or simply unavailable in many cases.[70] Thus, given the number of instances where the production-interchangeability defense has been rejected,[71] a court generally unsympathetic to this type of analysis may find it relatively easy to limit *Budd* to its particular facts.

Hopefully, this will not be the case. Led by a "new antitrust majority," [72] the Supreme Court appears to be creating a new climate in antitrust law, one more favorable to mergers than in the past.[73] Since one of the major means of blocking mergers was the use of extremely flexible — and at times questionable [74] — market definitions, change, if in store, will likely come in this area. If this development takes place, *Budd*, in addition to providing a practical and realistic rule for evaluating toehold acquisitions, should prove an important example of sensible application of economic analysis in defining markets.

Labor Law — ARBITRATION — DUTY TO ARBITRATE SEVERANCE PAY SURVIVES TERMINATION OF COLLECTIVE BARGAINING AGREEMENT BEFORE CLOSING OF PLANT — *Local 358, Bakery & Confectionary Workers v. Nolde Brothers, Inc.*, 78 Lab. Cas. ¶ 11,221 (4th Cir. Oct. 23, 1975).

On July 28, 1970, the Bakery Workers and Nolde Brothers entered into a collective bargaining agreement covering employees at the company's Norfolk, Virginia bakery. The agreement was to remain in effect until July 21, 1973 and thereafter until a new agreement was reached or until either party gave seven days' notice of termination.[1] It included a broad arbitration clause, a no-strike clause, and a provision for severance pay, upon the permanent closing of the bakery, for each employee who had worked full-time for at least three years imme-

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[70] *See* note 48 *supra*.

[71] *See* p. 809 & notes 56, 59 & 60 *supra*.

[72] *See* United States v. Marine Bancorporation, 418 U.S. 602, 642 (1974) (White, J., dissenting).

[73] One commentator has suggested that the Court's past hostility to mergers may have been an attempt to atone for earlier "sins" of undue tolerance of mergers. P. AREEDA, *supra* note 26, at 696.

[74] This branch of the Court's jurisprudence was described as the "nadir of its judicial performances," Handler, *supra* note 24, at 455. *See generally id.* at 455 n.229 (collecting commentary critical of the Court); Schlade, *supra* note 24, at 400–02.

[1] Local 358, Bakery & Confectionary Workers v. Nolde Bros., 382 F. Supp. 1354, 1355–56 (E.D. Va. 1974).

diately prior to his layoff due to the closing.[2] After several months of negotiations, the union on August 21, 1973 gave notice of its intent to terminate the agreement. On August 31, 1973, the union threatened to strike, whereupon the company immediately shut down the bakery. After the company refused to give severance pay or to arbitrate whether it had a duty to do so, the union sued in federal district court under section 301(a) of the Labor Management Relations Act.[3] The district court held that the union had no contractual entitlement to severance pay because it had voluntarily terminated the agreement prior to the bakery closing.[4] The court further stated that the company had no duty to arbitrate the dispute, since it had arisen after expiration of the agreement.[5]

The Court of Appeals for the Fourth Circuit reversed and instructed the district court to order the company to enter into arbitration.[6] Writing for the court, Judge Craven declared that the district court should not have proceeded to the merits of the underlying dispute. He stated that whether the parties "chose [to] agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired"[7] was a matter of contract interpretation that should only be considered by the arbitrator. Thus, the question the district court should have considered was whether the employer had a duty to arbitrate the severance pay dispute after the agreement had expired.[8] Judge Craven found support in two Supreme Court decisions, *John Wiley & Sons v. Livingston*[9] and *Piano Workers*

[2] Local 358, Bakery & Confectionary Workers v. Nolde Bros., 78 Lab. Cas. ¶ 11,221 at 20,195 & nn.1, 2 (4th Cir. Oct. 23, 1975).

[3] 29 U.S.C. § 185(a) (1970).

[4] 382 F. Supp. at 1358.

[5] *Id.* at 1359.

