, and that in the absence of a specific clause the arbitrator would exceed his jurisdiction to allow recovery.[34] In another the contract gave the company the right to schedule vacations "in accordance with operational requirements," and the arbitration clause excluded "any matters of general management questions, management policy, business requirements [or] operations." A dispute then arose over the right of the company to require employees to take their vacations during a period of plant shutdown. It was held that in the absence of a showing by the union that the company was not acting in good faith and that the shutdown was not based on production needs the dispute was not arbitrable.[35] (One wonders whether this isn't the same old semantic difficulty—didn't the arbitrator simply rule that the union had failed to meet the burden of showing that the contract had been violated? Is a dispute arbitrable if the union meets the burden, but not arbitrable if it does not? Hasn't the arbitrator really ruled on the merits in either case?) In a third case the contract gave the company the "sole right" to determine the "hours of work," and excluded from arbitration grievances concerning the "schedule of hours of work." When the company changed the starting time for cleaning women the union sought to review the decision in arbitration. It was held that the dispute was not arbitrable, despite the fact that the company had been unsuccessful in negotiations in getting a contract provision giving it the express right to change the starting time.[36] In the last case the company closed down one of two divisions in a given city. It offered displaced employees jobs at another division in a different city, but did not offer them employment

33. *Ibid.*

34. Curtiss-Wright Corp., 36 Lab. Arb. 1136 (1961).

35. American Arb. Ass'n's Summary of Awards, #30-4 (Sept. 15, 1961).

36. *Id.*, #35-23 (Feb. 15, 1962).

with the remaining plant in the home city. Each division of the company had signed the contract separately, and the arbitrator ruled that he had no authority to make an award allowing employees of one division to enter the seniority realm of the other.[37] Like the vacation case referred to earlier, this appears to be a decision on the merits rather than a ruling that the issue was not arbitrable.

III. Arbitrable Despite Express Contract Provisions

The cases in which the issue has been ruled arbitrable despite express language in the contract range over a wide variety of subjects, including retirement, insurance, seniority, work standards and related wage rates, and discipline and discharge.

The work standards—wage rate cases are particularly interesting. In *Ford Motor Company and UAW*[38] the company made a change in work standards. The contract provided that existing standards could be changed only in the event of a change in method, equipment, material or quality, so that work was added to or taken away from the job. It also provided that the validity of a new standard could be determined only by a mutually selected firm of industrial engineers, and was not within the jurisdiction of the umpire. In the principal case the union claimed that the company had improperly changed a work standard, and the company claimed that the matter was not within the jurisdiction of the umpire. The arbitrator ruled that the question of whether the company was within its rights in changing the standard was a different question from the one of whether the standards were correct in terms of engineering work measurements, and that the umpire had jurisdiction. In substance, this amounted to saying that the umpire had authority to determine whether there had been a change in method, equipment, material or quality. The arbitrator did not consider the merits of the question, since the parties had agreed that only the issue of arbitrability was before him.[39]

Another arbitrator had a somewhat similar case involving the *Dura Corporation.*[40] In that case the contract specifically provided that "the arbitrator shall have no authority over wage rates established under this Agreement." The company added a semi-automatic welder to its equipment, and a question arose as to the proper classification of the operator. The union contended it was more nearly that of an arc welder, and the company argued that it was parallel to the work of a spot welder. When they could not agree the company simply posted

37. American Bakeries Co., 37 Lab. Arb. 865 (1961).

38. Ford Motor Co. v. UAW, CCH 61-3 ARB #8913.

39. *Ibid.*

40. 36 Lab. Arb. 329 (1960).

the job as that of a spot welder and the union grieved. At the arbitration level the company argued that the case was not arbitrable because the contract clause deprived the arbitrator of jurisdiction over wage rates. Following the *Ford* decision, the arbitrator could have said that while he had no jurisdiction over wage rates this was not basically a question of rates but of classification. Once the classification question was settled the rate followed automatically. Perhaps because the rate would follow automatically from a classification decision the arbitrator ruled that the matter was not arbitrable.[41] In this sense the matter is distinguishable from *Ford*. In that case if the arbitrator ruled that there had been a change in method the question of the new standard presumably became one for the industrial engineers. In the *Dura* case any ruling from the arbitrator had the effect of setting a rate. Perhaps more than anything else the *Dura* case can be said to illustrate the enormous difficulty which cases often present in trying to separate form and substance.

