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The Post-Expiration Duty to Arbitrate: Disregarding the Nolde Presumption After an Impasse in Negotiations

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COMMENT

The Post-Expiration Duty to Arbitrate: Disregarding the *Nolde* Presumption After an Impasse in Negotiations

I. INTRODUCTION

There are two governing principles with regard to arbitrability following expiration of a Collective Bargaining Agreement (CBA).[1] The first principle is a strong presumption in favor of arbitration as a means of dispute resolution.[2] The reasoning behind this principle is that if the parties have agreed to handle their disputes through arbitration rather than litigation, their confidence in the arbitration process and "an arbitrator's presumed special competence in matters concerning bargaining agreements does not terminate with the contract."[3] All disputes arising out of the parties' relationship should be processed through the procedure they selected. The high cost of litigation and judicial economy are important considerations behind this principle.

The second principle is that arbitration is strictly a creature of contract and parties cannot be compelled to arbitrate something if they have not previously so agreed.[4] This argument suggests that once the contract between the parties is no longer in effect, neither party should be bound by its provisions.[5]

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1. A Collective Bargaining Agreement (CBA) is a negotiated contract between an employer and a labor union which regulates terms and conditions of employment. Such agreements typically stipulate that unresolved disputes between the union and employer be submitted to a neutral third party for binding arbitration.

Since the duty to arbitrate in this context arises from the CBA, the arbitrator's authority and jurisdiction is questionable once the CBA has expired.

2. Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, 430 U.S. 243, 254 (1977).

3. *Id.*

4. *E.g.*, Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960).

5. CBAs typically restrict the parties' use of economic weapons at their disposal. For

These competing principles come into play in varying degrees if the issue is arbitrability following expiration of a CBA. Section II of this comment summarizes the current state of the law regarding the post expiration duty to arbitrate in four specific situations: (1) when the grievance arises before the CBA expires, but arbitration takes place after expiration, (2) when the grievance clearly arises after expiration, (3) when the grievance arises after expiration but is based on a right that "vests" prior to expiration, and (4) when the grievance occurs after expiration, but the duty to arbitrate arises from an extra-contractual agreement.

Section III critiques the current legal standards regarding the fourth situation—when the duty to arbitrate arises from an extracontractual agreement. Section III explains the dilemma employers face when they seek to unilaterally implement terms and conditions of employment after an impasse,[6] without the courts construing an implied agreement to continue to arbitrate.[7] This comment urges adoption of an alternative legal standard which would allow employers to implement their own terms of employment after an impasse without being subjected to a continuing duty to arbitrate.

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example, the union may be obligated by a "no-strike clause" to abstain from calling a strike against the employer during the life of the CBA. Likewise the employer may not be able to "lock out" employees. Another important economic weapon favoring the union is an arbitration clause in a CBA. *See infra* note 68 and accompanying text.

6. Once an employer and union reach a genuine impasse in negotiations, the employer is allowed by law to unilaterally implement its own terms and conditions of employment. However, such terms and conditions must have been previously offered to the union during negotiations. NLRB v. Crompton-Highland Mills Inc., 337 U.S. 217, 223 (1949) (employer engaged in unfair labor practice when, without consulting employee's collective bargaining representative, it put into effect a general wage increase for most employees which was greater than any that employer had offered).

Thus, the common practice is for the employer to implement terms and conditions of employment according to its final offer to the union during negotiations.

7. An employer's final offer to a union during negotiations usually contains a grievance procedure because the parties usually intend to continue to arbitrate under a new CBA if they had arbitrated under the previous CBA. Once negotiations reach impasse the employer is allowed to implement the terms of its final offer. However, since the final offer contained a grievance procedure, the employer might be perceived as having consented to continued arbitration even though no CBA is in effect. Part III of this comment explains why such a result is contrary to the employer's intent and extremely unfair to the employer.

II. The Current Legal Standards

A. *Summary of the Current Legal Standards Regarding Post-Contract Arbitrability in Four Situations*

This comment will next discuss the current legal standards regarding post-contract arbitrability in four specific situations. The third and fourth situations are explored in somewhat greater detail. The third situation is particularly significant because it gave rise to the Supreme Court case which articulated the broad presumption of arbitrability. The fourth situation will be explored at greater length because it lays the foundation for the discussion that follows in section III.