[6] 78 Lab. Cas. at 20,196. Several courts have faced the issue in *Nolde*. In John Wiley & Sons v. Livingston, 376 U.S. 543, 555 (1964), the Supreme Court held that a successor employer's obligation to arbitrate disputes concerning the collective agreement of the predecessor employer included arbitration of a severance pay dispute arising after expiration of the agreement. Subsequent federal court decisions in cases not involving successor employers, however, are divided as to whether the duty to arbitrate severance pay survives expiration of the collective agreement. *Compare* United Steelworkers v. H.K. Porter Co., 64 L.R.R.M. 2201 (W.D. Pa. 1966) (duty to arbitrate did survive), *with* Milk Drivers Local 246 v. Thompson's Dairy, Inc., 80 L.R.R.M. 3403 (D.D.C. 1972), *aff'd mem.*, 489 F.2d 1272 (D.C. Cir. 1974) (duty did not survive), *and* Ward Foods, Inc. v. Local 50, Bakery & Confectionary Workers, 360 F. Supp. 1310 (S.D.N.Y. 1973) (same); *cf.* Local 595, International Ass'n of Machinists v. Howe Sound Co., 350 F.2d 508 (3d Cir. 1965) (duty to arbitrate holiday and vacation pay did survive).

[7] 78 Lab. Cas. at 20,196, *quoting* John Wiley & Sons v. Livingston, 376 U.S. 543, 555 (1964).

[8] 78 Lab. Cas. at 20,196–97.

[9] 376 U.S. 543 (1964).

Local 2549 v. W.W. Kimball Co.,[10] for his rejection of the employer's contention that the duty to arbitrate severance pay disputes expired with the agreement. He asserted that a dispute over whether the parties intended an accruable right such as severance pay to survive the expiration of their agreement, unlike a dispute involving a nonaccruable right,[11] is subject to the arbitration provision of the agreement even when the contingency giving rise to the dispute occurs after expiration.[12]

In a concurring and dissenting opinion,[13] Judge Widener argued that because it was not "clear beyond rational debate" [14] that the litigants intended the dispute to be submitted to arbitration, the question of arbitrability, as well as the underlying dispute, should be referred to the arbitrator.[15] The majority, he thought, had sought to resolve conclusively whether the dispute was arbitrable, thereby foreclosing further inquiry into this issue by the arbitrator.[16] In a concurring opinion,[17] Judge Aldrich questioned the extent to which his colleagues were in disagreement. He suggested that there are three issues involved every time a union requests a court to order arbitration. The preliminary issue is whether either of the remaining issues should be submitted for resolution by the arbitrator.[18] The second issue is whether the underlying grievance is in fact encompassed by the arbitration provision.[19] The final issue involves the merits of the underlying grievance.[20]

All three judges in *Nolde* agreed that the court should decide the first issue — whether anything should be submitted to arbitration.[21] They also agreed that the arbitrator should decide the third issue — the merits of the underlying dispute.[22] The possible disagreement within the *Nolde* court concerned who should

[10] 379 U.S. 357, *rev'g mem.* 333 F.2d 761 (7th Cir. 1964), *rev'g* 221 F. Supp. 461 (N.D. Ill. 1963) (reinstatement of district court's order that dispute involving seniority rights of laid off employees be arbitrated even though layoffs did not occur until after expiration of bargaining agreement).

[11] 78 Lab. Cas. at 20,199.

[12] *Id.* at 20,198.

[13] *Id.* at 20,200 (Widener, J., concurring and dissenting).

[14] *Id.* at 20,201 (Widener, J., concurring and dissenting).

[15] *Id.* at 20,202 (Widener, J., concurring and dissenting).

[16] *Id.*

[17] *Id.* at 20,199 (Aldrich, J., concurring).

[18] *Id.* (Aldrich, J., concurring) (whether "there is no arbitrable issue at all").

[19] *Id.* (Aldrich, J., concurring) ("whether the issue of substance is one subject to arbitration").

[20] *Id.* (Aldrich, J., concurring) (whether there is an "issue of substance").

[21] *See id.* at 20,198; *id.* at 20,199 (Aldrich, J., concurring); *id.* at 20,202 (Widener, J., concurring and dissenting).

