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COURT ENFORCEMENT OF ARBITRATION: PROVISIONS FOR NEW CONTRACTS

Whether or not a court, acting under Section 301 of the Labor Management Relations Act,¹ should compel arbitration concerning the terms of a new contract between an employer and a union, as provided for in their collective bargaining agreement, was recently before the Fourth Circuit Court of Appeals in the case of *Winston-Salem Printing Pressmen Union v. Piedmont Publishing Co.*² The case involved a union-instituted suit which asked the court to grant damages and compel the company to arbitrate. The collective bargaining agreement was one which was to run from year to year. Were either party to desire to change the agreement, provision was made for negotiations and, negotiations failing, there was provision for arbitration of the terms of a new contract. Affirming the lower court,³ the Fourth Circuit held that the dispute should be submitted to arbitration.⁴

In so doing, the court put another nail in the coffin of an opinion by Judge Wyzanski, *Boston Printing Pressmen's Union v. Potter Press*,⁵ which had refused to enforce an agreement to arbitrate new contract terms. The *Potter Press* case was the first judicial decision on this question and had remained an important case in the area long after it appeared that it was inconsistent with subsequent United States Supreme Court cases. *Potter Press* distinguished between compelling arbitration for past grievances ("quasi-judicial" arbitration) and arbitration for new contracts ("quasi-legislative" arbitration).⁶ The distinction, determined the Fourth Circuit in *Piedmont*, is no longer valid when viewed in the light of these subsequent cases developing "national labor policy" toward arbitration.⁷

This comment will attempt to show that *Potter Press* was a decision which can be understood only through a knowledge of the immediate legal environment in which it was decided, to show how this legal environment has changed since *Potter Press* through subsequent Supreme Court decisions, and to show that the *Piedmont* decision was the inevitable result of this change. It will attempt also to place new contract arbitration in the general context of labor-management relations. Regarding the legal environment of *Potter Press*, the comment will attempt to illustrate that Section 301 of the Labor Management Relations Act was under both a confusing and a restricted interpretation at the time of *Potter Press*, and that it was this interpretation which may have led Judge Wyzanski to develop a questionable distinction between grievance and new contract arbitration.

¹ 29 U.S.C. § 185 (1965).

² 393 F.2d 221 (4th Cir. 1968).

³ 263 F. Supp. 952 (M.D.N.C. 1967).

⁴ 393 F.2d at 228.

⁵ 141 F. Supp. 553 (D. Mass. 1956), aff'd, 241 F.2d 787 (1st Cir. 1957), cert. denied, 355 U.S. 817 (1957).

⁶ Id. at 556.

⁷ 393 F.2d at 223-24.

I. DEVELOPMENT OF SECTION 301: BEFORE *Potter Press*

An examination of the language of the pertinent parts of section 301⁸ does not provide a great deal of insight into either its purpose or scope, and numerous questions arose shortly after its enactment concerning its effect upon arbitration agreements. The first was whether section 301 was jurisdictional only, in which case courts would apply state common law to arbitration provisions. If section 301 was more than jurisdictional, the next question presented was what form of federal law should apply to proceedings under it. Some courts indicated that federal common law should apply,⁹ while at least one other court seemed to indicate that only federal statutory law could govern the proceedings under section 301.¹⁰

One of the early cases to consider the problems presented by section 301 was an opinion by Judge Wyzanski, *Textile Workers Union v. American Thread Co.*¹¹ In that case, the union instituted a suit to compel arbitration to determine whether the defendant was liable for separation pay under the collective bargaining agreement. Judge Wyzanski decided that the common law of the states was not the applicable law under section 301,¹² and that federal statutes other than section 301 were not needed to give substance to the jurisdiction conferred by section 301.¹³ Having thus concluded, Judge Wyzanski then had to decide, by application of the federal common law, whether to enforce the agreement to arbitrate. He concluded, through an examination of the "thin" legislative history of the section, "that § 301 pro-

⁸ 29 U.S.C. § 185 (1965).

(a) Venue, amount, and citizenship.

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

(b) Responsibility for acts of agents; entity for purposes of suit; enforcement of money judgments.

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against its assets, and shall not be enforceable against any individual member or his assets.

⁹ See *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437, 452 (1955).