The final work standards—wage rate case involved five grievances filed in the middle of 1958.[42] Subsequently a new contract was negotiated which included the job rates contended for by the company. The old contract contained a provision stating that grievances concerning job descriptions or job rate changes "during the life of the contract" would be arbitrable. The company argued that the language of the old contract, plus the agreed new contract, barred arbitration of the grievances in question. The arbitrator ruled against the company, holding that grievances should not be considered extinguished by the expiration of the contract under which they arose, even though the new contract referred to the jobs in dispute, unless there was a specific agreement settling the pending grievances.

Two retirement cases presented slightly different questions. In one the arbitrator had jurisdiction over grievances arising "out of any interpretation or application of any of the terms of the Agreement."[43] The seniority provision stated that the company would give light work to those who could not perform their regular work because of age, and added that "age 65 is considered the normal retirement age." The union grieved when the company retired several men who were over 65. The arbitrator sustained the company on the merits, but ruled that the dispute was arbitrable since it hinged on the proper interpretation of the phrase "normal retirement age." In a subsequent case a company had a unilateral retirement plan in effect and refused to accept or process a grievance complaining about the forced retirement of an individual because retirement was said to be a manage-

41. *Id.* at 330.
42. Philip Carey Mfg. Co., 36 Lab. Arb. 65 (1960).
43. National Airlines, 35 Lab. Arb. 67 (1960).

ment decision not subject to the grievance procedure.[44] The arbitrator ruled that the mere fact that a retirement plan was unilateral did not mean that the company could administer it in disregard of other contractual rights of employees.

A pair of insurance cases involved substantially the same issue. One contract provided that disputes "as to whether the Employer has provided the insurance benefits hereinabove described" should be subject to the grievance procedure and to arbitration. An employee grieved because he claimed the sanitarium in which he received treatment did not meet the requirements in the insurance agreement between the parties.[45] The umpire ruled that he could interpret the meaning of language used to describe insurance benefits in the absence of any language specifically excluding such disputes from arbitration. In the other situation an insurance carrier refused to indemnify a worker who sustained a broken arm during a fight.[46] The contract provided that "insurance matters shall not be subject to the grievance procedure, except that the union shall have the right to grieve in any instance where the subject matter of such grievance alleges that the company has failed to purchase the required insurance coverage." The arbitrator held that the grievance was arbitrable since no part of the insurance agreement defined accident so as to exclude coverage if the employee suffered a non-occupational injury. Conceding that such an exclusion might exist by informal agreement or past practice, the arbitrator nevertheless thought the union had the right to a hearing on the merits to see whether it could show that the loss was covered by the agreement.

The seniority cases which have raised the question of arbitrability have all involved clauses reserving to the company varying degrees of unfettered authority to make necessary decisions. In the *Jefferson City Cabinet Co.*[47] case the contract provided that the company could retain or hire employees regardless of seniority when by reason of special training, ability, or experience this was essential for the practical operation of the plant, and "the Company shall be the sole judge thereof." A grievance was filed protesting the placement of supervisors and other non-unit employees in the bargaining unit during a slack season. The arbitrator ruled that the dispute was arbitrable, since it involved the interpretation of the contract, but that the company was right on the merits. A second case, *Heckethorn Mfg. & Supply Co.*,[48] arose out of the promotion of a junior employee. The

44. Whitlock Mfg. Co., 36 Lab. Arb. 873 (1961).
45. Goodyear Tire & Rubber Co., 36 Lab. Arb. 1023 (1961).
46. American Arb. Ass'n's Summary of Awards, #22-14 (Jan. 15, 1961).
47. 35 Lab. Arb. 117 (1960).
48. 36 Lab. Arb. 380 (1960).

contract stated that "promotions and demotions will be based upon ability, skill, and physical fitness which shall be determined by the Company. When the above factors are equal in the judgment of the Company, the employee having the greatest length of service with the Company will be preferred." The company argued that its discretion could not be tested in arbitration, and the union contended that it had been the consistent past practice to promote senior employees. The arbitrator then ruled that the dispute was arbitrable because the contract did not expressly preclude it, and the union should have an opportunity to present its argument as to past practices. The company seems to have been on much weaker ground in the third case. The contract required that "every consideration" be given to job bidders. An employee grieved on the ground that "sufficient consideration" had not been given his qualifications for a particular job. The company insisted that the management rights clause gave it the right to make a unilateral decision without challenge. The arbitrator not only ruled that he had jurisdiction to determine whether "every consideration" had been given to the bid, but that he could go further and award any remedy needed to correct the situation so long as it was not punitive.[49]