[22] *See id.* at 20,196; *id.* at 20,199 (Aldrich, J., concurring); *id.* at 20,202 (Widener, J., concurring and dissenting).

decide the second issue. Judge Widener believed that, at least in this case,[23] the second issue — whether the grievance is subject to the arbitration clause — should also be decided by the arbitrator.[24] Judge Craven replied that under "the general rule . . . the initial question of arbitrability is . . . to be determined by the court" and that an arbitrator may "only adjudge grievances," [25] thus appearing to reject the contention that an arbitrator may dismiss the grievance without reaching the merits. Judge Aldrich, on the other hand, suggested that had the parties in *Nolde* raised the second issue,[26] he would have agreed with Judge Widener that it should be reserved for the arbitrator.[27]

The ambiguity of Judge Craven's opinion lends itself to a number of interpretations concerning what the character of the union's claim or the inherent nature of the right to severance pay had to be in order for the dispute to be arbitrable. He may have believed that the union's mere claim that severance pay rights vested was sufficient. A second interpretation is that the nature of these rights had to be such that they could vest — that is, they had to be accruable: susceptible to agreement by the parties that they would accrue over the term of the contract. Finally, he may have believed that a finding that severance pay rights had indeed accrued under the contract was necessary for a holding that the rights were arbitrable. None of these interpretations presupposes a finding that the rights actually vested and thus survived the expiration of the contract.[28]

If expiration has any impact on whether an employer remains bound by his promise to arbitrate, then in order for the court to

[23] Judge Widener did not suggest that he believed the second issue raised by Judge Aldrich should always be left open for determination by the arbitrator. Rather, he thought that this was proper in *Nolde* because it was not clear the parties intended disputes arising after expiration to be subject to arbitration and because this issue was "inextricably intertwined" with the underlying dispute. *See id.* at 20,201–02 (Widener, J., concurring and dissenting).

[24] *Id.* at 20,202 (Widener, J., concurring and dissenting).

[25] *Id.* at 20,198. Judge Craven said that "[a]n exception to the rule is where a clause in a labor contract purporting to exclude some matters from arbitration is vague and ambiguous. In such a case, an arbitrator may be expressly empowered to not only adjudge grievances but also to decide whether the instrument gives him the power to do so." *Id.*

[26] *See id.* at 20,199 (Aldrich, J., concurring) ("neither we, nor the arbitrator, face the issue of arbitrability"). Neither party's brief argued that the arbitrator should determine whether the severance pay grievance was indeed encompassed by the arbitration provision.

[27] *See id.* at 20,199–200 (Aldrich, J., concurring).

[28] Accrued rights need not vest. Parties might intend that rights to certain benefits accrue during the term of the agreement but that the rights expire when the agreement expires.

find a dispute arbitrable after expiration,[29] the union must allege more than that under a provision of the expired agreement, employees are entitled to certain benefits; it must claim something that transpired during the term of the agreement extends the entitlement beyond expiration. The union in *Nolde* fulfilled this requirement by arguing that the right to severance pay vested during the term of the agreement.[30] Under the first interpretation of Judge Craven's opinion, this allegation alone is sufficient for a holding of arbitrability.[31]

However, in distinguishing those post-expiration cases in which disputes were held nonarbitrable, he suggested that the bare union claim that rights had vested was not sufficient.[32] Under this second interpretation of his opinion, a finding by the court that such rights could indeed have vested — that is, that such rights were "accruable" [33] — was also necessary.[34]

A third interpretation of Judge Craven's opinion is that he considered neither a mere claim of vesting nor a simple finding

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[29] While the duty to arbitrate must be based on a valid contract, *see* Gateway Coal Co. v. UMW, 414 U.S. 368, 374 (1974); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960), this duty may survive expiration of the contract itself, *see* John Wiley & Sons v. Livingston, 376 U.S. 543, 554–55 (1964); Smith & D. Jones, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 MICH. L. REV. 751, 782–83 & n.77 (1964) (whether agreement to arbitrate has expired is a matter solely for judicial determination, but court may find that employer has obligation to arbitrate certain matters even after date of contract expiration).

[30] Brief for Appellant at 16 n.3, 18–23.

[31] *See* 78 Lab. Cas. at 20,196–97.

[32] *Id.* at 20,199 & n.7.