¹⁰ *Local 205, United Electrical Workers v. General Elec. Co.*, 233 F.2d 85, 97 (1st Cir. 1956).

¹¹ 113 F. Supp. 137 (D. Mass. 1953).

¹² "Congress, had it considered the matter, would have expected federal courts to accord specific performance of arbitration clauses, and would not expect the national judiciary to apply a checker-board set of remedies adapted to the laws of the several states, most of which do not provide for specific performance of arbitration clauses in labor contracts." *Id.* at 141.

¹³ *Cf. id.* at 141-42.

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vides, as a nationally available remedy, specific performance of arbitration clauses in labor contracts in industries affecting commerce."¹⁴

Had *American Thread* been adhered to in the next few years (1953-1956) it would have provided a sufficiently strong basis for Judge Wyzanski, in *Potter Press*, to enforce an agreement to arbitrate new contract terms. However, the decision in *American Thread* was weakened, not strengthened, during this period. Two important cases cast doubts upon the continued validity of the decision by narrowing the scope of section 301 concerning its use in enforcing collective bargaining agreements, and by confusing some of the basic questions concerning which law should apply under the section. The first of these cases was the Supreme Court pronouncement in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*¹⁵ *Westinghouse* was an action brought by an unincorporated labor organization seeking a declaratory judgment against the company, alleging that the company had withheld wages from certain employees, in violation of their collective bargaining agreement. It was the first United States Supreme Court decision under section 301, and thus was to be very important in setting the tone of national labor policy, as expressed by the Court, under the section. Justice Frankfurter, joined by Justices Burton and Minton, held that federal courts did not have jurisdiction under section 301 to hear the case.¹⁶

Reading the statute under the "meaning [that] its language spontaneously yields," Justice Frankfurter stated, "it would seem clear that all it does is to give procedural direction to the federal courts."¹⁷ To determine the meaning and scope of section 301, continued Justice Frankfurter, the Court must go beyond the language of the statute to its congressional history.¹⁸ In examining this legislative history, he again concluded that section 301 was procedural or jurisdictional in nature, and was not intended as a means for the creation of a body of federal law to be used in the enforcement of labor agreements.¹⁹ Having so decided, he then raised a constitutional question concerning the power of Congress to increase federal jurisdiction in this manner,²⁰ and expressed misgivings about the problems likely to result from the application of federal law in such situations: "To turn § 301 into an agency for working out a viable theory of the nature of a collective bargaining agreement smacks of unreality."²¹

After this analysis, which suggested that state law should apply in section 301 cases, Justice Frankfurter followed an alternative path and concluded that the problems that he had raised could be avoided by the holding that section 301 was not designed to involve cases concerning the rights of an individual, as opposed to the rights of a union, under an employment contract.²²

¹⁴ *Id.* at 141.

¹⁵ 348 U.S. 437 (1955).

¹⁶ *Id.* at 461.

¹⁷ *Id.* at 443.

¹⁸ *Id.* at 444.

¹⁹ See *id.* at 449.

²⁰ *Id.*

²¹ *Id.* at 456.

²² *Id.* at 459-60.

The *Westinghouse* case drew two concurring opinions and one dissent, which are important in that they demonstrate the Supreme Court's lack of a unified interpretation of section 301. Chief Justice Warren and Justice Clark stated that section 301 was not designed to help enforce "uniquely personal" rights of an employee, and that consequently there was no need to raise the problems that had been discussed in the majority opinion.²³ Justice Reed took the position that section 301 was not designed to enforce separate contracts between each employee and the employer, but that generally, federal law should apply under section 301.²⁴ Finally, Justices Douglas and Black dissented, saying that the case before the Court should come under section 301 and that federal law should apply to the proceedings.²⁵

Westinghouse succeeded in presenting several problems that must be recognized for an understanding of the *Potter Press* case. First, the majority opinion seemed to imply that section 301 was to be viewed in a restrictive sense and not as a means for providing federal substantive law for the settling of labor disputes.²⁶ Second, the majority opinion left unanswered several questions, including: the constitutionality of congressional delegation of authority to the courts, and the problems involved in applying federal law under the section. Finally, the fact that Justice Frankfurter held that the section was not to be applied because the issue in question involved personal employee rights opened to dispute the binding effect on lower federal courts of the remaining discussion in the opinion.²⁷