The discipline and discharge cases, like those involving seniority, all involve varying degrees of clear unilateral authority in the company. In *Commissary Service Co., Inc.*,[50] the grievant was discharged for insubordination when she refused a new assignment after finishing a job. The contract provided that "the right to hire, promote, discharge, or discipline for cause . . . is the sole responsibility of the Company except that Union members shall not be discriminated against as such." Other sections of the contract provided that "only such matters as relate to the interpretation and application of this agreement are subject to arbitration," that a discharged employee may "present his grievance to the steward before leaving the premises," and that "if through the grievance procedure" it is found that an employee was unjustly discharged he shall be reinstated and reimbursed for any time lost. Reading all of the above clauses together the arbitrator concluded that the company's power to discharge was limited to instances of just cause. In a very similar case the arbitrator implied a restriction on the company not expressly stated in the contract.[51] The whole plant went out on an illegal strike. The contract provided that participants in or responsible for an illegal strike were subject to such discipline as "the company may in its exclusive discretion determine." The company gave several employees three day

49. American Arb. Ass'n's Summary of Awards, #22-14 (Jan. 15, 1961).
50. CCH 62-1 ARB #8247.
51. *In re* Kaye-Tex Mfg. Co., 36 Lab. Arb. 660 (1960).

suspensions, and the employees then grieved. The arbitrator held that he had jurisdiction to pass upon whether there was discrimination in the selection of strike participants for discipline, but that he could not pass on the validity of the degree of penalty involved. This implied restriction would appear to be broader than the express restriction imposed by the contract in the *Commissary Service Co.* case.

Another discipline case clearly illustrates the semantic difficulty that is often found in arbitrability cases. *Brunswick Corp.*[52] involved a situation in which several employees were disciplined for participating in an illegal wildcat strike. The no-strike provision of the contract provided that the "only issue before the Arbitrator shall be limited to the employee's participation in such unauthorized activity." Since none of the grievants denied their participation in the strike, the company argued that the case was not arbitrable. The arbitrator ruled against the company, saying that it could not be known whether any of the grievants would deny participation until evidence was taken on that question. As the hearing proceeded the grievants admitted participation in the strike and the abitrator then denied their grievances.

One last decision deserves mention because of some of the language it contains.[53] The contract provided: "Except as otherwise in this agreement expressly provided, nothing in this agreement shall be deemed to limit the Company in any way in the exercise of the regular and customary functions of management including but not limited to the right to hire, transfer from job to job and department to department. . . ." The grievant was transferred from one department to another without any company explanation. Arbitration was permitted over any differences "as to the meaning of the terms of this contract or the existence of violations thereof. . . ." The union contended that the transfer was unjust because it resulted in a reduction in work and pay, and that in any event on permanent transfer the company was required to have a good reason for such action and to tell the employee why he was being transferred. The company contended that its contractual right to make the transfer was so clear that it need not justify such moves. Given the union's first contention, that the transfer resulted in loss of work and pay, it is not particularly surprising that the dispute was held arbitrable though the arbitrator subsequently found no merit in this part of the union's claim. The interesting part of the decision relates to the union's claim that the company had to have a good reason for its decision and communicate that reason to the employee. Apparently this was the real sore spot which lay behind

52. 37 Lab. Arb. 951 (1961).