[33] Judge Craven stated that the *Nolde* decision should not be read as disapproving the refusal to find "disputes involving nonaccruable rights" arbitrable. *Id.* He specifically sought to distinguish Milk Drivers Local 246 v. Thompson's Dairy, Inc., 80 L.R.R.M. 3403 (D.D.C. 1972), *aff'd mem.*, 489 F.2d 1272 (D.C. Cir. 1974), in which a dispute over severance pay after expiration was held nonarbitrable, by noting that in *Milk Drivers* the severance pay provision contained a promise only to "negotiate" severance pay. Under such a provision, "nothing could accrue." 78 Lab. Cas. at 20,199 n.7. It appears that the union in *Milk Drivers* failed even to claim that rights had vested. *See* Brief for Appellant at 17 n.4, Local 358, Bakery & Confectionary Workers v. Nolde Bros., 78 Lab. Cas. ¶ 11,221 (4th Cir. 1975). Judge Craven did not rely on this; rather, he said that in *Milk Drivers* "there was no room for an argument" that the parties had intended severance pay rights to vest, 78 Lab. Cas. at 20,199 n.7, which suggests that he thought that even if the union had made such a claim, it would not have been sufficient for a holding of arbitrability.

[34] It is possible that in distinguishing between disputes involving "accruable" rights and those involving "nonaccruable" rights, Judge Craven was merely categorizing previous post-expiration cases according to whether the party seeking arbitration claimed that the disputed rights vested during the term of the agreement. If this was all he intended, then his discussion of accruability is consistent with the first interpretation of his opinion.

by the court that such rights could have vested sufficient for a holding of arbitrability. His statement that "only those rights . . . that employees earn and that may or may not 'vest' " [35] are arbitrable suggests that a court must find that the disputed rights had actually accrued under the agreement.[36]

Each of these views concerning the requirements for a holding of arbitrability implies a different division of responsibility between the court and the arbitrator in resolving the three issues raised in Judge Aldrich's opinion.[37] The argument that the disputed right must have accrued has some initial appeal, for if Judge Craven intended to require a finding that the rights upon which the grievance is based clearly arose during the term of the agreement, *Nolde* would be analogous to previous cases that found a duty to arbitrate because the events upon which the grievance was based clearly occurred during the term of the agreement.[38] However, this argument ultimately fails. Although its premise is that rights need not vest as they accrue, and that whether the parties intended them to vest remains to be decided by the arbitrator, the argument still requires consideration of the inherent nature of the rights under dispute and thus impinges upon the province of the arbitrator as sole interpreter of the substantive terms of the agreement.[39] On the one hand, if the court finds that the union has failed to prove this element of its case (i.e., that the rights had accrued), a grievance that the arbitrator might have decided for the union [40] will be prevented from reaching arbitration. On the other hand, if the court sends the grievance to the arbitrator because of its finding that the

[35] 78 Lab. Cas. at 20,199. While the union equated earned rights and vested rights, *see id.* at 20,196; Brief for Appellants at 19–20, the statement quoted in text suggests that Judge Craven did not accept this contention. Rather, he appears to have implicitly equated "earn" with "accrue:" *Id.* at 20,199 & n.7; *see* note 28 *supra.*

[36] However, given Judge Craven's criticism of the district court for making a finding as to the inherent nature of severance pay, *see id.* at 20,196–97, it is unlikely that he intended to base his holding of arbitrability on the "earned" nature of the contested rights.

[37] *See* p. 814 *supra.*

[38] *Compare* Item Co. v. New Orleans Newspaper Guild, 256 F.2d 855 (5th Cir.) (discharge occurring before contract expiration is arbitrable), *cert. denied,* 358 U.S. 867 (1958), *with* Procter & Gamble Ind. Union v. Procter & Gamble Mfg. Co., 312 F.2d 181 (2d Cir. 1962) (arbitration not required where grievance based on events occurring after term of agreement), *cert. denied,* 374 U.S. 830 (1963).

[39] *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960).