1. When the grievance arises before the CBA expires, but arbitration takes place after expiration

When the grievance arises before the contract expires "but the demand to arbitrate occurs after expiration, an order to arbitrate will usually issue."[8] Otherwise, "a party could simply stall the arbitration hearing until after the expiration and thus not be bound to arbitrate."[9] Once the grievance procedure begins for a particular grievance (typically when the union files a grievance with the employer), expiration of the CBA does not affect the duty to arbitrate.[10] However, it should be noted that any such grievance must arise under the CBA. The claim must be one which on its face is governed by the contract.[11]

2. When the grievance clearly arises after expiration

When the events giving rise to the grievance occur after expiration of the CBA, the courts normally refuse to compel arbi-

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8. B. Fairweather, Practice and Procedure in Labor Arbitration, 36, 37 (2d ed. 1983).

9. *Id.* (quoting Piper v. Meco, Inc., 302 F. Supp. 926, 927 (N.D. Ohio 1968), *aff'd*, 412 F.2d 752 (6th Cir. 1969)).

10. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960)(sustained arbitrator's award regarding grievances which arose prior to expiration of CBA but were arbitrated after expiration).

11. Montgomery Mailers' Union 127 v. Advertiser Co., 827 F.2d 709 (11th Cir. 1987) (issue of whether union accepted employer's offer was not subject to arbitration; CBA was silent on which proposal was to be accepted).

It therefore follows that any post-expiration grievances must still be presented according to the formalities of the particular grievance procedure (i.e., presented in writing, in a timely manner etc.). Otherwise, the grievance would not "arise under" the expired CBA.

tration.[12] In such situations the prevailing principle seems to be that arbitration is a creature of contract, and that once the contract expires the parties are no longer bound by it.[13] In *Local 703, International Brotherhood of Teamsters v. Kennicott Bros. Co.*,[14] an employee was discharged six months after the CBA expired. The court held that the presumption of a post expiration duty to arbitrate weakens as the time between expiration and grievance increases.[15] Thus, if the occurrences leading to the grievance take place well after expiration of the CBA, arbitration usually will not be compelled.[16]

3. When the grievance arises after expiration but is based on a right that "vests" prior to expiration

If the grievance arises after expiration but is based on a right that is said to have "vested" under the expired CBA, a court will probably decide that the grievance is arbitrable. The landmark case on this issue is *Nolde Brothers Inc. v. Local 358, Bakery and Confectionery Workers.*[17] In *Nolde* a labor union exercised its right to terminate a collective bargaining agreement and the employer closed its plant shortly thereafter.[18] The employer paid the employees their accrued wages and vacation pay. However, the employer refused to give employees severance pay as the CBA required.[19] The employer rejected the union's demands that it arbitrate the issue, claiming it was not bound to arbitrate after the union had terminated the agreement.[20]

The Supreme Court held that the contractual duty to arbitrate does not automatically expire with the agreement.[21]

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12. B. FAIRWEATHER, *supra* note 8, at 37 & n.41.

13. *See, e.g.*, Local 7-21, OCAW Int'l Union v. American Maize Prod., 492 F.2d 409 (7th Cir.), *cert. denied*, 417 U.S. 969 (1974) (grievance contesting employer's lockout on August 1 not arbitrable where agreement expired after midnight on August 1); *In re* Globe Seaways, Inc., 451 F.2d 1159 (2d. Cir. 1971) (affirmed district court's denial of arbitration awards in favor of union members who were discharged for strike related activities during hiatus between agreements).

14. 771 F.2d 300 (7th Cir. 1985).

15. *Id.* at 303.

16. *See* Local 106, Serv. Employees Int'l Union v. Homewood Memorial Gardens, Inc., 838 F.2d 958 (7th Cir. 1987) (where CBA terminated in 1983 and employee was discharged in 1986, court held employer was not bound to arbitrate).

17. 430 U.S. 243 (1977).

18. *Id.* at 247.

19. *Id.*

20. *Id.*

21. *Id.* at 251.