53. *In re* J-M Poultry Packing Co., 36 Lab. Arb. 1433 (1961).

the grievance. On this score the arbitrator probably raised some hackles when he intermingled ethics and contractual rights by saying:

> In considering this contention . . . one is immediately conscious of the fact that what is in question is a concept as to man's relationship with man in industrial society and how it should be conducted. Industrial society has come to the realization that man—the individual—is entitled to an explanation for any action which involves his job and his sense of security. Such a belief is consistent with the degree of equality and liberty accorded the individual in industrial society today. By such action, it is felt the individual suffers no loss of his natural rights as a human entity and the rights and freedoms of the Company are not reduced or restricted.
>
> While such truisms are fast emerging as principles of industrial relations, they have not as yet been established as hard and fast rules governing the relationship of the parties. Consequently, while failure on the part of the Company to explain to the grievant the reason for his transfer may be deplored under today's standards, such an unethical approach is not of sufficient magnitude to warrant the restriction of clear contractual rights of the Company. Further, whether the Company's reason for transferring the grievant is plausible is a matter of opinion and controversy in which the Arbiter may not engage. . . .[54]

IV. Arbitrable Despite Silent Contract

In many ways the silent contract cases are the most interesting of all because they may say more about the status of the labor-management relationship than do any of the others. Given the present emphasis on job security, it is not surprising to find that a majority of the cases involve some kind of company action having manpower repercussions. One which did not, however, presents a rather unique situation.[55] A bakery company changed its bookkeeping system for route salesmen. The union filed a grievance, contending that this was contrary to an oral agreement reached during contract negotiations. The company insisted that there had been no such agreement, and that the dispute was not arbitrable. The arbitration clause in the contract permitted "any charge of violation of this Agreement," or "any charge of discrimination, grievance or dispute" to go to arbitration. The arbitrator held that he had the power to determine whether the parties made an oral agreement during negotiations. The grievance was then denied on the merits because the union failed to prove the existence of such an agreement.

It will surprise no one to hear that several of the silent-contract arbitrability disputes involve contracting out. This subject has been

54. *Id.* at 1437.

55. American Bakeries Co., CCH 61-1 ARB # 8189.

so well explored in the last few years that there is little left to say about it.[56] Despite the absence of language dealing with subcontracting, every single case was held to be arbitrable.[57] One of them was the famous *Warrior* case which went to arbitration following the Supreme Court's landmark decision.[58]

The remaining cases deal with a variety of problems. In one the union sought to challenge the company's right to move machinery from one plant, which was unprofitable, to another two hundred miles away.[59] The contract permitted "all differences" as to the meaning and application of the contract, and "any question" relating to its various provisions to go to arbitration. The action of the company had the direct consequence of eliminating two job classifications and combining others. The arbitrator ruled that the phrase "any question" was so broad that it was not even necessary to go into whether a grievance in the formal sense was involved. The issue was arbitrable. The discussion of arbitrability contrasts nicely with another decision rendered in *McGough Bakeries Corp.*[60] In that case one man was displaced by automation, there having been two men on the job previously. The contract permitted "any . . . charge of discrimination, grievance or dispute" to go to arbitration. The union contended that the work was too arduous for one man and sought to arbitrate the issue. The company insisted that the issue was not arbitrable since no section of the contract had been violated. Because of the broad grievance clause the arbitrator ruled that the dispute was arbitrable. But he added:

> This does not mean to say that any irresponsible grievance or dispute which might arise is one of an arbitrable nature. The question to be decided then is whether or not the term "grievance or dispute" exists under the terms of the contract. If so then the matter at hand is arbitrable. If not, there is no arbitrable issue and the work of the arbitrator ends at that point.[61]

One wonders whether this isn't further evidence of the semantic difficulty which was mentioned earlier. Does one say that an "irresponsible" grievance is not arbitrable, or that it is arbitrable but without merit? Would not the latter approach be more logical?

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56. See Celanese Corp., 33 Lab. Arb. 925 (1959); Crawford, *The Arbitration of Disputes Over Subcontracting*, in National Academy of Arbitrators, Challenges to Arbitration 51 (McKelvey ed. 1960).

57. *Cf. In re* Allegheny Ludlum Steel Corp., 36 Lab. Arb. 912 (1961).

58. Warrior & Gulf Nav. Co. v. United Steelworkers, 36 Lab. Arb. 695 (1961).

59. *In re* Weyerhaeuser Co., 37 Lab. Arb. 308 (1961).

60. *In re* McGough Bakeries Corp., 36 Lab. Arb. 1388 (1961).

61. *Id.* at 1391.

