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Ramona Mariani

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LABOR LAW—POST-EXPIRATION ARBITRABILITY UNDER COLLECTIVE BARGAINING AGREEMENTS IN THE THIRD CIRCUIT

Luden's Inc. v. Local Union No. 6

I. INTRODUCTION

The collective bargaining agreement (CBA) represents the ultimate compromise effected between a union and management. It contractually defines each party's rights and obligations and, in the event they disagree, substitutes neutral arbitration in place of disruptive labor practices such as strikes and lockouts. Whether such an arbitration clause survives the expiration of a CBA is of critical importance to both employer and em-

1. See Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 580 (1960). In Warrior & Gulf, the United States Supreme Court defined a collective bargaining agreement as:

an effort to erect a system of industrial self-government. When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability pre-exists the negotiations. Rather it is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces. The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time.

Id.; see also Archibald Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1498-99 (1959) (commenting that collective bargaining agreement is document that union and employees use to impose limits and express restrictions upon management).

2. See Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957). In Lincoln Mills, the Court found that the congressional intent was to promote the collective bargaining process in an attempt to avoid the more radical remedy of strikes. Id. at 453. Further, the Court held that the agreement to arbitrate grievance disputes is the quid pro quo for a no-strike clause in a collective bargaining agreement. Id. at 455. Thus, the Court found that federal policy favors arbitration as a method of preserving industrial peace. Id.; see also Boys Markets, Inc. v. Retail Clerks' Union, Local 770, 998 U.S. 235 (1970). In Boys Markets, the Court considered the appropriateness of injunctive relief under § 301(a) of the Labor Management Relations Act of 1947. Id. at 237-38. As a practical matter, the Court found that any incentive for employers to enter into CBAs is dissipated if the no-strike clause cannot be enforced. Id. at 248. In fact, the Court believed that the purpose of arbitration procedures is to replace traditional mechanisms of dispute resolution such as strikes, lockouts or other self-help measures. Id. at 249. Finally, finding that Congress attached great importance to voluntary settlement of labor disputes without resort to self-help, the Court concluded that injunctive relief was an appropriate measure when a union strikes in violation of the no-strike provision contained in the collective bargaining agreement. Id. at 252-53.
ployee. If, for instance, the clause does not survive and no duty to arbitrate exists, then employees' remedies are severely curtailed. Nevertheless, employers reasonably object to being held liable to arbitration under the terms of an expired agreement. In *Litton Financial Printing Division v. NLRB*, the United States Supreme Court reversed settled principles of dispute resolution by suggesting that the courts look to the merits of claims arising under expired CBAs to determine their arbitrability. By utilizing this new approach the Court resolved the underlying claim

3. See John F. Corcoran, *The Arbitrability of Labor Grievances that Arise After Expiration of the Collective Bargaining Agreement*, 43 Syracuse L. Rev. 1073 (1993). After first noting that the goal of reducing industrial strife has led to the federal policy favoring arbitration, Corcoran urges Congress to enact legislation extending the duty to arbitrate in the post-expiration period. *Id.* at 1091. He argues for this result because arbitrators are presumed to have greater competence in interpreting collective bargaining agreements than the courts, and arbitration furthers the parties' presumed objectives in creating the collective bargaining agreement. *Id.*

4. See Corcoran, *supra* note 3, at 1077 (noting that arbitration is relied upon in lieu of resort to "ultimate economic weapon," the strike). Once the arbitral stage is removed from the grievance procedure, the dispute is actually less likely to be mutually or impartially resolved. *Id.* at 1079. Corcoran finds arbitration analogous to the heart of a living organism. *Id.* Once the heart is removed, the remainder of the body cannot function. *Id.* Arbitration agreements are intended to lead to joint resolution of disputes between labor and management by "an impartial third-party — the arbitrator." *Id.* Thus, Corcoran finds that removing arbitration from the process reduces the likelihood that impartial settlements can be reached. *Id.* The effect on employees is to reduce peaceful means of resolving labor disputes. *Id.*

5. See Nolde Bros. v. Local No. 358, Bakery & Confectionary Workers Union, 430 U.S. 243, 250 (1977). In *Nolde*, the employer argued that because the duty to arbitrate was strictly a creature of the contract, it necessarily expired with the collective bargaining contract. *Id.* The employer stressed that numerous prior decisions of the Supreme Court established the proposition that "arbitration is a matter of contract and [that] a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Id.* (quoting Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)); see Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 374 (1974) (holding that party cannot be compelled to submit grievance to arbitration without contracting to do so); John Wiley & Sons v. Livingston, 376 U.S. 543, 547 (1964) (same); Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241 (1962) (same). Hence, *Nolde* argued that forcing the employer to arbitration would run contrary to federal labor policy of prohibiting compulsory arbitration unless the parties are bound by an arbitration agreement. *Id.* While the *Nolde* Court did not disagree with the employers' contention, it found it inapplicable in this instance because the dispute in question arose under the contract's terms and thus was one the parties had agreed to arbitrate. *Id.* at 252.


7. *Id.* The decision in *Litton* purported merely to interpret the Court's previous decision in *Nolde*. *Id.* at 193. However, the Court's holding concerning the need to review the merits of the underlying dispute far exceeded the scope of the original *Nolde* decision. See *id.* at 218 (Stevens, J., dissenting) (finding that Court erred in reaching merits of issue rather than arbitrator).
presented in Litton. Consequently, the Court usurped the ultimate function of the arbitrator.

Recently the United States Court of Appeals for the Third Circuit, in Luden's Inc. v. Local Union No. 6, provided a novel ruling on this issue. The Third Circuit avoided a Litton review on the merits of the underlying claim and instead applied contract theory to find that an implied-in-fact contract survived the expiration of the CBA. Because the Luden's court found the arbitration clause in effect under the surviving implied-in-fact contract, the arbitrator was ultimately free to rule on the merits of the underlying claim.

8. See id. at 211 (Marshall, J., dissenting) (finding majority decision contrary to prior decision announced in Nolde and to labor law policy of leaving determination on underlying merits of claim to arbitrator). For a discussion of the facts and circumstances resulting in litigation in Litton, see infra note 63.

9. Id. at 213 (Marshall, J., dissenting) (criticizing majority for fearing that arbitrators cannot decide issue correctly).

Commentators have severely criticized the majority’s decision. See Corcoran, supra note 3, at 1085-86 (arguing that Litton Court misinterpreted previous Nolde decision, narrowed applicable standard concerning when arbitrable grievances survive expiration of CBA, and immediately misapplied its own new test); see also Clyde W. Summers, The Trilogy and its Offspring Revisited: It's a Contract, Stupid, 71 Wash. U. L.Q. 1021, 1091-92 (1993) (commenting that Litton was inconsistent with contract analysis and previous policies established by Court); Michael J. Harley, Survey, A More Rigorous Standard for Post-Expiration Enforcement of Arbitration Clauses: Litton Financial Printing v. NLRB, 33 B.C. L. Rev. 351, 357-58 (1992) (arguing that because no clear standard emerges from Litton, each situation will have to be decided on case-by-case basis). Hartley further contends that the Litton decision may actually spawn new litigation because the Court determined the bases under which arbitration could survive in very general terms, leaving parties plenty of room for future argument. Id.