Rather, the duty to arbitrate disputes arising out of a CBA extends beyond the date of expiration.[22] According to the Court, "the presumptions favoring arbitration must be negated expressly or by clear implication."[23] The Court stated that by not excluding from arbitration disputes arising after termination, the parties are presumed to have intended to arbitrate after expiration.[24] The Court found that the dispute "arose under" the expired CBA.[25] In other words, the particular severance right at issue had actually been earned prior to expiration of the CBA.[26] Since the severance right resulted from services performed prior to expiration, it had effectively "vested,"[27] and thus arose under the CBA.[28]

Arbitrators have been receptive to arguments that "certain rights growing out of the agreement have effectively 'vested,' and where those rights are at issue in an arbitral proceeding, arbitrability will be found despite the expiration" of a CBA.[29] The broad language in *Nolde*, referring to the strong presumption of arbitrability and the continuing duty to arbitrate unless "negated expressly or by clear implication,"[30] is often cited by parties seeking to compel arbitration, even in situations dealing with other than vested types of rights.[31] However, some courts

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22. *Id.* at 250-252.

23. *Id.* at 255.

24. *Id. But see* Geslewitz, *Case Law Development Since* Nolde Brothers; *When Must Post-Contract Disputes Be Arbitrated?*, 35 LAB. L.J. 225, 228 (1984) ("If anything, it was much more reasonable to assume that the parties contractually intended that all restraints and concessions agreed to in the contract, including the duty to arbitrate, terminated with the cancellation of the contract.").

25. *Nolde*, 430 U.S. at 251-252. The Court cited its decision in John Wiley & Sons v. Livingston, 376 U.S. 543, 553 (1964), wherein the Court concluded "that the parties' obligations under their arbitration clause survived contract termination when the dispute was over an obligation arguably created by the agreement." *Nolde*, 430 U.S. at 252.

26. *See Nolde*, 430 U.S. at 248-49.

27. In this context, it appears that "vested rights" are any rights that can be earned under, or are guaranteed by a CBA. Once such rights are nonforfeitable, they have "vested," and expiration of the CBA should have no affect on securing those rights.

28. *See Nolde*, 430 U.S. at 248-49.

29. M. HILL & A. SINICROPI, REMEDIES IN ARBITRATION 230 (1981).

30. *Nolde*, 430 U.S. at 255.

31. *See, e.g.*, Local Joint Executive Bd. v. Royal Center, Inc., 796 F.2d 1159 (9th Cir. 1986) *cert denied*, 479 U.S. 1003 (1987) (presumption of arbitrability not limited to rights undeniably accruing under the contract prior to termination); Federated Metals Corp. v. United Steelworkers, 648 F.2d 856, 861 (3rd Cir.) *cert denied*, 454 U.S. 1031 (1981) (presumption of arbitrability does not depend on whether rights have vested).

and arbitrators read *Nolde* narrowly, concluding that the Nolde presumption is limited to the arena of vested rights.[32]

Although there is disagreement as to whether the *Nolde* presumption applies in situations other than vested rights, it is clear that if the contested rights have vested prior to expiration, the courts generally conclude that such ripened rights are arbitrable. However, even if the rights have vested, employers may not be required to arbitrate indefinitely. If the disputed rights are not asserted within a "reasonable time" after expiration, the employer might not be compelled to arbitrate.[33]

4. When the grievance occurs after expiration, but the duty to arbitrate arises from an extra-contractual agreement

Although a grievance arises after expiration of the CBA, and the disputed right has not vested prior to expiration, the parties may be found to have either explicitly or *implicitly* agreed to continue to arbitrate.[34] An example of an implied agreement to arbitrate resulting from a party's failure to challenge the arbitrator's jurisdiction is *Miscellaneous, Drivers & Helpers Local No. 610 v. VDA Moving & Storage Inc.*[35] There the CBA had expired and the union and employer arbitrated a grievance that arose after expiration concerning reinstatement of certain employees. The arbitrator ordered reinstatement.[36] The employer challenged the arbitrability of the dispute in district court, but the court found that the employer had indicated an intent to arbitrate by not previously challenging the arbitrator's jurisdiction.[37]

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32. *See* Garment Workers Local 589 v. Kellwood Co., 592 F.2d 1008 (8th Cir. 1986) (scope of employer's obligation under expired contract to "maintain" pension benefits "in effect" arbitrable under *Nolde*); Nibbs v. Felix, 726 F.2d 102, 104 (3d Cir. 1984) (dispute over failure to promote "arises under" expired contract only if eligibility list structured or prepared under that contract); *See also*, Bell Foundry Co., 73 LAB. ARB. (BNA) 1162 (1979) (Roberts Arb.) (stating that *Nolde* does not disturb the existing concept that grievances not involving claims of "vested" rights are not arbitrable after expiration).