62. CCH 61-3 ARB #8793.

Manufacturers and Repairers Ass'n of New Orleans[62] is an example of a factual situation in which one party argued that the contract was silent, and the other argued that the wage appendix controlled the dispute. The company had inadvertently assigned laborers to do a job that belonged to the carpenters. When the mistake was discovered it was immediately rectified. Though the carpenters did not lose any work or pay they asked for pay for the mis-assigned hours. The union relied on the wage appendix which set forth rates of pay for various classifications and the company insisted that since there was no contractual clause relating to assignment of work the issue was not arbitrable. A grievance was defined as "any dispute . . . concerning the interpretation or application of the terms of this agreement." The arbitrator ruled that the issue was arbitrable, pointing out that the wage appendix had no validity unless the right jobs were assigned to the right people.

The most unusual of the silent contract cases in which arbitrability was argued was *Mechanics Universal Joint Division, Borg-Warner Corp.*[63] A steward had accepted a supervisory position after discussing the opportunity with a member of management. Apparently there was an understanding that if the new position did not work out the steward could return to his old job in the production unit. After the steward became a supervisor he was discharged for inefficiency. He then grieved, claiming his old job back. The company contended the grievance was not arbitrable because the man was a supervisor and was therefore not an "employee" within the terms of the contractual grievance procedure. The arbitrator ruled that because of the understanding reached prior to his promotion the grievant was an employee with supervisory characteristics or vice versa, and that the dispute was therefore arbitrable. Since the contract did contain a clause covering discharge of production employees, and since the effect of the arbitrator's ruling was to estop the company from denying that the grievant was an employee, it may be said that this is not a silent contract case at all. On the other hand, in some ways it represents a significant addition to the contract for it had the effect of amending the contract to treat a production employee promoted out of the unit as though he were still in it.

Finally, there is a Christmas bonus case decided by an arbitrator which shortly thereafter had its parallel in a federal court decision. In the arbitration case the company unilaterally terminated a Christmas bonus which had been awarded to all employees for a number of years.[64] The union grieved, and the company claimed that the dispute

63. CCH 61-1 ARB #8257.

64. American Arb. Ass'n's Summary of Awards, #33-3 (Dec. 15, 1961).

was not arbitrable because the contract contained neither a reference to the Christmas bonus nor a past practice clause, and the arbitrator was limited to disputes "arising out of the terms of the contract or the interpretation thereof." The grievance was held arbitrable, on the theory that while the arbitrator was limited to what the parties had agreed to this necessarily required identifying the constructive as well as the actual agreements. To limit the arbitrator to disputes expressly covered in the contract would, he thought, fail to recognize the decisive and outstanding differences that distinguish labor-management agreements from commercial contracts, wills, deeds of trust and similar consensual agreements. Subsequently a federal court took the same position on very similar facts. In the *Harris Structural Steel Co.*[65] case the contract did not contain a clause covering the Christmas bonus which the company had been awarding for some fifteen years, but the annual payment had been made and it was related in amount to hours, rate of pay, and length of service. When the company reduced the Christmas bonus by fifty per cent the union brought a grievance. The company sought to stay arbitration by seeking a declaratory judgment that the dispute was not arbitrable. The contract contained a no-strike clause. The court held that the Christmas bonus was related to wages, that the bonus was not excluded from the grievance procedure, that the parties had agreed to arbitrate differences as to the meaning and interpretation of the contract, and that the dispute was therefore arbitrable.

V. Employer Grievances

Since the initiative remains with management in connection with the administration of the collective bargaining agreement most grievances are naturally in response to an act of management. It follows that in the course of processing the grievance it will usually be management which will insist that the grievance is not arbitrable. However, this is not always so, and there are several cases in which it is the union which insists that the dispute cannot go to arbitration.

In re Meletron Corp.[66] involved a strike situation in which five union members crossed the picket line. The contract contained a no-strike clause and an arbitration clause. A return-to-work agreement was worked out under which it was agreed that the returning employees would not discriminate against the men who stayed on the job or were hired after the strike commenced. Soon thereafter the union tried and fined the five members who crossed the picket line. The company

65. Harris Structural Steel Co. v. United Steelworkers, 298 F.2d 363 (3d Cir. 1962).

66. 36 Lab. Arb. 315 (1961).