For a more favorable analysis of the Litton decision, see Diane Fox, Litton v. NLRB: Evolution of the Post-Expiration Duty to Arbitrate Grievances, 9 Ohio St. J. on Disp. Resol. 161 (1995). Fox contends that Litton provided much needed clarification for lower courts concerning the arbitrability of disputes under expired CBAs. Id. at 161.

10. 28 F.3d 347 (3d Cir. 1994).

11. Id. at 354. For a discussion of the Third Circuit's application of contract law to the expired CBA, see infra notes 115-16 and accompanying text.

12. Id. at 354 (applying implied-in-fact contract theory to avoid looking at merits of underlying claim). The application of contract theory to resolve questions arising under CBAs is not unique to Luden's; however, it is not an approach wholly endorsed by the Supreme Court. Compare Teamsters Local v. Lucas Flour Co., 369 U.S. 95, 105 (1962) (holding that strike to settle dispute when CBA instead mandates arbitration violates accepted principles of traditional contract law) with Steelworkers v. American Mfg. Co., 363 U.S. 564, 567 (1960) (criticizing decisions of lower courts for being overly preoccupied with contract law when reviewing arbitrability under CBAs).

Commentators contend that the Supreme Court's earlier decisions, for historical reasons, tend to obscure the underlying contract principles that may actually provide a helpful framework for understanding those decisions. See Summers, supra note 9, at 1027. For example, Summers argues that the language the Court used in many decisions extolling arbitration and arbitrators was unnecessary. Id. at 1029. Under the contractual framework, the only question is what forum the par-
This Casebrief considers the Third Circuit's unique theory and approach as contrasted with other circuits' interpretations of the applicable Supreme Court precedent. The next section summarizes the basic case law concerning whether and when a duty to arbitrate survives an expired CBA. Section III discusses the Third Circuit's approach in *Luden's* in light of Supreme Court precedent and the express policies driving the development of federal labor law. Additionally, the third section considers potential problems in the application of the Third Circuit's implied-in-fact contract theory. Finally, Section IV summarizes how an implied-in-fact contract is established after the expiration of a collective bargaining agreement.

II. BACKGROUND

A. The Policies Driving Promulgation of the National Labor Relations Act

The National Labor Relations Act (NLRA) was enacted in 1935 with the express intention of promoting industrial peace. The Supreme Court found this goal to be the defining policy behind the NLRA and a strong influence on the ensuing case law. Because the NLRA and the

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.


The NLRA was enacted based on the constitutional theory that statutory regulation was necessary to diminish industrial strife, because such strife posed a threat to interstate commerce. WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 28 (3d ed. 1993). Both the NLRA and the subsequently enacted Taft-Hartley
subsequent modifications added by the Taft-Hartley Act provide only a framework for industrial relations, rather than a precise guide, judicial decisions are of paramount importance in determining the outcome in labor disputes.\footnote{ARCHIBALD Cox ET AL., CASES AND MATERIALS ON LABOR LAW 87 (11th ed. 1991). The NLRA was intended to provide a framework for industrial relations, not a complete code. \textit{Id.} at 31. Gould notes that the Supreme Court, in interpreting the language of the Taft-Hartley Act, has held that Congress intended to promote the arbitration process. \textit{Id.} at 141.}

In \textit{Textile Workers Union v. Lincoln Mills},\footnote{353 U.S. 448 (1957).} the Supreme Court construed section 301 of the Labor Management Relations Act (LMRA) as empowering the federal courts to develop a federal common law in suits arising under CBAs.\footnote{\textit{Id.} at 451. In \textit{Lincoln Mills}, the Court held that § 301 of the LMRA authorizes federal courts to fashion substantive federal law for the enforcement of collective bargaining agreements. \textit{Id.} Reading § 301(a) and § 301(b) together, the Court noted that § 301(b) provided the procedural remedy, thus, § 301(a) did something more. \textit{Id.} While the Court found the legislative history behind § 301 both "cloudy and confusing," overall the Court held that it supported the inference that the Congressional intent was to authorize a federal policy of using federal courts to enforce CBAs. \textit{Id.} at 452-55. Coining the now-famous phrase that "the agreement to arbitrate grievance disputes was considered as quid pro quo of a no-strike agreement," the Court noted that the failure to arbitrate was "not a part and parcel of the abuses against which the Norris-LaGuardia Act was aimed." \textit{Id.} at} amendments (Taft-Hartley Act) intended to define the role of the courts and the National Labor Relations Board in labor relations. \textit{Id.} at 31. Gould notes that the Supreme Court, in interpreting the language of the Taft-Hartley Act, has held that Congress intended to promote the arbitration process. \textit{Id.} at 141.

As originally enacted in 1935, the NLRA, also called the Wagner Act, focused on protecting employees' and unions' right to organize in the face of tyrannical and often violent repercussions from employers. \textit{See} § 7, 49 Stat. at 452 (codified as amended at 29 U.S.C. § 157). Section 7 of the Wagner Act provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." \textit{Id.}

The Taft-Hartley Amendments, enacted in 1947, were promulgated to protect employers and employees from overreaching unions; thus, Taft-Hartley supplemented the original language of the Wagner Act. \textit{See} 29 U.S.C. § 157. Under the original Wagner Act, § 7, shown above, ended with the word "protection;" the Taft-Hartley Amendments added language stating "and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." Labor Management Relations Act, Pub. L. No. 80-101, § 101, 61 Stat. 136, 140 (1947) (codified at 29 U.S.C. § 157).

In 1947, Congress also promulgated the Labor Management Relations Act (LMRA). \textit{See} 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-197 (1994)). The LMRA's stated purpose was to provide the procedural mechanisms by which employees and employers could exercise their statutory rights under the NLRA. \textit{See} 29 U.S.C. § 141. Section 301 of the LMRA, for example, vests jurisdiction for suits involving contract disputes in federal district courts. § 301, 61 Stat. at 156 (codified at 29 U.S.C. § 185).

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putes over whether federal courts should apply federal or state law in deciding such suits.\footnote{Lincoln Mills, 353 U.S. at 450-51.} Specifically, in \textit{Lincoln Mills}, the Court held that federal law should apply and should be fashioned from the policies of the NLRA.\footnote{Lincoln Mills, 353 U.S. at 456.}

Subsequently, in the trilogy of Steelworkers cases (\textit{Steelworkers Trilogy}), the Supreme Court identified four principles, all arising from the general NLRA policy, to guide courts when determining whether a labor dispute is arbitrable.\footnote{Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 598 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); \textit{see also} Cumberland Typographical
ance to arbitration. Second, the question of whether the parties have agreed to arbitrate is for the courts to decide. Under the third principle, the courts cannot weigh the merits of the underlying substantive claim. Thus, even when an employer argues that the claim advanced is

Union 244 v. Times & Alleganian Co., 943 F.2d 401 (4th Cir. 1991) (providing good summary and example of application of four Steelworkers Trilogy principles). In the Steelworkers Trilogy, the Supreme Court addressed questions left unanswered by Lincoln Mills concerning what the courts' role should be concerning arbitration. See Gould, supra note 18, at 141. In making that determination, the Court looked to previous judicial decisions. Id. at 142. At that time, the leading case was from the New York Court of Appeals, where the court, in interpreting the CBA, decided the case on the underlying merits. Id. In the Steelworkers Trilogy, the Supreme Court reacted out of concern that a detailed examination of the merits of the underlying dispute would deprive the parties of their bargain that the arbitrator should have jurisdiction over such matters. Id. In an analysis of these decisions, Professor Summers identified an additional concern that once courts meddled in the underlying merits of the disputes, they would become unduly burdened by such cases. Summers, supra note 9, at 1026.