33. In *Nolde*, 430 U.S. at 255 n.8, the Court stated: "[W]e need not speculate as to the arbitrability of post-termination contractual claims which, unlike the one presently before us, are not asserted within a reasonable time after the contract's expiration."

34. *See* Ficek v. Southern Pac. Co., 338 F.2d 655, 656 (9th Cir. 1964) (an agreement to arbitrate a particular issue need not be express, it may be implied from the conduct of the parties).

35. 447 F. Supp. 439 (E.D. Mo. 1978).

36. *Id.* at 442.

37. *Id.* at 443.

Another situation that often gives rise to an implied agreement to arbitrate is when the CBA expires and the parties negotiate to an impasse. The employer then commences implementation of the terms of its last offer to the union during negotiations. Usually the employer's final offer contains a grievance procedure.[38] Thus, when an employer declares it is implementing according to the terms of its last offer, a court may find, using the *Nolde* presumption of arbitrability,[39] an implied agreement to arbitrate according to the grievance procedure in the final offer. For example, in *Teamsters Local 238 v. C.R.S.T.*, (*CRST I*)[40] a truck driver was discharged after the contract expired and impasse had been reached.[41] Before the discharge, the employer had unilaterally implemented its "schedule of terms and conditions" of employment, which was consistent with its final offer to the union during negotiations. This schedule allowed for resolution of "seniority disputes" through the grievance procedure, but was silent regarding other kinds of disputes.[42] The court construed an ambiguity in the company's schedule as to which grievances would be arbitrated.[43]

The *CRST I* court held that the grievance of the discharged truck driver was arbitrable.[44] Its conclusion was based on the following: (1) the final offer contained a grievance procedure and the implemented "schedule" was purported to be consistent with the final offer,[45] (2) the employer explicitly agreed to continue arbitrating certain grievances according to the grievance procedure,[46] and (3) ambiguities in contract provisions are to be construed against the drafter, with all reasonable doubts as to

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38. The parties usually intend to continue to arbitrate under a new CBA if they had arbitrated under the previous CBA.

39. Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, 430 U.S. 243, 255 (1977) (the presumption favoring arbitration must be negated expressly or by clear implication).

40. 780 F.2d 379 (8th Cir. 1985).

41. *Id.* at 380 (CBA expired June, 1982 and employee was discharged July 1983).

42. *Id.* The schedule itself did not contain a grievance procedure, but seniority disputes were specifically allowed to be submitted to "the" grievance procedure of the old contract. *Id.* at 380.

43. *Id.* at 384 ("Whatever CRST's intent, the schedule's silence as to the submission of other issues besides seniority to the grievance procedure rendered the schedule ambiguous, and compels us to conclude that the schedule did not preempt [the] discharge from being subject to a grievance procedure.").

44. *Id.*

45. *Id.* at 383.

46. *Id.*

interpretation resolved in favor of the other party.[47] The court also relied heavily on the *Nolde* presumption that parties intend to continue to arbitrate unless they clearly or expressly demonstrate otherwise.[48] Thus, under the *CRST I* standard, if the employer is at all ambivalent as to whether the grievance procedure of the expired contract is to be honored after implementation, all doubts will be construed in favor of arbitration. *CRST I* illustrates that actions by an employer during implementation of its final offer can be construed as an implied agreement to continue to arbitrate.

The implied agreement to continue to arbitrate may have its limits, however. The subsequent history of *CRST I* illustrates that when the event giving rise to arbitration clearly arises after expiration, courts might hesitate in finding an implied agreement to continue to arbitrate. After the *CRST I* court instructed the district court to enter judgment for the union and require arbitration, CRST (the "Company") sought rehearing en banc. Rehearing was granted in *Chauffeurs, Teamsters and Helpers, Local 283 v. C.R.S.T., Inc.*, (*CRST II*).[49] In *CRST II*, the court reversed its previous holding and held the grievance was not arbitrable. The court relied heavily on the fact that discharge had occurred more than one year after expiration of the CBA.[50] This, the court held, was not a reasonable time[51] after expiration, and thus, the discharge dispute did not arise under the expired CBA.[52] With regard to the ambiguity concerning the Company's agreement to arbitrate seniority disputes, the court concluded

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47. *Id.* at 379 (citing Taft Broadcasting Co. v. NLRB, 441 F.2d 1382, 1384 (8th Cir. 1971)).