These several problems left Judge Wyzanski's opinion in *American Thread* on extremely unstable grounds, and created numerous obstacles for his decision in *Potter Press*. That these difficulties troubled Judge Wyzanski is clear from his statement in *Potter Press*:

Recalling with what a jaundiced eye § 301 of the Labor Management Act has been viewed by some justices of the Supreme Court . . . [in *Westinghouse*] and with what difficulty the courts in this circuit were led to the doctrine of . . . [*American Thread*], this Court deems it undesirable to jump into what may be a bottomless pit of dispute over future working conditions.²⁸

Westinghouse, as a setback for *American Thread* and section 301, may have been sufficient in itself to produce the result in *Potter Press*, but when coupled with the First Circuit opinion in *Local 205, United Electrical*

²³ *Id.* at 461.

²⁴ *Id.* at 461-64.

²⁵ *Id.* at 465.

²⁶ "Justices Frankfurter, Burton, and Minton subjected the section to a forced, indeed it may be thought, to an emasculating reading which enabled them on the facts before them to hold it inapplicable." Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 *Harv. L. Rev.* 1, 9 (1957). It is submitted that this forced reading prevented federal court judges from using section 301 to develop national labor policy.

²⁷ "[T]he holding of the case [*Westinghouse*] left federal judges without guidance in damage actions not involving 'uniquely personal' employee rights." Wellington, *Judge Magruder and the Labor Contract*, 72 *Harv. L. Rev.* 1268, 1271 (1959).

²⁸ 141 *F. Supp.* at 557.

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Workers v. General Elec. Co.,²⁹ it appears that Judge Wyzanski had little choice in his decision in *Potter Press. General Electric* involved a suit by a labor union for specific performance of arbitration provisions in a collective bargaining contract. The First Circuit implied that section 301 conferred more than jurisdiction upon federal courts, but that federal common law was not the substantive law to be applied. Although the court was familiar with *American Thread*, it nevertheless concluded that "a firmer statutory basis than § 301 should be found to justify departure from the judicially formulated doctrines with reference to arbitration agreements."³⁰ In examining other legislation which might provide the basis, the court first dealt with the Norris-LaGuardia Act, and a possible conflict between it and section 301. The court resolved the conflict by holding that the Norris-LaGuardia Act did not prevent a federal court from issuing an injunction under the authority conferred by section 301.³¹ The court then looked to the United States Arbitration Act. It found that this Act provided sufficient authority to enforce the arbitration provision,³² despite the provision in the Act reading, "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."³³

Thus, in *Potter Press* Judge Wyzanski was faced with a Supreme Court decision saying that state law should apply in section 301 proceedings, and an opinion in his own circuit stating that, although federal law would apply, he would need to look for a statutory basis upon which to enforce an agreement to arbitrate the terms of a new contract. It is clear that the policy expressed by *American Thread* involved a liberal interpretation of section 301 regarding court enforcement of arbitration agreements and the general importance of section 301. It had viewed the section as a means for developing a national labor policy which would attempt to reduce industrial disputes through enforcement of the means chosen by the parties for the resolution of their disputes.

However, this liberal interpretation was replaced by a narrow interpretation during the time between *American Thread* and *Potter Press*. It is submitted that Judge Wyzanski, as the author of *American Thread*, did not desire to hold that *no* arbitration agreements could be enforced by courts. Yet, in light of the *Westinghouse* and *General Electric* opinions, he would need some justification to enforce such agreements. To resolve this difficulty, he distinguished between two forms of arbitration: quasi-legislative and quasi-judicial, enforcing only the latter. If quasi-legislative arbitration is considered to be a slightly more progressive form of handling labor-management disputes than is grievance arbitration,³⁴ it follows that a strong

²⁹ 233 F.2d 85 (1st Cir. 1956).

³⁰ *Id.* at 97.

³¹ *Id.* at 91.

³² *Id.* at 97-98.

³³ 9 U.S.C. § 1 (1953).

³⁴ Grievance arbitration involves determining the rights that have grown out of past actions. These usually relate to specific complaints by either employees or employers and are reasonably close to the traditional judicial function of conflict resolution. New con-

foundation for section 301 would be needed before a judge would feel secure in compelling the former. As has been indicated, this foundation was wholly lacking at the time that *Potter Press* was decided.