25. Warrior & Gulf, 363 U.S. at 582. The Court held that "[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Id.; see also, Carbon Fuel Co. v. United Mine Workers, 444 U.S. 212, 219 (1979) (citing Warrior & Gulf for proposition, that parties cannot be forced to arbitrate in absence of contractual agreement); Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 374 (1974) ("No obligation to arbitrate a labor dispute arises solely by operation of law."); Kingsport Publishing Corp. v. NLRB, 399 F.2d 660, 661 (6th Cir. 1968) (reasoning that despite congressional policy favoring arbitration, duty rests on contractual basis); Proctor & Gamble Indep. Union v. Proctor & Gamble Mfg. Co., 312 F.2d 181, 184 (2d Cir. 1962) (finding duty to arbitrate wholly contractual and courts determine if contract imposes that duty), cert. denied, 374 U.S. 830 (1963).

26. Warrior & Gulf, 363 U.S. at 582. Congress assigned to the courts the responsibility of determining whether the promise to arbitrate has been breached. Id. Arbitration is a matter of contract; thus, a party cannot be compelled to arbitrate a dispute without prior agreement. Id. But, to be consistent with Congressional policy favoring resolution of disputes through arbitration, the judicial inquiry must be confined to the question of whether the reluctant party actually agreed to arbitrate the grievance or to give the arbitrator power to make the award. Id.; see also AT&T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643, 649 (1986) (concluding that arbitrability is unquestionably issue for judicial determination); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557-58 (1964) (concluding that issues of "substantive arbitrability" are for courts to determine and "procedural arbitrability" are for arbitrator to decide). For a more detailed discussion of Warrior & Gulf, see infra note 27.

27. Enterprise Wheel, 363 U.S. at 596. The Supreme Court held that courts should refuse to review the merits of an arbitration award under collective bargaining agreements. Id. The Court reasoned that the federal policy of settling labor disputes by arbitration would be jeopardized if courts had the last say on the merits of the awards. Id. Finally, the Court found that the arbitrator's award is legitimate as long as it draws its essence from the collective bargaining agreement. Id. at 597. In Enterprise Wheel, there was a collective bargaining agreement that provided that "any differences 'as to the meaning and application' of the agreement should
completely unmeritorious, such a decision is for the arbitrator to make, not for the court. Finally, under the fourth principle, when doubt exists,

be submitted to arbitration and that the arbitrator's decision 'shall be final and binding on the parties.' " Id. at 594. Further, special provisions contained in the following passage governed the suspension and discharge of employees:

Should it be determined by the Company or by an arbitrator in accordance with the grievance procedure that the employee has been suspended unjustly or discharged in violation of the provisions of this Agreement, the Company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for the time lost.

Id. A group of employees left their jobs protesting another employee's discharge. Id. at 595. The arbitrator found the employee's discharge unjustified. Id. As a remedy, he awarded reinstatement with back pay, minus pay for a 10-day suspension and whatever other sums the employee earned from other employment. Id.

The employer refused to comply with the award. Id. The district court directed the employer to comply. Id. The United States Court of Appeals for the Fourth Circuit held that the award was unenforceable due to the failure of the arbitrator to specify the amounts to be deducted from back pay. Id. at 596. In addition, the Fourth Circuit held that because the CBA subsequently expired, neither back pay nor reinstatement could be enforced after its termination. Id. The Supreme Court reversed, holding that mere ambiguity in the opinion accompanying an award is not a sufficient reason for refusing to enforce the award. Id. at 598. Further, the Court noted that the Fourth Circuit's opinion pertaining to reinstatement and partial back pay was not based on any finding that the arbitrator did not premise his award on the construction of the contract. Id. Rather, the Fourth Circuit merely disagreed with the arbitrator's construction. Id. That reasoning amounted to an impermissible review of the merits of the arbitrator's decision, thus, rendering meaningless the provisions in the contract making the arbitrator's decision final. Id. at 599.

In Warrior & Gulf, the Court reiterated the principle that the arbitrator's decision is not to be reviewed on the merits. 363 U.S. at 585. In doing so, it provided even more deference to the arbitrator, indicating that the arbitrator performs functions not normal to courts; that his source of law is not confined to the express provisions of the contract, but also includes the practices of the industry and the shop; that the arbitrator is chosen because the parties have confidence in his knowledge and personal judgment; and that the ablest of judges cannot be expected to bring the same experience and competence to bear upon the determination of a grievance. Id. at 581-82. The arbitrator's award is to be upheld unless an express provision excludes a particular grievance from arbitration, or the "most forceful evidence of a purpose to exclude the claim from arbitration" is introduced. Id. at 585.

More recently, the Supreme Court applied this deferential standard toward arbitrators' awards in United Paperworkers International Union v. Misco, Inc., 484 U.S. 29 (1987). In this case, the Court again reiterated that the proper approach to arbitration is to refuse to review the award on the merits. Id. at 37-38. A court may not reject an arbitrator's fact-finding or contract interpretation simply because they disagree with it. Id. at 38. Provided that the arbitrator even arguably acts within the scope of his or her authority, even the court's conviction that he or she has committed serious error is insufficient to overturn the decision. Id.

For a discussion of the underlying reasons for the Court's extreme deference to arbitrator's awards, see supra note 24 and accompanying text. For an historical analysis and critique of the Supreme Court's extreme deference toward arbitrators awards in the context of CBAs, see Summers, supra note 9, at 1021.

28. American Mfg., 363 U.S. at 568. The Court found that even the processing of frivolous claims may have therapeutic value. Id.
arbitration clauses should be construed in favor of arbitration. Arbitration is a peaceful mechanism to resolve disputes; therefore, the Court's policy in favor of arbitration furthers the national policy of promoting industrial peace.

Problems arise under the Steelworkers Trilogy formulation when the terms of the CBA are ambiguous. Where such ambiguity exists, the court may be forced to consider whether the disputed issue is one the parties intended to be arbitrable. For example, in United Steelworkers of America v. Yellow Transportation Co., 365 U.S. 589 (1961), the Court held that an arbitration clause was ambiguous and therefore required interpretation by the arbitrator.