48. *Id.* at 384.

49. 795 F.2d 1400 (8th Cir. 1986).

50. *Id.* at 1404.

51. In *Nolde*, 430 U.S. at 255 n.8, the Court stated: "[W]e need not speculate as to the arbitrability of post-termination contractual claims which, unlike the one presently before us, are not asserted within a reasonable time after the contract's expiration."

Because the Supreme Court qualified its holding in this manner, courts have at times held that events giving rise to grievances which do not occur within a reasonable time after expiration do not arise under the CBA, as did the court in *CRST II*. *See also* Local 703, Int'l Bhd. of Teamsters v. Kennicott Bros. Co., 771 F.2d 300, 304 (7th Cir. 1985)("The significantly longer period in this case than in *Nolde* between expiration of the Agreement and the events triggering the grievances eviscerates the *Nolde* presumption of arbitrability and distinguishes this case.").

52. *CRST II*, 795 F.2d at 1405. The court in *CRST II* was confronted with the situation where the grievance clearly arose after expiration, but where the existence of a post-contract agreement to arbitrate was questionable. The court decided against arbitrability.

that the Company's willingness to arbitrate seniority disputes should be interpreted as a clear statement of the extent to which the Company intended to continue to arbitrate.[53]

The Fifth Circuit, in *Seafarers National Union v. National Marine Services, Inc.*,[54] distinguished *CRST II* and read *Nolde* much more broadly. In *Seafarers*, National Marine Services Inc. sold its tugboat operation and laid off employees the day after expiration of the CBA.[55] The union filed grievances regarding the employer's decision to sell the operation as well as the decision to lay off employees.[56] The district court denied the union's motion to compel arbitration and the Fifth Circuit reversed, holding that the *Nolde* presumption is not limited to "vested" rights.[57] The Fifth Circuit distinguished *CRST II* noting that the *CRST II* incident arose after expiration, and the disputed right did not occur within a reasonable time.[58] However, in *Seafarers* the Fifth Circuit found the following: (1) at least some of the underlying disputes occurred prior to expiration of the CBA, (2) the union requested arbitration before expiration, and (3) the employees' rights had been asserted within a reasonable time.[59]

5. *General summary of the current legal standards*

As the above cases indicate, the circuits do not completely agree on the legal standards in area of post-contract arbitrability.[60] The *CRST II* court summarized the current standard by saying that all the courts appear to require that the disputed right must have vested prior to expiration or relate to events which occurred at least in part prior to expiration of the CBA.[61]

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53. *CRST II*, 795 F.2d at 1404.

54. 820 F.2d 148 (5th Cir. 1987).

55. *Id.* at 149.

56. *Id.* at 150.

57. *Id.* at 153 ("We therefore reject National Marine's contention that the *Nolde* decision applies only to rights that accrue under the collective bargaining agreement.").

58. *Id.* at 153 n.3.

59. *Id.*

60. In particular, the Fourth and Fifth Circuits do not agree as to how broadly the *Nolde* presumption should be read. *See id.* at 153.

61. *CRST II*, 795 F.2d at 1403.

> How to apply the narrow holding of *Nolde* and its broad presumption has created some confusion among courts in determining the arbitrability of post-expiration grievances. *However, all of the courts appear to require that for a right to arbitration to exist the grievance must either involve rights which to some degree have vested or accrued during the life of the contract and merely*

Included in the current standard is the notion that the duty to arbitrate survives expiration if the parties have either explicitly or implicitly agreed to continue to arbitrate. In addition to the foregoing principles, it seems to be accepted that the post-expiration duty to arbitrate weakens as the time between expiration and the events giving rise to grievance increases.