II. DISTINCTION BETWEEN QUASI-LEGISLATIVE AND QUASI-JUDICIAL ARBITRATION

In examining the actual distinction between grievance arbitration and new contract arbitration, Judge Wyzanski looked for a statutory basis to enforce the latter. He concluded that enforcement of quasi-legislative arbitration provisions was not intended by Congress under section 301 alone, nor under the United States Arbitration Act when read in conjunction with section 301, and that judges should be very careful before entering the delicate area of labor negotiations.³⁵ Several arguments have been advanced in support of the distinction. One line of reasoning suggests that compelling arbitration for new contracts will remove a necessary impetus for agreement during the collective bargaining between the parties.³⁶ If the parties know that arbitration, rather than a strike or lockout, will result should they fail to reach an agreement, there will obviously be less pressure to reach an agreement. This argument is closely related to the "free play" argument advanced by the late Dean Shulman.³⁷ The free play argument concludes that the process of arbitration functions at its best when it is least interfered with by the courts. There is a weakness to both these arguments since both can be applied to grievance arbitration (in fact, the free play discussion was originally advanced in that capacity) and neither is limited to new contract arbitration. Therefore, these arguments do not support a distinction between the two forms of arbitration.

Another argument against court enforcement of collective bargaining agreements which provide for arbitration of new contracts relates to the general views of the parties toward the collective bargaining contract. Generally, management likes to reassess its overall economic position within its industry and its position in relation to its employees at the end of the contract period. At the same time, unions like to reassess their position in relation both to management and to other workers in the same or similar industries. This reassessment is then taken into account by both parties in bar-

tract arbitration, however, has been looked upon as a "prospective" device for the resolution of conflicts concerning future conditions, and thus does not fit the traditional mode of judicial function. As will be seen, this distinction is questionable. See 52 *Nw. U.L. Rev.* 284 (1957).

³⁵ 141 *F. Supp.* at 556-58.

³⁶ 64 *Colum. L. Rev.* 109, 113 (1964); 105 *U. Pa. L. Rev.* 269, 271-72 (1956).

³⁷ Shulman, *Reason, Contract, and Law in Labor Relations*, 68 *Harv. L. Rev.* 999 (1955). The theory is best stated in Dean Shulman's often quoted words:

But the courts cannot, by occasional sporadic decision, restore the parties' continuing relationship; and their intervention in such cases may seriously affect the going systems of self-government. When their autonomous system breaks down, might not the parties better be left to the usual methods for adjustment of labor disputes rather than to court actions on the contract or on the arbitration award? I suggest that the law stay out—but, mind you, not the lawyers.

Id. at 1024.

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gaining for a new contract. According to this argument, arbitration for new contracts is unwarranted for it tends to bind the parties longer than either feels is practical.³⁸ A difficulty with this line of reasoning is that it appears to be relevant only at the stage when the collective bargaining contract is being written, and not to a discussion of court enforcement of such agreements, for it relates to whether or not such provisions should be written into the contract. If it is accepted that collective bargaining constitutes a give and take process wherein one party "wins" the right to have new contract terms arbitrated (and thus realizes both the drawbacks and the advantages of such arbitration), then it follows that courts should not refuse to enforce these provisions.

Related to the above argument against arbitration is the fact that arbitration for new contracts creates a large risk for both parties in that the issues are considerably less limited than those in grievance arbitration.³⁹ Neither management nor unions are willing to accept this risk in the form of an unreasonable contract, and both, in most cases, feel that they can minimize the risk by having the contract decided by the collective bargaining process without third party interference. However, this argument also is a reason for not having such provisions in the collective bargaining contract, and is not a reason for non-enforcement of such provisions once they are agreed upon by the parties.

When the arguments for distinguishing between grievance arbitration and new contract arbitration are analyzed there does not seem to be any strong reason supporting the distinction, *as far as court enforcement of such agreements is concerned*. It is not unreasonable to assume that the parties were aware of both the benefits and the burdens presented by inclusion in their contract of a provision for new contract arbitration, and it clearly is not a proper judicial function to rewrite the collective bargaining agreement. Rather, the function of the court should be merely to enforce those provisions agreed upon by the parties. By developing distinctions between grievance and new contract arbitration and enforcing the former but not the latter, the court is, in effect, imposing upon the parties involved, its own views of the best policy for resolving disputes. In the area of labor disputes, this has never been considered a proper exercise of the judicial function.