29. Warrior & Gulf, 363 U.S. at 578. The inclusion of arbitration provisions in CBAs is a major factor in achieving industrial peace. Id. Apart from matters the parties specifically excluded, all questions on which they disagree must come within the scope of the grievance and arbitration provisions of the CBA. Id. at 581. An order to arbitrate should be granted unless it can be positively stated that the arbitration clause excludes any interpretation that it covers the dispute. Id. at 582-83. Finally, in Warrior & Gulf, the Court stated that "[d]oubts should be resolved in favor of coverage." Id. at 583; see also Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 209 (1991) (acknowledging presumption in favor of arbitrability where effective bargaining agreement exists); Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 78 (1991) (finding court of appeals approach flawed because it failed to consider strong policy favoring peaceful settlement of labor disputes); Nolde Bros., Inc. v. Bakery Workers, 430 U.S. 243, 255 (1977) (Stewart, J., dissenting) (stating that where dispute is over provision in expired agreement "presumptions favoring arbitrability must be negated expressly or by clear implication"); Boys Mkts., Inc. v. Retail Clerks' Union, Local 770, 398 U.S. 235, 251 (1970) (noting that congressional policy promotes peaceful settlement of labor disputes through arbitration).

A comprehensive list of circuit court decisions enforcing the Supreme Court's determination of a presumption of arbitrability can be found in Hardin, supra note 21, at 965-66 nn.67-68.

30. For a discussion of the Supreme Court's application of the national policy furthering industrial peace in relation to arbitration, see supra note 29 and accompanying text.

31. See, e.g., AT&T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643, 653 (1986) (Brennan, J., concurring). The United States Court of Appeals for the Seventh Circuit found that the issue of arbitrability and the merits were the same. Id. (Brennan, J., concurring). Because of this finding, the appellate court reasoned that determining the arbitrability would involve an improper decision on the merits, and concluded that the arbitrability issue should be submitted to the arbitrator. Id. Justice Brennan compared the AT&T Technologies case to Warrior & Gulf, where the dispute also revolved around the meaning of the Management Functions clause. Id. at 653-54 (Brennan, J., concurring). He concluded that the court of appeals erred in reading the Management Functions clause so as to make arbitrability depend on the merits of the parties' dispute. Id. at 654 (Brennan, J., concurring). Justice Brennan reasoned that the real question for the court to decide was whether the parties agreed to submit disputes over the meaning of the contract clauses to arbitration. Id. (Brennan, J., concurring). Because the collective bargaining agreement between AT&T and the union contained a standard, broadly-worded arbitration clause, the Court found that the issue was arbitrable unless expressly excluded elsewhere in the contract, or unless the party opposing arbitration adduced "the most forceful evidence" to that effect. Id. at 655 (Brennan, J., concurring).

32. See id. at 651. The Court held that in these situations it is for the court to determine the question of arbitrability. Id.; see also Litton, 501 U.S. at 208. In Litton, the Court noted that although "doubts should be resolved in favor of coverage," the court must determine whether the parties agreed to arbitrate the dispute...
America v. Warrior & Gulf Navigation Co., the Supreme Court held that under the generic terms of the broadly-worded arbitration clause, claims arising under the contract were arbitrable unless they were either specifically excluded within the contract, or excluded by the most forceful extrinsic evidence. Consequently, a court must delve into the merits of the underlying claim to the extent that the parties may have agreed to exclude that claim from arbitration. To determine this question, courts admit evidence concerning past practice and bargaining history. However, such evidence is often the same evidence that would be offered to prove the merits of the case. Thus, courts experience the most difficulty in applying the law when the question on arbitrability and the question on the merits of the claim are the same.

B. The Duty to Bargain Until Impasse Imposed by the Unilateral Change Doctrine

Once a CBA expires and negotiations over a new CBA commence, an employer cannot unilaterally alter the previously established terms and conditions of employment that are the subjects of mandatory bargaining under section 8(d) of the NLRA. The underlying rationale supporting in question, and that duty cannot be avoided because it requires interpretation of a provision of the bargaining agreement. Id. at 209 (citing AT&T Technologies, 475 U.S. at 650).

34. Id. at 584-85.
35. Id.; see also Summers, supra note 9, at 1028. Professor Summers points out that when a court finds a dispute is not arbitrable, it is tantamount to deciding for the employer on the merits. Id. He also suggests that courts look to the entire agreement as well as to the parties' intent and understanding in entering into the agreement. Id. He points out, for example, that broadly-worded arbitration clauses gives rise to a presumption that the parties prefer arbitration to litigation. Id. at 1029-30.

37. See, e.g., Independent Lift Truck Builders Union v. Hyster Co., 2 F.3d 233, 235 (7th Cir. 1993) (reasoning that inquiries concerning whether grievance is arbitrable and whether grievance has merit both collapse into same inquiry).
38. See id. The Seventh Circuit pointed out that where the two issues collapse into one, the inquiry creates tension between the two doctrines that apply to arbitrability of labor disputes — that on one hand the question of arbitrability is to be decided by the court, and on the other hand, in deciding whether the parties have agreed to submit a grievance to arbitration, a court cannot rule on the merits. Id. at 235-36. In reviewing Litton Financial Printing Division v. NLRB, 501 U.S. 190 (1991), the Seventh Circuit determined that it stood for the proposition that when "the court must, to decide the arbitrability issue, rule on the merits, so be it." Id. at 236.

39. § 8, 49 Stat. at 452 (codified as amended at 29 U.S.C. § 158(d) (1994)). This section provides:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of
the unilateral change doctrine is that if an employer could change the terms and conditions of employment during negotiations, the union would be unfairly disadvantaged. In addition, the NLRA imposes a statu-

the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . . .

Id.

In NLRB v. Katz, 369 U.S. 736 (1962), the Supreme Court held that the duty to bargain collectively imposed by § 8(a)(5) could be violated without a general failure of subjective good faith, if the party refused to bargain at all about the mandatory subjects provided by § 8(d). Id. at 742-43. Thus, an employer's unilateral change in conditions of employment under negotiation is a violation of § 8(a)(5), because it circumvents the duty to negotiate, frustrating the objectives of the statute as much as a flat refusal. Id. at 743; see also Laborer's Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 544 n.6 (1988) ("Freezing the status quo ante after a collective agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract." (quoting Katz, 369 U.S. at 743)).

The Supreme Court provided some enlightenment concerning what constitutes a subject of mandatory bargaining under the NLRA in NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1958). The Court construed the words of § 8(d), concerning the duty to bargain relating to "wages, hours, and other terms and conditions of employment" as words of limitation. Id. at 348-49. Thus, the duty to bargain is limited to those subjects contained in § 8(d), that the Court further defines as areas relating to the employment relationship. Id. at 349-50.

A good example of a non-mandatory subject of bargaining can be found in Borg-Warner, where the Court considered whether or not a "ballot" clause proposed by the company was a mandatory subject of employment. Id. at 350. The clause provided that for nonarbitrable grievances there had to be a secret ballot on the company's last offer taken among all employees before the union could call a strike. Id. at 346. If a majority of the employees rejected the company's last offer, the company had the opportunity to make a new proposal and have a vote on it prior to any strike. Id. The Supreme Court concluded that because the clause actually sought to regulate relations between employees and the union, it was not a subject of mandatory bargaining as defined by § 8(d). Id. at 350.