III. The Need to Disregard the *Nolde* Presumption in Situations of Implementation After Impasse—A New Standard

A. The CRST I Analysis

Section II of this comment explored various situations which give rise to a post-expiration duty to arbitrate, with particular emphasis on the fourth situation regarding implied agreements to continue to arbitrate after the employer has unilaterally implemented terms of employment. The analysis of the court in *CRST I* is one possible approach to be used in such situations. However, there are drawbacks to the *CRST I* approach. This comment will now critique and propose a different analysis than the one used in *CRST I* that could be used when the issue is whether an employer implicitly agreed to continue to arbitrate after implementation.

The *CRST I* court articulated several principles in its attempt to deal with this situation. First, ambiguities (as to whether the employer intends to continue to arbitrate) are to be construed against the drafter. Second, when the final offer to the union during negotiations contains a grievance procedure, and the implemented terms are to be consistent with the final offer, there is an implied agreement to continue to arbitrate. Finally, the *CRST I* court relied on the *Nolde* presumption that parties intend to continue to arbitrate unless clearly or expressly demonstrated otherwise.

Under the *CRST I* approach, if the employer's implemented terms are at all ambiguous as to whether the grievance procedure of the expired contract will be honored after implementation, all doubts will be construed in favor of arbitration.[62] Unfor-

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ripened after termination, or relate to events which have occurred at least in part while the agreement was still in effect.

Id. (citations omitted)(emphasis added).

62. *CRST I*, 780 F.2d at 382 (citing Taft Broadcasting Co., v. NLRB, 441 F.2d 1382 (8th Cir. 1971)).

tunately, however, the current law may not allow the employer to avoid such ambiguity.

In order for the employer to lawfully implement terms and conditions of employment, any changes must have been previously offered to the union.[63] Thus, it is commonly held that the employer may implement terms and conditions in accordance with its final offer to the union. The employer's difficulty arises when the final offer included a grievance procedure.[64] Since the employer's implemented terms must be consistent with the final offer, the implemented terms arguably include a grievance procedure. If the employer purposefully omits a grievance procedure from the implemented terms, the employer may be guilty of bad faith bargaining,[65] of changing terms and conditions of employment,[66] thus violating the unfair labor practice provisions of the NLRA.[67] Thus, to comply with the law, employers declare that they are implementing in accordance the final offer to the union.

Employers seem to be left in a dilemma. The law dictates that they may only implement according to the final offer, but if they do so, courts using the *CRST I* approach would conclude that they have impliedly agreed to continue to arbitrate. Because of this dilemma, courts should not conclude that just because implemented terms are consistent with a final offer, the employer must have intended to continue to arbitrate. Indeed,

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63. NLRB v. Katz, 369 U.S. 736, 743 (1962)(employer violates its duty to bargain when it institutes changes in wages, hours or conditions of employment without first consulting the union); *see also* NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217, 225 (1949)(unilateral change by employer can be of no greater extent than what was offered to the union).

64. Where the employer and union have had a CBA which included a grievance procedure they usually anticipate continuing to have a grievance procedure once their CBA is renewed, although they may disagree on the terms. Consequently, the employer's final offer usually includes a grievance mechanism.

65. *See Katz*, 369 U.S. at 743.

66. *See Crompton-Highland Mills*, 337 U.S. at 225 (unilateral change by employer can be of no greater extent than what was offered to the union).

67. The National Labor Relations Act (NLRA) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1982).

Section 9(a) mandates that representatives of a majority of the employees "shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. § 159(a) (1982).

there are several reasons why employers generally do *not* intend to continue to arbitrate after expiration of a CBA.

First, there is a well recognized principle, which was ignored by the Court in *Nolde*, that the duty to arbitrate is considered the quid-pro-quo for a "no strike" clause of a CBA.[68] It is generally conceded that after a CBA expires the union is no longer bound by a no strike clause. The union is at liberty to use its most effective economic weapon. If the union is at liberty to strike, it is unlikely that the employer would be happy to continue to arbitrate with the union. Indeed, withholding from the employer the economic weapon it surrendered to obtain the no-strike clause, namely the ability to force the union to engage in costly litigation in order to obtain a judgment against the employer, would be unfair. It would be inequitable to impose a duty to arbitrate on the employer in such situations unless the employer clearly intended to continue to arbitrate.