contended that this action violated the strike settlement agreement. The union insisted that this issue was not arbitrable because it was an internal union affair, and because the company could not process a grievance without the aggrieved employee. Despite his stated belief that "there may be a good deal of potential mischief in the *Warrior* notion of specific exclusion," and his conclusion that this is "far too mechanistic an approach to the difficult and delicate problems of interpretation of a particular collective agreement," the arbitrator concluded that the dispute was arbitrable. He reasoned that since the contract contained a no-lockout clause "to hold that the employer does not possess either the right to grieve or the right to lockout would manifestly be unfair. In that context, it is not mechanistic to conclude that if the Parties had wished to impose that strong a disadvantage upon the employer (and upon the prospect of success in their overall relationship) they should have done so quite explicitly."[67]

The *Meletron* decision is interesting not only because it represents a rather infrequent situation, but also because of the arbitrator's statement of the management prerogative theory. He said:

> [I]t has traditionally been argued by employers that all those powers possessed by them prior to the execution of a collective agreement continue to exist except as qualified by the terms of the new agreement. Since arbitrators necessarily are a rather pragmatic group there has been observable in arbitral decisions a considerable reluctance to embrace that concept as an all inclusive and valid generalization. Although it has a surface appeal because of its simplicity, like the Warrior principle of specific exclusion it appears unduly mechanical as the reason for an arbitral decision when one takes into account the basic nature and justification of labor-management arbitration. But in the circumstances of this case, to the degree to which that concept may be applicable, it would indicate a decision that the employer has a right to grieve and go to arbitration about conduct by the Union allegedly violative of the collective agreement.[68]

In re Publishers' Ass'n[69] was another case in which the contract was silent on the issue which management wished to bring to arbitration. The controversy arose out of a situation in which the publisher wished to run pre-print runs and the union advised him that there would be a work stoppage unless two additional men were assigned to each of three presses. The publisher hired the men and paid them under protest. It then sought to arbitrate its claim for reimbursement, consequential damages, and further relief to prevent this happening in the future. The union argued that since the agreement was silent on the

67. *Id.* at 319.

68. *Id.* at 318-19.

69. 36 Lab. Arb. 195 (1960).

question of manning a press under such circumstances the dispute could not be arbitrated. The arbitrator ruled against the union. Once again the language is interesting:

> The history of labor unions in the United States, to a considerable extent, is the story of how employees fought to achieve grievance and arbitration procedures which would enable them to enforce agreements without the necessity of resorting to litigation in the courts or to economic force which caused great damage to the parties in conflict and to the public generally. . . .
>
> Insinuations or suggestions of stoppage, slowdown, strike or the application of other types of economic action as an alternative to the use of the grievance and arbitration machinery, by a Union, constitute rejection and a denial of the historical aspirations of labor unionism, as well as the collective bargaining agreement in which such provisions are set forth. If such direct action should be regarded as excusable or understandable where the Union protests that the Management action objected to constitutes a hazard to life or limb or health, or where the relief that might be afforded later by an arbitrator would be inadequate to make the injured party whole, such direct action surely cannot be countenanced where the damages are of a monetary nature only.[70]

The third situation in which the union contended the company could not bring the matter to arbitration involved a case in which third shift employees were refusing to work on shifts extending into holidays because of disagreement over the pay for such shifts.[71] The company sought an interpretation of the holiday pay clause and the union argued that the issue was not arbitrable because the company was trying to alter a past practice. The grievance was not only held arbitrable, but the umpire went further and ruled for the company on the merits on the ground that there was a meeting of the minds during negotiations even though the written contract did not contain such an agreement.

VI. Conclusions

What, if any, generalizations can one draw from the arbitrability cases before arbitrators? If the reported cases are a fair example, at least five conclusions seem warranted. They are:

1. The air would be cleared if the term "arbitrability" could be discarded from the arbitrator's lexicon. It gives rise to both semantic and substantive difficulties. There is a patent contradiction in terms for an arbitrator to announce, after a full hearing has been accorded the matter, that a given issue is not arbitrable. How can it be non-arbitrable when a full scale arbitration hearing has just been held? A decision which simply said that the grievance was dismissed because

70. *Id.* at 199-200.

71. American Arb. Ass'n's Summary of Awards, #28-7 (July 15, 1961).

the contract did not give the arbitrator authority to rule on the issue would be much more understandable.

On the substantive side, surely the cases reveal that arbitrators are as guilty as the courts ever were of basing a decision on the merits and then clothing the result in terms of arbitrability. This only adds confusion to the picture. Why should an arbitrator be reluctant to say that an issue has no merit? His analysis almost invariably reveals that this is his conclusion. The decision would be sounder if he said so.