If the national labor policy had been more favorable regarding court enforcement of arbitration agreements, the court in *Potter Press* would not have been forced to create a distinction which, in retrospect, appears contrived. As noted above, *Westinghouse* and *General Electric* made such a decision almost impossible. Since the decision in *Potter Press* there has been a major change in the national labor policy. The Supreme Court has not only moved away from its restricted interpretation of section 301, as expressed in *Westinghouse*, but it has developed an interpretation quite favorable to arbitration.

³⁸ See 393 F.2d at 226.

³⁹ See M. Handsaker, Arbitration & Contract Disputes, in Challenges to Arbitration: Proceedings of the Thirteenth Annual Meeting, Nat'l Academy of Arbitrators 78, 84 (1960) [hereinafter cited as Handsaker].

III. DEVELOPMENT OF SECTION 301: AFTER *Potter Press*

The first Supreme Court case to display this new attitude was *Textile Workers Union v. Lincoln Mills*,⁴⁰ decided one year after *Potter Press*. This case is probably the single most significant decision concerning arbitration brought under section 301, for it marked the actual turning point in the labor policy. In an opinion by Justice Douglas, the Supreme Court granted specific performance of an agreement to arbitrate a grievance dispute, and decided that federal substantive law, to be fashioned from our national labor policy, should govern section 301 cases.⁴¹ Drawing on Judge Wyzanski's opinion in *American Thread*, the Court determined that the intent of Congress, in passing section 301, was to make arbitration agreements enforceable in federal courts. The national labor policy was designed to be an instrument to further "industrial peace," and arbitration was one such means for achieving this peace.⁴² The decision, in effect, allowed for the creation of a complete body of federal substantive law to promote smoother relations between labor and management through the enforcement of collective bargaining agreements.

The *Lincoln Mills* Court distinguished *Westinghouse*, claiming that the latter involved a question of union standing to sue while the former was concerned with arbitration proceedings.⁴³ As might be expected, the decision drew an angry dissent from Justice Frankfurter, based upon his reading of the legislative intent in section 301. Justice Frankfurter could not dismiss *Westinghouse* as easily as did the majority, and felt that the constitutional issues which had been avoided there could not be answered by application of federal law under section 301 proceedings.⁴⁴

Despite Justice Douglas' attempt to distinguish *Westinghouse*, *Lincoln Mills* actually did overrule many aspects of the *Westinghouse* decision, or at least the opinion of the three member plurality, by greatly expanding the scope of section 301. *Lincoln Mills* stated that federal law would apply under section 301, while the holding in *Westinghouse* implied that state law would apply. *Lincoln Mills* also found no problems in the question of congressional authorization of jurisdiction, unlike *Westinghouse*. Finally, the *Lincoln Mills* Court thought that federal courts could manage to fashion a body of their own law to apply to these proceedings, while *Westinghouse* had stated that this development would be extremely difficult, if not impossible.

In a companion case to *Lincoln Mills*, the Supreme Court reviewed the First Circuit opinion in *General Electric*.⁴⁵ Although the Court affirmed the lower court decision, its opinion was based on a different line of reasoning. The *Lincoln Mills* Court said that section 301, not the United States Arbitration Act, furnished its own basis for enforcement of collective bargaining agreements to arbitrate. Thus, the lower court should not even have looked

⁴⁰ 353 U.S. 448 (1957).

⁴¹ 353 U.S. at 456.

⁴² See id. at 455.

⁴³ Id. at 456 n.6.

⁴⁴ Id. at 461-62.

⁴⁵ 353 U.S. 547 (1957).

to the Arbitration Act in its decision.⁴⁶ Had this decision been handed down before *Potter Press*, Judge Wyzanski would not have needed a statutory basis for the enforcement of a "quasi-legislative" arbitration agreement, and could have applied federal common law which he would fashion from the national labor policy as determined by the Supreme Court and lower federal courts. Until the Supreme Court spoke in *Lincoln Mills* and *General Electric*, however, it would have been very difficult for Judge Wyzanski to apply this line of reasoning. It is ironic that Judge Wyzanski, who wrote the basically progressive decision in *American Thread*, was bound by the regressive decisions in *Westinghouse* and *General Electric* in *Potter Press*, yet was later vindicated by the Supreme Court in *Lincoln Mills* and *General Electric*.