Another reason employers might not intend to continue to arbitrate is that collective bargaining agreements typically make arbitration "final and binding." The scope of judicial review under such agreements is extremely narrow.[69] Also, due to the lack of procedural safeguards such as the rules of evidence and binding precedent, it is doubtful that the employer would intend to continue to arbitrate where the union is at liberty to strike at its pleasure.[70]

It could be argued that final and binding arbitration with its lack of procedural complexity is a benefit to employers as well as unions even after expiration. After all, the employer did agree to arbitration as the forum for dispute resolution under the CBA. However, once the contract expires, the employer's reasons for initially choosing arbitration are no longer present. Once the CBA expires, it is usually the employer's position, founded on contract principles, that the employer need not arbitrate at all. Thus, after expiration, it is in the employer's interest to avoid arbitration rather than have a convenient forum which the union can use to seek judgments against the employer. On the other

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68. Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448 (1957); Goya Foods, Inc., 238 NLRB 1465, 1467 (1978) ("Absent an explicit expression of an intention [to the contrary] . . . the agreement to arbitrate and the duty not to strike should be construed as having coterminous application.") (citing Gateway Coal Co. v. United Mine Workers of Am., 414 U.S. 368, 382 (1974)).

69. Geslewitz, *supra* note 24, at 228.

70. *Id.* at 228-229.

hand, while a CBA is in effect, it is mutually beneficial for the parties to choose a convenient forum for expeditious resolution of inevitable disputes.

For these reasons, an employer would rarely find it in its best interests to continue to arbitrate grievances when the union is not bound by a valid collective bargaining agreement. In such situations the *Nolde* presumption that parties intend to continue to arbitrate unless they expressly indicate otherwise lacks merit.

Another reason the *Nolde* presumption should be avoided in situations of implementation after impasse is that the "arising under" link is much weaker. In *Nolde*, the Court expressly held that the grievances "arose under" the CBA. The severance rights had "vested" under the expired CBA, and the terms of the CBA seemed to govern.

However, disputes arising after implementation do not "arise under" the collective bargaining agreement, but rather arise under the unilaterally implemented terms. After impasse and implementation, the employment terms implemented by the employer resemble the employer's mere work rules rather than a collective bargaining agreement with the union. Grievances which surface after expiration and implementation would thus "arise under" the employer's self-imposed work rules rather than a CBA with the union. This is an important distinction because the *Nolde* presumption applies if the issue is "whether a party to a *collective bargaining contract* may be required to arbitrate . . . pursuant to the *arbitration clause of that agreement*."[71] Thus, if there has been an impasse followed by unilateral implementation, the "arising under" link between the expired CBA and post-implementation disputes is tenuous.

Further, the arising under analysis should not be read too broadly; if carried to its logical conclusion, the analysis would make it possible for "a union to force an employer to arbitrate any post-contract dispute as long as it simply could cite a provision of the lapsed contract as being involved."[72] Nearly any dispute involving terms and conditions of employment can be said to involve some provision of a CBA.[73]

Additionally, *Nolde* dealt with "vested" types of rights. The

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71. Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, 430 U.S. 243, 244 (1977)(emphasis added).

72. Geslewitz, *supra* note 24, at 229.

73. *Id.*

Supreme Court gave little guidance as to what other types of rights might "arise under" an expired CBA. Courts should hesitate to apply the *Nolde* presumption to fact situations (such as implementation after impasse) which were not before the Court.[74]

In summary, if the issue is arbitrability after expiration of a CBA followed by implementation of terms of employment, ambiguities should not be construed against the employer because national labor law is usually the source of such ambiguities. Further, the *Nolde* presumption of arbitrability should be avoided because employers would not intend to continue to arbitrate after expiration of a CBA. The *Nolde* presumption lacks applicability in situations of implementation after impasse because the "arising under" link between the expired agreement and post-implementation disputes is tenuous. Finally, the logical extension of a broadly applied "arising under" analysis is that any work place dispute can be said to have involved some provision of an expired CBA.

B. An Alternative Legal Standard

This comment opened with a brief discussion of two competing principles with regard to the duty to arbitrate after expiration of a CBA. The first is a presumption in favor of arbitration, and the second is that parties cannot be compelled to arbitrate unless they have contracted to do so. As discussed, if the issue is arbitrability after impasse in negotiations followed by implementation of terms of employment, the first principle (presumption that parties intend to arbitrate) is much weaker. Hence, the second principle (arbitration is a creature of contract) should govern.