[40] Arbitrators may well approach interpretation of a collective bargaining agreement differently than do courts. *See* United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 581–82 (1960).

contested rights had accrued, the arbitrator would still be precluded from considering the second issue raised by Judge Aldrich: whether the contested rights in fact arose under the agreement and therefore were subject to its arbitration provision.[41]

If, however, Judge Craven intended only that the court must find the contested rights accruable, that is, that the claim of vesting is colorable,[42] the effect of the court's holding is less severe. Should the court determine that the disputed rights are arguably subject to the arbitration provision of the agreement, the arbitrator would be free to decide otherwise. But if the court rejects the union's claim of accruability, it is still possible that grievances the arbitrator might have decided for the union will be prevented from reaching arbitration. This judicial determination of colorability seems to conflict with the Supreme Court's admonition that "the courts . . . have no business weighing the merits of the grievance . . . ." [43]

Under the first interpretation of Judge Craven's opinion — that the union's claim of vesting was all that was required for a holding of arbitrability — both the merits of the claim and the

[41] Several commentators have suggested that the arbitrator is always free to refuse to decide the merits of a grievance. *See, e.g.*, E. Jones, *The Name of the Game is Decision: Some Reflections on "Arbitrability" and "Authority" in Labor Arbitration*, 46 TEXAS L. REV. 865, 879–80 (1968); Aaron, *Judicial Intervention in Labor Arbitration*, 20 STAN. L. REV. 41, 42–43 (1967). *But see* Communications Workers v. Pacific N.W. Bell Tel. Co., 337 F.2d 455 (9th Cir. 1964); Piano Workers Local 2549 v. W.W. Kimball Co., 239 F. Supp. 523 (N.D. Ill. 1965) (on remand). In practice, an arbitrator is bound by a court's holding that a given dispute is arbitrable only if his award would be vacated or altered by an enforcement court on the ground that he did not abide by the determinations made by an earlier court in finding the dispute arbitrable. There exists little, if any, case law on this issue, probably because an arbitrator who disagreed with a court's determinations would not explicitly base his decision on this disagreement. *Cf.* Smith & D. Jones, *supra* note 29, at 761, 787 (if arbitrator writes his opinion as if deciding merits, legal and practical result does not depend upon whether arbitrator denies grievance on grounds of arbitrability or on the merits).

[42] Assuming that accrual of severance pay rights during the term of the agreement is a prerequisite for vesting of those rights before expiration, a finding that the parties could have intended that the rights accrue, i.e., that the rights were "accruable," would assure that the claim of vesting has potential merit, or is "colorable."

[43] United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960); *see* Smith and D. Jones, *supra* note 29, at 785. *But cf.* John Wiley & Sons v. Livingston, 376 U.S. 543, 555 & n.8 (in finding rights to severance pay arbitrable even after expiration, Court pointed out that there existed "possibility" that such rights had accrued during agreement). It is not clear whether the Court thought it *necessary* that such rights be found accruable or whether it was merely noting accruability as support for its conclusion that "[i]t is *sufficient* . . . that the union's demands are not so plainly unreasonable that . . . the dispute must be regarded as nonarbitrable because it can be seen in advance that no award to the union could receive judicial sanction." *Id.* at 555 (emphasis added).

question whether the grievance is subject to the arbitration clause are preserved for the arbitrator. This view seems most consistent with the standard of arbitrability enunciated by the Supreme Court. If "[t]he function of the court is . . . confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract," [44] then the arbitrator should be able to decide whether the grievance is in fact encompassed by the arbitration provision.[45] In setting forth a low threshold for arbitrability, the Court emphasized both the unique expertise of the arbitrator and the fundamental difference between the arbitrator's mode of interpretation of a collective bargaining agreement and a court's interpretation of contract language.[46] If indeed it "is the arbitrator's construction [of the agreement] which was bargained for," [47] then when the agreement contains a broad arbitration clause, the courts should preserve for the arbitrator all questions beyond the initial determination that the duty to arbitrate is based on a valid contract.[48]

Yet Judge Craven suggested that since the prior issue of arbitrability had been determined by the court, only the merits of the grievance were reserved for the arbitrator.[49] It is difficult to reconcile this view with either of the first two interpretations of what he thought was required for a holding of arbitrability.[50] If he considered sufficient either the mere claim that rights had vested or a judicial determination that this claim was colorable, then not only the merits but also the suitability of the claim for arbitration should have been reserved for the arbitrator.[51] Because neither of these two interpretations would require the court to find definitively that the grievance was governed by the

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[44] United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567–68 (1960). *See also* United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 581, 582–83 (1960).

[45] *See* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 801 (1973); Gregory, *Enforcement of Collective Agreements by Arbitration*, 48 VA. L. REV. 883, 888 (1962); E. Jones, *supra* note 41, at 881.