For a general discussion of the dichotomy between mandatory and permissive bargaining, see Hardin, supra note 21, at 594-96. There are actually three categories of bargaining subjects: mandatory, permissive and illegal. Id. at 594. Mandatory subjects of bargaining are created by § 8(a)(5) and 8(d) and are limited to subjects enumerated in those sections, such as the duty to meet at reasonable times, and to conduct good faith discussion concerning wages, hours, and other terms and conditions of employment. Id. at 595. Permissive subjects include "collective bargaining provisions covering supervisors or agricultural labor, performance bonds, legal-liability clauses, and internal union affairs." Illeg. Illegal subjects are those subjects that are forbidden from the bargaining table. Illeg. at 596. Examples of illegal subjects include "closed-shop provisions, hiring-hall provisions that give preference to union members, 'hot cargo' clauses that violate section 8(e), contract provisions inconsistent with a union's duty to fair representation, and contract clauses that discriminate among employees on invidious bases, such as race, religion, sex, or national origin." Illeg.

40. Katz, 369 U.S. at 747. In Katz, the Court reviewed the three unilateral actions the employer took and found each illustrated the policy and practical considerations behind the rule announced. Id. at 744. First, the company instituted unilateral changes in the sick-leave plan by reducing the number of paid sick-leave
tory obligation on both the union and the employer to bargain in good faith. In sum, the employer has a duty to bargain with the union both in good faith and to impasse. Once those two obligations are satisfied, an employer may only impose unilateral changes after an impasse in negotiations is reached.

Second, the company unilaterally instituted an across-the-board wage increase greater than that previously negotiated by the union. The Court found that the automatic wage increase conclusively demonstrated the company's bad faith in negotiations, because such action was inconsistent with a sincere desire to conclude an agreement with the union.

Finally, the employer unilaterally granted merit increases to 20 out of the 50 employees in the unit. The Court viewed this as tantamount to a refusal to bargain as well. Unlike a simple continuation of the status quo, the merit increases were a drastic change in policy because there was no long-standing practice of granting merit increases. Thus, there was substantial room for negotiation on this topic, which unilateral action by the company foreclosed.

Despite the concern for the union's position evidenced by the Court's earlier decisions, subsequent decisions under the "unilateral change doctrine" have been criticized as unfairly disadvantageous to unions. See James B. Zimarowski, Interpreting Collective Bargaining Agreements: Silence, Ambiguity, and NLRA Section 8(d), 10 INDUS. REL. LJ. 465 (1988). Zimarowski contends that while the classification of mandatory-permissive items is ostensibly neutral, in application, the dichotomy disadvantages labor's bargaining power.

The Supreme Court and lower courts have consistently held that good faith is required under § 8(d). See NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 484-85 (1960) (holding that duty to bargain in good faith is corollary of duty to recognize union); NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152 (1956) (holding that duty to bargain in good faith requires that claims made by either side be honest); NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 402 (1952) (stating that duty to bargain "requires more than a willingness to enter upon a sterile discussion"); NLRB v. A-I King Size Sandwiches, Inc., 732 F.2d 872, 877 (11th Cir.) (noting duty to bargain in good faith), cert. denied, 469 U.S. 1035 (1984).

42. See HARDIN, supra note 21, at 634. Where there are irreconcilable differences in the parties position, the law recognizes the existence of an impasse. Id. at 634-35.

43. Id. at 640. Once impasse occurs, the employer is free to make unilateral changes in working conditions provided that such changes are consistent with offers previously rejected by the Union. Id.
The unilateral change doctrine has both a procedural and a substantive impact. As a procedural matter, cases brought under the unilateral change doctrine revolve around unfair labor practices where primary jurisdiction vests in the NLRB. Thus, if a dispute involves a subject of mandatory bargaining under section 8(d) of the NLRA, it most likely will be an unfair labor practice case as well and cannot be heard in federal district court. In contrast, actions under section 301 of the LMRA, which include actions to compel arbitration, may be brought in federal district court.

Further, as a substantive matter, the NLRB has long recognized that the unilateral change doctrine also extends to the contractual grievance procedure. It is the unresolved grievance that ultimately leads to arbitration, but surprisingly, the NLRB exempts the arbitration clause from the prohibition on unilateral changes. The NLRB reasoned that arbitration

44. For an excellent discussion of the unilateral change doctrine, see Corcoran, supra note 3, at 1077-82.
45. See Hardin, supra note 21, at 28-29. To enforce the substantive provisions of the NLRA, the Wagner Act established the National Labor Relations Board (NLRB) in §§ 3-6 of the NLRA. Id. at 28. Section 10 of the Wagner Act gave the NLRB exclusive jurisdiction over the unfair labor practices defined in § 8 and included provisions for judicial review and court enforcement of NLRB orders. Id. at 28-29. Sections 10(e) and 10(f) vest the authority to review NLRB decisions in the United States Courts of Appeals. § 10, 49 Stat. at 453 (codified as amended at 29 U.S.C. § 160(e),(f) (1994)).
46. See, e.g., Amalgamated Clothing & Textile Workers Union v. Stanbury Uniforms, Inc., 811 F. Supp. 464, 467 (E.D. Mo. 1992) (stating unfair labor practice claims subject to exclusive jurisdiction of the NLRB). For the exact sections of the NLRA vesting such jurisdiction, see supra note 45.
47. See Gould, supra note 18, at 140. Section 301 was intended to make CBAs enforceable in federal courts. Id. Ironically, § 301 of the LMRA was passed out of concern that unruly trade unions were unfaithful to the no-strike provisions negotiated for in CBAs. Id. For a full history and analysis of the impact of § 301, see Hardin, supra note 21, at 957-79.

Because § 301 provides courts with the jurisdiction to enforce collective bargaining agreements, some overlap will occur between the courts and the NLRB in those cases which also involve § 7 or § 8 of the NLRA. Id. at 968-69. The Supreme Court has previously held that "[t]he authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts under § 301." Id. at 969 (citation omitted).
48. See Bethlehem Steel Co., 136 N.L.R.B. 1500, 1503 (1962). The NLRB found that the grievance machinery is "[a] method for presenting and adjusting grievances which deal with 'wages, hours, and other terms and conditions of employment' [so] manifestly related to those matters." Id. at 1502. This determination was subsequently upheld in Indiana & Michigan Elec. Co., 284 N.L.R.B. 53 (1987). For a discussion of the Indiana & Michigan Electric Co. holding, see infra notes 50-51 and accompanying text.
49. Hilton-Davis Chem. Co., 185 N.L.R.B. 241, 242-43 (1970). The NLRB found that the national policy favoring arbitration was not a sufficient inducement to overlook the fact that arbitration is a matter of contract. Id. at 242. Thus, after expiration of a CBA, the parties must continue to seek agreement over terms and conditions of employment, as well as utilize the employee grievance procedure established, but are not required to submit any grievances they are unable to re-
is a consensual surrender of the economic power that the parties are otherwise free to utilize. Thus, if the union is free to strike after the expiration of the CBA, the employer should not be bound to the arbitration provision. The Supreme Court upheld the NLRB's determination that arbitration is properly excluded from the unilateral change doctrine in Litton. Therefore, if the dispute is over the duty to arbitrate, even if the underlying issue involves a subject of mandatory bargaining, the case can be heard in federal district court pursuant to section 301.