Thus, the first inquiry should be what the employer has "contracted" with its employees to do regarding future arbitrations. As discussed above, such a contract should not be inferred merely because the employer's terms and conditions of employment are said to be consistent with its final offer to the union.[75]

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74. The Supreme Court itself expressly declined to expand its holding to fact situations which were not before it. *See Nolde*, 430 U.S. at 255 n.8 (declining to speculate as to arbitrability of claims which are not asserted within a reasonable time after expiration).

75. Since the law dictates that the employer can only implement terms of employment according to its final offer to the union, *see supra* text accompanying note 63, it should not be inferred that the employer knowingly and contractually agreed to adopt

Rather, the focus should be on what the employer expressly contracts to do in this regard. For instance, in *CRST II*[76] the employer explicitly agreed to continue to arbitrate seniority disputes. The court stated:

> The schedule's mention of a grievance procedure to determine seniority rights cannot be interpreted as allowing for arbitration of all disputes, but rather should be read as a clear statement showing explicitly how far CRST intended arbitration to reach. If CRST had intended arbitration to reach further, it would have so stated in the schedule.[77]

This approach of considering the employer's statements regarding continued arbitration as explicit statements showing how far the employer intends arbitration to reach is more faithful to contract principles (including the statute of frauds), as well as the probable intent of the employer. Thus, the inquiry should focus on what the employer has explicitly contracted with its employees to do regarding arbitration after implementation. Any statements by the employer should be read as indicating the extent to which the employer agrees to continue to arbitrate.

There may, however, be drawbacks to a wholesale adoption of this approach. It could be argued that adopting the "explicit statement" approach will open the door for employers to abuse their employees.[78] For instance, an employer might decide to make no explicit statements regarding arbitration, thereby avoiding a duty to arbitrate. The employer might then conduct its affairs so as to lead its employees to believe they will continue to have a remedy through arbitration. The employer's motive might be to gain employee acceptance of the implemented terms and conditions of employment, or to avoid a strike.

There are at least two ways such abuses by employers could be guarded against. One way would be for the courts to give equitable doctrines such as reliance and estoppel full play. If an employee relies to his or her detriment on conduct or representations made by the employer, the employer should be estopped

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the grievance procedure tucked away in its final offer to the union.

76. Chauffeurs, Teamsters and Helpers Local 238 v. C.R.S.T., Inc., 795 F.2d 1400 (8th Cir. 1986).

77. *Id.* at 1404.

78. *See id.* at 1408 (Heaney, J., dissenting). Judge Heaney argued that the company's statement that it was placing in effect wages, hours and other working conditions consistent with its final offer led employees to believe that the critical protections of the grievance procedure remained in effect. *Id.*

from denying the existence of an agreement to continue to arbitrate. In such situations the employer should be obliged to arbitrate the grievance.

The other solution is to require employers to explicitly deny during implementation any duty to continue to arbitrate. However, the current law regarding implementation may not allow employers to make such statements.[79] The courts and the NLRB would therefore have to give employers the freedom to explicitly deny a continuing duty to arbitrate after implementation without giving rise to a charge of bad faith bargaining. It would be unfair to require employers to explicitly deny a continuing duty to arbitrate if such statements would result in a charge of bad faith bargaining before the NLRB. Since this solution would require changes in the law regarding unilateral implementation of terms of employment after impasse, it seems that the first solution—incorporate doctrines of reliance and estoppel—would be simpler and easier to apply.

IV. Conclusion

This comment suggests an analysis which disregards the *Nolde* presumption of arbitrability when negotiations have reached impasse and the employer has unilaterally implemented terms and conditions of employment. Rather, the inquiry should focus on what the employer has explicitly contracted to do. Any statements by the employer regarding arbitration after implementation should be viewed as explicit statements showing the extent to which the employer intends to continue to arbitrate. The next step is to look at the employer's conduct to see whether the employer has led its employees to believe they would have a remedy through arbitration, and whether inequitable results would follow if employees were not allowed the forum of an arbitration proceeding. This approach will yield results which are closer to the true intentions of employers while protecting the interests of employees.

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79. Employers can only implement according to the terms of its final offer. Any denial of a duty to arbitrate would be contrary to the terms of the final offer. *See supra* note 63 and accompanying text.