[46] United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 580–82 (1960).

[47] United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960). *See also* note 40 *supra*.

[48] *See* Smith & D. Jones, *supra* note 29, at 782–88. *See also* Feller, *supra* note 45, at 800–01 (because arbitration is not merely alternative forum for adjudicating contract claim, but is "performance of the only promise made [by an employer]," premise of superior expertise of arbitrator is not necessary for rule that all grievances purportedly based on contract should be referred to arbitration).

[49] *See* p. 815 *supra*.

[50] *See id.*

[51] *See* p. 818 *supra*.

agreement, Judge Craven's suggestion that only the merits remain for the arbitrator seems to force the employer to proceed to the merits of a dispute that the parties may not have intended to be subject to arbitration.[52] Under the third interpretation, a court would be required to find that the grievance was governed by the contract, which is consistent with the view that the only issue for resolution in arbitration is final determination of the merits of the dispute.[53] It is doubtful, however, that Judge Craven intended this result [54] or that it is correct under the standard of arbitrability established in the *Steelworkers Trilogy*.[55]

Because of the ambiguity of the opinions in *Nolde*, the court was not successful in communicating to the arbitrator or to the parties whether they had to proceed directly to the merits of the severance pay dispute. But whatever issues remain open to the arbitrator, the effect of the court's opinion is to require Nolde Brothers to submit to arbitration a dispute that did not arise until the union had terminated the collective bargaining agreement [56] and the employer had ceased operations.[57] The appropriateness of obligating the employer to arbitrate when the union has no reciprocal obligation not to strike,[58] and when the employ-

[52] Criticism of Judge Craven for this apparent gap between what a court should decide and what an arbitrator should decide may be unwarranted, for the same ambiguity may be found in the *Steelworkers Trilogy*. While setting forth a low threshold of arbitrability for the courts, the Supreme Court also asserted that "the question of arbitrability is for the courts to decide," United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 583 n.7 (1960); *see id.* at 581–83.

[53] *See* p. 817 *supra*.

[54] *See* note 36 *supra*.

[55] *See* p. 819 *supra*.

[56] However, the agreement might as easily have been terminated by the employer, *see* p. 812 *supra*. If an employer were not bound to arbitrate severance pay claims after termination, he could be expected to take advantage of such termination power in anticipation of plant shutdown.

[57] Since none of the opinions in *Nolde* relied on the short period between termination of the agreement and shutdown of the plant, it is not clear what a court would have done if the union had been decertified or had disappeared by the time of plant shutdown. While the Supreme Court has held that an individual employee may sue upon the agreement under § 301(a) of the Labor Management Relations Act, *see* Smith v. Evening News Ass'n, 371 U.S. 195 (1962), it has not decided whether an individual has a right to arbitration in such a situation. Judge Craven suggested that a court might itself decide the merits of a dispute when arbitration is not "available," 78 Lab. Cas. at 20,196. At least one state court has held that an employee has standing to sue for severance pay benefits under an expired agreement. Owens v. Press Publishing Co., 20 N.J. 537, 545–48, 120 A.2d 442, 446–48 (1956). While it has been argued that the only enforceable promise made by an employer is to arbitrate with the union, *see* Feller, *supra* note 45, at 797, 801. The employer should be required to choose between arbitrating with the employee or submitting to judicial resolution. Otherwise, the promise to arbitrate becomes no promise at all when a union fortuitously disappears.

[58] *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957)

ment relationship itself has ended, is questionable. Arbitration as a means of averting strikes and other forms of industrial unrest [59] may serve no purpose in such a situation.[60] Nevertheless, the supposed expertise of the arbitrator in determining what the parties intended in the provisions of the collective bargaining agreement suggests that arbitration should be preferred to judicial resolution, even after expiration and plant shutdown.

("Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike."). *But see* Feller, *supra* note 45, at 797–98 (arbitration and no-strike provisions are not purely reciprocal promises).

[59] *See* United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 578, 580 (1960).

[60] However, if the union bargained for a broad arbitration clause in part because it believed this would require arbitration even after contract expiration, then this obligation of the employer would have served a purpose in achieving a collective agreement and thus in preventing industrial unrest while the agreement remained in effect.