C. The Role Policy Plays in Establishing Rights and Duties Under Expired CBAs

The issue of arbitrability after a CBA expires reflects a further refinement in decisional labor law. Courts have uniformly held that it would be manifestly unjust to allow employers to escape arbitration for alleged violations occurring while the CBA was in force merely because the grievance process was protracted until after the contract expired. The difficulty to arbitration. Id. The NLRB seems to draw a distinction between the grievance process, which it refers to as a channel for grievance resolution, and arbitration, which, as the final step in that channel, provides a binding resolution. See id. at 242-43 (noting grievance procedure "channels for resolution of disputes" is followed by binding arbitration if agreement has failed). For a criticism of the distinction drawn between the grievance process and arbitration, see Corcoran, supra note 3, at 1079.

50. Indiana & Michigan Elec. Co., 284 N.L.R.B. 53, (1987). After reviewing legislative history and previous court decisions, the NLRB held: [w]e do not believe that the Court's general formulation in Katz of the requirements imposed by Section 8(a) (5) is applicable to the postexpiration withdrawal from arbitration. To conclude otherwise flies in the face of the specific admonition of the Court and the clear intent of Congress that submission to arbitration is purely a matter of consent and cannot be mandated by operation of the Act. Rather, we find because an agreement to arbitrate is a product of the parties' mutual consent to relinquish economic weapons, such as strikes or lockouts, otherwise available under the Act to resolve disputes, that the duty to arbitrate is sui generis. It cannot be compared to the terms and conditions of employment routinely perpetuated by the constraints of Katz. Id. at 58.

51. Id.

52. See Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 200 (1991). The majority found the NLRB's position rational and consistent with the NLRA, and thus, entitled to deference. Id. (citing Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 42 (1987)). Further, the rule conforms with the Court's previous holdings that the obligation to arbitrate a labor dispute arises solely under the contract. Id.

53. For a discussion of jurisdiction under § 301, see supra note 47 and accompanying text.

54. For a discussion of Supreme Court decisions in the area of post-expiration arbitrability, see infra notes 58-78 and accompanying text.

55. See, e.g., John Wiley & Sons v. Livingston, 376 U.S. 543 (1964). In Wiley, the Court held that a dispute over employees' rights to severance pay under an expired collective bargaining agreement was arbitrable even though there was no longer any contract between the parties. Id. at 547. Likewise, in Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionary Workers Union, 430 U.S. 243 (1977), the
cult cases arise when the parties are in dispute over when the rights and obligations provided under the contract arose. Typically in this situation, the union will argue that the rights either arose or vested during the contract’s terms and the employer will argue that they arose after its expiration.

Court held that the termination of a collective bargaining agreement does not automatically extinguish a party’s duty to arbitrate grievances arising under the contract. In Nolde, the Court noted that, carried to its logical conclusion, such a holding would preclude arbitration of a dispute arising during the life of the contract when arbitration proceedings had not begun before termination of the contract.

The CBA in Nolde contained provisions agreeing “to resolve all disputes by resort to the mandatory grievance-arbitration machinery.” The dispute “would have been subject to resolution under those procedures had it arisen during the contract’s term.” Thus, the Court reasoned, because nothing in the arbitration clause expressly excluded a dispute arising under the contract, but based on events occurring after its termination, there were strong reasons to conclude that the parties did not intend their arbitration duties to terminate automatically with the contract.

Following the principles established by the Supreme Court, the United States Court of Appeals for the Sixth Circuit, in General Drivers v. Malone & Hyde, Inc., 23 F.3d 1039 (6th Cir.), cert. denied, 115 S. Ct. 665 (1994), held that given the national policy favoring arbitration, it would be inconsistent to relieve a party of the duty to arbitrate when the dispute arose while the CBA was in effect, but had not been resolved by the time the CBA expired.

56. See Indiana & Michigan Elec. Co., 284 N.L.R.B. 53, 54 (1987) (describing employer’s argument that grievances in question did not concern rights that vested while contract was in effect and union’s opposing argument). Troubled by the concept that an employer may be perpetually bound to arbitrate terms under an expired CBA, the NLRB sought to limit the duty to arbitrate to grievances arising under the expired agreement.

57. See International Bros. of Teamsters v. Pepsi-Cola, 958 F.2d 1331, 1332-33 (6th Cir. 1992) (examining union contention that grievance arose under terms of expired CBA); Cumberland Typographical Union 244 v. Times, 943 F.2d 401, 405 (4th Cir. 1991) (noting company’s argument that dispute in question did not arise under expired CBA); Amalgamated Clothing & Textile Workers Union v. Stanbury Uniforms Inc., 811 F. Supp. 464, 466-67 (E.D. Mo. 1992) (presenting employer’s argument that agreement terminated on January 1, 1992, and events giving rise to complaint occurred after that date; union argued that even if agreement was not in effect, disputed rights vested or accrued before termination).
In the landmark case of *Nolde Bros. v. Local No. 358, Bakery & Confectionery Workers Union*, the Supreme Court held that severance pay was a right that vested under the contract, and thus, the obligation to arbitrate over when severance pay was due survived the contract's expiration. Thus, disputes arising under the terms of an expired CBA can remain subject to arbitration. In addition, when the parties do not expressly exclude post-termination arbitration, the Court found that the federal policy of favoring dispute resolution by arbitration mandated its continuation. Therefore, the *Nolde* Court established the broad proposition that a grievance hinging on the interpretation of rights arising under an expired contract could be arbitrable notwithstanding the fact that the events giving rise to the grievance occurred after the contract's expiration.

The Court revisited this question in *Litton Financial Printing Division v. NLRB*. In *Litton*, the Court held that because the disputed claim did not "vest" under the contract, like the severance pay had in *Nolde*, the claim

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59. Id. at 252-53. The original CBA providing for the severance pay was terminated on August 27, 1973. Id. at 247. Negotiations continued until August 31, when in response to a threatened strike, the employer informed the union that it was closing the plant effective that day. Id. The employer paid accrued wages, but refused either to pay severance pay under the expired CBA, or to submit to arbitration concerning its obligations under the expired CBA. Id.

60. Id. at 252-53.

61. Id. at 254-55. The *Nolde* Court noted that the "parties drafted their broad arbitration clause against a backdrop of well-established federal labor policy favoring arbitration as the means of resolving disputes" arising under CBAs. Id. at 254. The *Nolde* Court voiced an additional, practical concern that to allow an employer to conclude presumptively that parties did not intend their arbitration duties to terminate automatically with the contract "would permit the employer to cut off all arbitration of severance-pay claims by terminating an existing contract simultaneously with closing business operations." Id. at 253.