After the *Lincoln Mills* and *General Electric* cases, the Supreme Court went on to develop an even stronger national labor policy favoring arbitration and, as a corollary, the use of section 301 as a means of settling labor disputes. The next major cases were a series of decisions known as the *Steelworkers* trilogy.⁴⁷ These cases can be read as "not only recognizing arbitration as an acceptable method of resolving labor disputes, but actively encouraging it."⁴⁸ In the *Warrior* opinion, for example, the Court stated, "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."⁴⁹ The Court stated also:

[I]n the commercial case, arbitration is the substitute for litigation. Here [in a labor dispute] arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.⁵⁰

Since the trilogy other Supreme Court cases have strengthened the national labor policy favoring arbitration. In one of these, *John Wiley & Sons, Inc. v. Livingston*, the Court stated:

This Court has in the past recognized the central role of arbitration in effectuating national labor policy. . . .

. . . .

The preference of national labor policy for arbitration as a

⁴⁶ See *id.* at 548.

⁴⁷ The "Steelworkers Trilogy" is the common name given to the three cases: *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Co.*, 363 U.S. 593 (1960).

⁴⁸ 393 F.2d at 226.

⁴⁹ 363 U.S. at 582-83.

⁵⁰ *Id.* at 578.

substitute for tests of strength between contending forces could be overcome only if other considerations compellingly so demanded.⁵¹

It is submitted that by this time in the development of section 301, the Court would not consider the differences between grievance and new contract arbitration as sufficient reasons to "compellingly demand" a policy of non-enforcement of a provision to arbitrate in the collective bargaining agreement. This conclusion becomes especially apparent when one remembers the weakness of the reasoning for the distinction as far as court enforcement of the provision is concerned.

IV. THE *Piedmont* CASE

These later cases provide a much stronger foundation for a court to apply federal common law under section 301 than existed at the time of *Potter Press*. They also imply that this common law should be such as to favor arbitration as a means for resolving industrial strife. In so doing, they led to the almost inevitable decision in *Piedmont*, which agreed to enforce such provisions. There, the court had neither *Westinghouse* nor *General Electric* as obstacles preventing the enforcement of the agreement, and had available the later cases to encourage enforcement. Thus, the court felt free to enforce those agreements that had been reached by the parties during the collective bargaining sessions.

We must assume that either the parties mutually agreed on this provision [to arbitrate the terms of a new contract] from the start or that one of the parties secured it during the give and take of the collective bargaining. In either case, *as long as it is not against the national labor policy, which it certainly is not*, it is entitled to enforcement along with any other provision agreed upon by the parties. Nothing would be more out of step with our national labor policies than for courts to refuse to enforce a voluntary agreement to arbitrate differences.⁵² (Emphasis added; footnote omitted.)

A reading of *Piedmont* readily indicates the court's awareness of the changes in national labor policy since *Potter Press*. First, the case recognizes the problems that *Westinghouse* and *General Electric* had posed for Judge Wyzanski in the writing of *Potter Press*.⁵³ Next, the *Piedmont* court realized that *Lincoln Mills* "substantially eroded the foundation of *Potter Press*,"⁵⁴ and that the Supreme Court decision in *General Electric* constituted an even "more direct attack" on the First Circuit's position.⁵⁵ Finally, the *Piedmont* court went on to point out the more recent cases which have furthered the

⁵¹ 376 U.S. 543, 549-50 (1964). Cf. *Drake Bakeries, Inc. v. Local 50, Am. Bakery & Confectionery Workers*, 370 U.S. 254, 263-64 (1962).

⁵² *Winston-Salem Printing Pressmen Union v. Piedmont Publishing Co.*, 393 F.2d 221, 227 (1968).

⁵³ *Id.* at 224.

⁵⁴ *Id.* at 225.