2. Only in the cases where there is a clear procedural defect is there a strong likelihood that the arbitrator will rule a dispute non-arbitrable.

3. Where a substantive issue is involved the chances are very good that the arbitrator will rule the dispute arbitrable. This may, however, not be very significant. Parties wishing to avoid arbitration are likely to draw a tight contract and then insist on a court test of arbitrability.[72] This suggests that arbitrators get the cases in which non-arbitrability is less of an issue.

4. "Institutional" factors which do not appear in the contract, will influence the outcome of the decision as to arbitrability. Several examples from the cases illustrate this point. In *Hughes Tool* the arbitrator was not influenced by whether a court might have ruled the dispute arbitrable because this would be "to abdicate the assumed independence of judgment based on specialized knowledge and experience"[73] which arbitrators are supposed to have. It is common knowledge among students of industrial relations that the parties to a contract do not normally expect to arbitrate wages under a re-opener clause. This knowledge of the institution of collective bargaining was doubtless influential in bringing about the decision which the arbitrator reached. By the same token, another abitrator thought that the absence of a discharge clause could not mean that the parties did not intend to arbitrate discharge cases because "the very nature of the working agreement, absent a clear proviso to the contrary, makes clear an implied understanding that the Company does not have the unilateral right to discipline or discharge an individual. . . ."[74] In still another case the issue of whether a Christmas bonus must be awarded was arbitrable because the arbitrator thought that to limit the arbitrator to disputes expressly covered in the contract would fail to recognize the difference between labor-management contracts and commercial contracts, wills, deeds of trust and similar consensual agree-

72. United Steelworkers v. General Elec. Co., 211 F. Supp. 562 (N.D. Ohio 1962).

73. *In re* Hughes Tool Co., 36 Lab. Arb. 1125, 1129 (1960).

74. *In re* General Portland Cement Co., CCH 62-1 ARB #8177.

ments.[75] Finally, the employer grievance cases illustrate situations in which, given their knowledge of labor-management relations, arbitrators concluded that it would be unfair "to hold that the employer does not possess either the right to grieve or the right to lockout,"[76] or to conclude that the union did not recognize the right of the employer to grieve since this would constitute "rejection and a denial of historical aspirations of labor unionism."[77]

5. There is little evidence in the arbitrability cases that arbitrators subscribe to an unfettered management prerogative theory which would place in the hands of management (and "management" can, under certain circumstances, be either the company or the union) all powers previously had or exercised unless such powers have been curtailed or eliminated by statute or contract. It may well be that arbitrators have no articulate theory of the management prerogative. Nevertheless, the drift of the decisions is in the direction of permitting review over any significant unilateral act which affects the relationship of the parties.

In the absence of a prior court decision sending the case to arbitration it seems fair to say that prospects for any excitement as to the issue of arbitrability before arbitrators are not very great. But what about cases in which courts rule that the issue is appropriate for arbitration and the case then comes to an arbitrator? Will arbitrators ever say, upon receipt of such a case, that it is non-arbitrable? Or has that issue already been decided? *Drake Bakeries*[78] furnishes an interesting example of the problem. The court sustained the union's contention that the company's claim for damages had to be submitted to arbitration. Some arbitrators feel that the parties do not intend to give arbitrators authority to award damages in such cases.[79] Should such an arbitrator refuse to take the case? If he does take the case could he rule that the parties did not intend to give the arbitrator power to award damages? What if he did? Could the company then reinstate its court claim?

The fun may not be over—new and more difficult questions arising out of arbitrability may be over the horizon.[80]

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75. American Arb. Ass'n's Summary of Awards, # 33-3 (Dec. 15, 1961).

76. *In re* Meletron Corp., 36 Lab. Arb. 315, 319 (1961).

77. *In re* Publishers' Ass'n, 36 Lab. Arb. 195, 199 (1960).

78. Drake Bakeries Inc. v. Local 50, Am. Bakery Workers, 370 U.S. 254 (1962) (Harlan, J., dissenting).

79. *Cf. In re* Baldwin-Lima-Hamilton Corp., 30 Lab. Arb. 1061 (1958).

80. Pacific N.W. Bell Tel. Co. v. Communication Workers, 310 F.2d 244 (9th Cir. 1962).