62. Id. at 252-53. Justice Marshall subsequently restated the *Nolde* test as "whether (1) the dispute is 'based on ... differing perceptions of a provision of the expired collective-bargaining agreement' or otherwise 'arises under the contract,' and, if so, (2) whether the 'presumptions favoring' arbitrability have been 'negated expressly or by clear implication.' " *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 212 (1991) (Marshall, J., dissenting) (quoting *Nolde*, 430 U.S. at 249-55).

63. 501 U.S. 190 (1991). The dispute in *Litton* concerned whether seniority was a right which could vest under an expired CBA. Id. at 209. The employer and the union entered into a CBA that remained in effect until October 3, 1979. Id. at 193. The CBA contained a broadly-worded arbitration provision providing for a two-step grievance process before submitting the matter to arbitration. Id. at 194. An employee sought decertification of the union shortly before the CBA's expiration. Id. The NLRB conducted an election on August 17, 1979, where the Union prevailed by only one vote. Id. Testing the NLRB's position, Litton refused to bargain with the union. Id. The Board rejected Litton's position, declaring its refusal to bargain an unfair labor practice. Id. In the meantime, Litton decided to eliminate its coldtype operation at the plant, and laid off 10 of the 42 employees in the operation in late August and early September of 1980. Id. "The layoffs occurred without any notice to the Union and included 6 of the 11 most senior employees in the plant." Id.
was not arbitrable after the expiration of the CBA. \(^6^4\) Furthermore, the Court suggested that, under the facts in \textit{Litton}, the question of arbitrability and the question of the underlying merits of the claim were the same. \(^6^5\) This holding caused a conflict between two of the four defining principles laid down under the \textit{Steelworkers Trilogy}: (1) that arbitrability is a question for the court to decide, and (2) that the court should not review the merits of the underlying dispute. \(^6^6\) The \textit{Litton} Court decided that the former principle should take precedence over the latter principle. \(^6^7\) The Court’s primary rationale for this decision apparently rested on a concern that otherwise frivolous suits might ensue. \(^6^8\) Thus in \textit{Litton}, the Court reviewed the merits of the claim first and found that the underlying dispute was not arbitrable under the terms of the expired contract. \(^6^9\)

Contrary to the \textit{Litton} Court’s claim that it merely interpreted \textit{Nolde}, the \textit{Litton} Court narrowed the parameters for when a grievance is arbitrable under an expired CBA. \(^7^0\) Specifically, the Court found that a post-expiration grievance could only “arise under” the contract in three ways: (1) where the facts and circumstances arose before expiration, (2) where the right vested or accrued under the contract, or (3) where the right would survive the expired agreement under general contract interpretation principles. \(^7^1\) In contrast, the \textit{Nolde} Court’s holding could be read far

\begin{itemize}
\item \(^6^4\). \textit{Id.} at 210.
\item \(^6^5\). \textit{Id.} at 209. “[W]e must determine whether the parties agreed to arbitrate this dispute, and we cannot avoid that duty because it requires us to interpret a provision of a bargaining agreement.” \textit{Id.}
\item \(^6^6\). \textit{Id.} at 209-10. For a discussion of the four principles laid out in the \textit{Steelworkers Trilogy}, see \textit{supra} notes 24-30 and accompanying text.
\item \(^6^7\). \textit{See id.} (stating that court must determine arbitrability even if it requires interpretation of bargaining agreement).
\item \(^6^8\). \textit{Id.} While acknowledging the presumption in favor of arbitrability when an effective CBA exists and the agreement contains a broad arbitration clause, the \textit{Litton} Court “refused to apply that presumption wholesale” out of concern that “to do so would make limitless the contractual obligation to arbitrate.” \textit{Id.} at 209.
\item Professor Summers notes that the Court apparently feared that applying the presumption in favor of arbitration in the context of an expired CBA would give rise to unlimited frivolous claims. Summers, \textit{supra} note 9, at 1032. But, as he points out, frivolous claims may be raised without limit while the CBA is in force. \textit{Id.} In fact, the Supreme Court has found that resolving such apparently frivolous claims through arbitration may have some therapeutic value. \textit{Id.} Summers argues that because the obligation to arbitrate is controlled by the parties, they should dictate whether courts or arbitrators should decide the merit of post-agreement claims. \textit{Id.}
\item \(^6^9\). \textit{Litton}, 501 U.S. at 210. The Court noted that the order of layoffs under the agreement looked first to aptitude and ability. \textit{Id.} Only when those factors were equal was the employer obliged to consider seniority. \textit{Id.} The Court reasoned that because such factors as aptitude and ability do not remain constant, but change over time, they cannot be considered to vest or to accrue as a form of deferred compensation. \textit{Id.}
\item \(^7^0\). \textit{Id.} at 205-06.
\item \(^7^1\). \textit{Id.} at 206.
\end{itemize}
more broadly to incorporate any grievance where resolution of the claim depended on the interpretation given the expired contract.\textsuperscript{72}

The Supreme Court's holding in \textit{Litton} has generated confusion among the circuit courts concerning when a court should consider the underlying merits of a dispute.\textsuperscript{73} Courts confronted with similar issues in cases decided after \textit{Litton} have interpreted the decision in three ways.\textsuperscript{74} The United States Courts of Appeals for the Fourth and Sixth Circuits, as well as the federal district courts that have considered the question, interpreted \textit{Litton} as requiring courts to look to the merits in every situation in order to determine arbitrability under expired CBAs.\textsuperscript{75} The United States Court of Appeals for the Seventh Circuit, however, interpreted \textit{Litton} to hold that a court should look to the merits of the underlying dispute only when the question of arbitrability and the question on the merits collapse.\textsuperscript{76} Finally, the Third Circuit, in an entirely unique approach, held

\textsuperscript{72} Id. at 212 (Marshall, J., dissenting). Justice Marshall argued that the majority grossly distorted the \textit{Nolde} test for arbitrability when it held that the first requirement was that post-termination disputes arise under the expired contract. \textit{Id.} (Marshall, J., dissenting). Under \textit{Nolde}, a dispute arises under the agreement when the resolution of the claim “hinges on the interpretation ultimately given the contract.” \textit{Id.} (Marshall, J., dissenting). By specifically identifying that a post-expiration grievance can only be said to arise under the agreement where the challenged action infringes a right accrued or vested under the agreement, or under normal principles of contract interpretation, Justice Marshall argued that the majority forces courts to review these substantive questions by passing on the merits. \textit{Id.} (Marshall, J., dissenting).

\textsuperscript{73} For a discussion of the cases decided after \textit{Litton} and their differing interpretations of the \textit{Litton} decision, see infra notes 74-78 and accompanying text. These differences arise due to the lack of clarity many courts find in the \textit{Litton} decision. See Luden's Inc. v. Local Union No. 6, 28 F.3d 347, 353 (3d Cir. 1994) (noting that tension between \textit{Nolde} and \textit{Litton} breeds uncertainty in labor law); Independent Lift Truck Builders Union v. Hyster Co., 2 F.3d 233, 236 (7th Cir. 1993) (noting that reasoning in \textit{Litton} is less than clear before concluding that court may decide merits of underlying dispute when that issue collapses with inquiry into arbitrability); Winery, Distillery & Allied Workers Local 186 v. Guild Wineries & Distilleries, 812 F. Supp. 1035, 1036 (N.D. Cal. 1993) (asserting that \textit{Litton} Court came close to overruling \textit{Nolde} and seriously weakened presumption in favor of arbitrability).