⁵⁵ *Id.*

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favorable attitude toward arbitration as a means for resolving industrial strife.⁵⁶

While at this point in the discussion the recognition of these changes may appear obvious, other courts have in recent years been faced with the question of judicial enforcement of agreements to arbitrate new contracts, and either have failed to recognize the changes or have recognized them but minimized their importance. These cases demonstrate that the question of court enforcement of agreements to arbitrate the terms of new contracts is still an open one. In so doing, they make *Piedmont* more than a single decision enforcing a labor agreement between a union and a company. The *Piedmont* decision can thus be viewed as the culmination of the changes in the national labor policy over the past decade, and the contrary decisions can be viewed as the ties holding us to the *Potter Press* case and past labor policy.

V. NEW CONTRACT ARBITRATION: OTHER JURISDICTIONS

Besides the *Potter* rule in the First Circuit, several district courts and one circuit court have refused to compel arbitration for new contract terms. The Fifth Circuit, in *Austin Mailers Union No. 136 v. Newspapers, Inc.*,⁵⁷ refused to enforce an agreement to arbitrate new contract terms. The case was partially based upon the opinion in *Potter Press*, with no special awareness of the changes in national labor policy between 1956 and 1963, or at least no awareness of how these changes affect the issue of new contract arbitration. The Fifth Circuit Court of Appeals merely regarded *Potter Press* as "correctly decided."⁵⁸ The *Austin* case can be distinguished from both *Potter Press* and *Piedmont* on the basis of the actual collective bargaining contract involved, but it does rest, to an extent, on the distinction drawn in *Potter Press* between "quasi-legislative" and grievance arbitration. Further, the lower court opinion in the case states that the United States Arbitration Act, "does not apply to quasi-legislative matters but is concerned only with the enforcement of quasi-judicial awards . . ."⁵⁹ Thus, the district court in *Austin* seems to ignore the Supreme Court decisions in *Lincoln Mills* and *General Electric*, not to mention the later cases reinforcing those two decisions.

Another district court,⁶⁰ recognizing the recent changes in national labor policy toward arbitration, also refused to compel arbitration for new contract terms. It based its decision partially upon the fact that the parties had not intended such arbitration, but it also relied on and concurred in the reasoning of *Potter Press*.

Finally, a district court in *International Typographical Union Local No. 21 v. San Francisco Newspaper Printing Co.*, refused to compel arbitration for issues relating to new contracts.⁶¹ Recognizing the recent cases

⁵⁶ Id. at 226.

⁵⁷ 329 F.2d 312 (5th Cir. 1964), cert. denied, 377 U.S. 985 (1964).

⁵⁸ Id. at 313.

⁵⁹ 226 F. Supp. 600, 602 (W.D. Tex. 1963).

⁶⁰ *Couch v. Prescolite Mfg. Corp.*, 191 F. Supp. 737 (W.D. Ark. 1961).

⁶¹ 247 F. Supp. 963 (N.D. Cal. 1965). See also *In re Valencia Baxt Express, Inc.*, 199

enlarging the scope of section 301 and the federal labor policy favoring arbitration, the court quoted extensively from *Potter Press*, referring to it as "a decision which has met with significant judicial approval . . ."⁶² It is hard to reconcile this court's knowledge of national labor policy with its approval of *Potter Press*. The court in *Piedmont* noted these cases:

While the Company refers the court to a number of recent decisions affirming the holding of *Potter Press*, these cases are entitled only to the remaining force and validity underlying the rationale of Judge Wyzanski's opinion. More persuasive are the reasoning and conclusions of the opinions, equal in number, challenging the statutory predicate of *Potter Press* in light of more recent Supreme Court decisions, *supra*. We cast our lot with the latter group.⁶³ (Footnotes omitted.)

VI. NEW CONTRACT ARBITRATION IN LABOR-MANAGEMENT RELATIONS

Thus far, the basic questions that have been discussed relate to judicial enforcement of agreements to arbitrate the terms of new contracts. Very few cases have actually been presented to the courts concerning new contract arbitration, and one might conclude that this fact proves that arbitration agreements of this type are seldom used. Of all collective bargaining agreements, the number which make provisions for arbitration of new contracts is extremely small. Further, only a small percentage of all arbitration agreements reach the courts,⁶⁴ as most are voluntarily accepted by the parties. Arbitration for new contracts is used, however, and its use may well be expanding in the near future.

For parties considering whether to include a provision providing for arbitration of a new contract, there are arguments both for and against its use. The arguments against such provisions are essentially the same as were presented against court enforcement of the agreements. The "too risky" argument, the desire of the parties to control their own economic destiny, and the desire of the leaders of the groups involved to maintain their positions through the power which they wield during the collective bargaining for new contracts inhibit the use of such agreements. One comment on the topic concludes, "In short, the contract arbitrator would in fact legislate in wide

F. Supp. 103 (D.P.R. 1961) where the court, sitting in the First Circuit, indicated that it was bound to follow *Potter Press*.

⁶² 247 F. Supp. at 966.

⁶³ 393 F.2d at 227. This latter group, to which the court in *Piedmont* was referring, includes several cases which clearly recognize that *Potter Press* is no longer good law. See *Builders Ass'n v. Laborers District Council*, 326 F.2d 867, 870 (8th Cir. 1964), cert. denied, 377 U.S. 917 (1964) ("[*Potter*] is far too weak a peg upon which to hang a reversal. . ."); see *Division No. 892, Street Ry. Employees v. M.K. & O. Transit Lines, Inc.*, 210 F. Supp. 351, 356 (N.D. Okla. 1962), rev'd on other grounds, 319 F.2d 488 (10th Cir. 1963), cert. denied, 375 U.S. 944 (1963) ("[*Potter*] is at odds with the rulings of the Supreme Court"); see *A. Seltzer & Co. v. Livingston*, 253 F. Supp. 509 (S.D.N.Y.), aff'd, 361 F.2d 218 (2d Cir. 1966). It is interesting to note that both *Austin Mailers*, refusing to compel arbitration for new contract terms, and *Builders Ass'n*, refusing to restrain arbitration were both denied certiorari by the Supreme Court, 377 U.S. 985 (1964); 377 U.S. 917 (1964).

⁶⁴ *Handsaker* at 81-82.

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areas and in so doing would take over—by voluntary default, if you will—the prime responsibility of the parties. No amount of reappraisal will convince many unions or managements to accept this.”⁶⁵

The principal argument in favor of such agreements relates to the desire of both the parties involved and the general public to minimize strikes. It is thought that arbitration agreements for new contract terms will reduce the large profit and wage losses that are incurred through strikes and lockouts. Also, it is felt that new contract arbitration may strengthen the collective bargaining process because “[i]t may obviate the possible coming of compulsory arbitration.”⁶⁶ “While the general attitude is to hold that such arbitration is not useful or suitable, it is interesting to note in some of our recent major disputes, one side or the other has suggested arbitration of contract terms.”⁶⁷

In the examination of the situations in which new contract arbitration is used, the particular industry involved is a significant factor. In areas where a strike is most likely to cause severe harm, new contract arbitration is more likely. Such areas as transit, public utilities, printing, publishing and textiles have all made attempts to use new contract arbitration.⁶⁸

VII. CONCLUSION

In conclusion, therefore, it can be said that there are large and open possibilities for new contract arbitration in the near future, despite the fact that it may not have been used to a great extent in the past. As labor disputes become more costly the need for peaceful resolution of such disputes becomes greater. This conclusion is not to say that courts should, in any manner, force such forms of arbitration upon the parties. But, as has been illustrated, failure to enforce such agreements, when written in the collective bargaining agreement, is totally out of step with the national labor policy. Full play should be given to the means that the parties have chosen in their collective bargaining sessions for the resolution of disputes. *Potter Press* could not do so because of the restrictive cases which had preceded the decision. This comment has attempted to show the context surrounding *Potter Press*, and the evaporation of these restrictive policies in the last decade. The inevitable result was the opinion delivered by the Fourth Circuit in *Piedmont*, and that court's willingness to compel arbitration if that is the method chosen by the parties for resolving disputes. Now, it can be hoped that the jurisdictions which have followed *Potter Press* will move in the direction that our national labor policy has favored, and that the issue of court enforcement of new contract arbitration will soon become history.

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⁶⁵ J. Waddleton, Discussion in Challenges to Arbitration: Proceedings of the Thirtieth Annual Meeting, Nat'l Academy of Arbitrators 92, 95 (1960).

⁶⁶ Handsaker at 92.

⁶⁷ Id. at 80-81.

⁶⁸ See id. at 81.