\textsuperscript{74} For a discussion of the cases decided after \textit{Litton}, see infra notes 75-78 and accompanying text.

\textsuperscript{75} See International Bros. of Teamsters v. Pepsi-Cola, 954 F.2d 1381, 1383 (6th Cir. 1992) (citing \textit{Litton} for proposition that in context of expired CBA, court must determine whether parties intended to arbitrate dispute even if doing so requires court to interpret provision of expired agreement); Cumberland Typographical Union 244 v. Times, 943 F.2d 401, 406 (4th Cir. 1991) (holding dispute arbitrable after examining contract provisions because wages vested under expired agreement); Amalgamated Clothing & Textile Workers Union v. Stanbury Uniforms, Inc., 811 F. Supp. 464, 467-68 (E.D. Mo. 1992) (finding claim not arbitrable after looking to merits and citing \textit{Litton}).

\textsuperscript{76} Hyster, 2 F.3d at 236. The court cited \textit{Litton} for the proposition that the policy of courts determining arbitrability takes precedence over the policy that courts must not rule on the underlying merits of the dispute. \textit{Id.} (citing \textit{Litton}, 501 U.S. at 209). Therefore, the Seventh Circuit reasoned that if the issue of arbi-
that after a CBA expires, an implied-in-fact contract can arise. This approach enabled the Third Circuit to narrow the issue to whether the arbitration clause survived the implied contract and, thus, avoid reviewing the merits of the dispute.

III. The Third Circuit’s Luden’s Resolution

A. The Rule Announced in Luden’s Conforms with Supreme Court Precedent and Compares Favorably with the Procedure Used in Other Circuit Courts

In Luden’s Inc. v. Local Union No. 6, the Third Circuit confronted the typical case concerning whether an arbitration clause survived the expiration of the CBA. At trial, the district court, interpreting the Supreme Court’s Litton decision as instructing courts to construe the contractual terms of the CBA in question, held that Luden’s did not have to arbitrate the dispute. The Third Circuit, by adopting the implied-in-fact contract theory, avoided that result.

trability cannot be determined without also ruling on the merits, then the court must do so. Id.

77. Luden’s, 28 F.3d at 349. For a discussion of Luden’s implied-in-fact contract theory, see infra notes 82-85 and accompanying text.

78. Id. at 354. The implied-in-fact contract theory allows the court to avoid the tension between Nolde and Litton. Id. Using this theory courts need only look to whether the arbitration clause was encompassed in the implied-in-fact CBA. Id. at 361.

79. 28 F.3d 347 (3d Cir. 1994). The dispute arose over the retroactivity of wages under the terms of an expired CBA. Id. at 349. On May 1, 1988, Luden’s and the union executed a CBA (1988 CBA). Id. The 1988 CBA contained a clause entitled “Duration of Agreement” which provided:

This Agreement shall be and remain in full force and effect for a period of three (3) years until and including April 29, 1991, and thereafter, until a new agreement, the wage clause of which shall be retroactive to the above given date, has been consummated and signed, or until this Agreement, upon sixty (60) days notice in writing, has been terminated by the Union with the sanction of the Bakery, Confectionery and Tobacco Workers’ International Union of America or has been terminated by the Company.

Id. at 349-50. In addition, the 1988 CBA incorporated a tiered grievance procedure culminating in final and binding arbitration. Id. at 350. Prior to the expiration of the 1988 CBA, the parties began negotiations on a new CBA. Id. The parties agreed on substantially all terms for the new CBA with the exception of the retroactivity of the wage scale. Id. at 351. The union invoked the grievance and arbitration procedure provided by the 1988 CBA. Id. Luden’s then brought an action in the United States District Court for the Eastern District of Pennsylvania seeking a declaratory judgment that the retroactivity of wages under the expired 1988 CBA was not arbitrable. Id.

80. Id. at 352-53.

81. Id. at 354. The Third Circuit ruled that it did not have to consider the conflicting rules in Litton and Nolde because Luden’s contractual duty to arbitrate grievances never completely lapsed. Id.
The general theory relied on by the Third Circuit was that implied-in-fact CBAs have sure footing both in contract law and federal labor policy. The court noted that general contract law both recognizes and enforces implied-in-fact contracts. Moreover, it found that an implied-in-fact CBA is compatible with the goals of federal labor policy. Finally, the Third Circuit noted that the implied-in-fact contract theory is consistent with the Supreme Court’s holding in Litton, because both parties are free to modify the arbitration clause unilaterally after the lapse of the CBA.

The Luden’s decision purports to resolve the tension between the two main precedential cases, Nolde and Litton, by providing a reasonable alter-
The Third Circuit read \textit{Nolde} to hold that courts should order arbitration under expired CBAs if the CBA potentially affected the issue in dispute.\textsuperscript{87} Thus, the Third Circuit found \textit{Litton} at odds with \textit{Nolde} because under the \textit{Litton} decision, courts must decide if the expired CBA actually creates the obligation in dispute in order to determine arbitrability.\textsuperscript{88}

The majority of courts confronted with the question of arbitrability under an expired CBA have construed \textit{Litton} in the same manner as the Third Circuit.\textsuperscript{89} The exception is the Seventh Circuit.\textsuperscript{90} Specifically, in \textit{Independent Lift Truck Builders Union v. Hyster Co.},\textsuperscript{91} the Seventh Circuit held that \textit{Litton} applies only where the question of arbitrability and the question of the merits of the underlying issue collapse into one.\textsuperscript{92} The \textit{Hyster} court’s interpretation of \textit{Litton} is perhaps the most logical. Under its interpretation, the dual doctrines that govern the question of arbitrability but not the merits survive intact in all but a few, limited situations.\textsuperscript{93}

The problem is that courts may experience difficulty in applying the \textit{Hyster} interpretation because under it, arguably, the \textit{Litton} Court immediately misapplied its own test.\textsuperscript{94} A review of a few of the leading cases illus-

\begin{itemize}
\item \textsuperscript{86} See id. at 354 (stating that \textit{Litton} holding is in contradistinction to \textit{Nolde}).
\item \textsuperscript{87} Id. at 353. The Third Circuit interpreted the \textit{Nolde} holding to mean “that courts are not to reach the merits of the dispute, but instead are to order arbitration if the lapsed CBA arguably creates the obligation at the center of the grievance.” Id.
\item \textsuperscript{88} Id. at 354. The Third Circuit construed \textit{Litton} to hold that “a court has the duty to reach the merits of the claim, and can order arbitration only if it concludes that the lapsed CBA in fact creates the right or obligation at issue.” Id. (citation omitted).
\item \textsuperscript{89} For a discussion of the post-\textit{Litton} decisions, see supra notes 55-57 and accompanying text.
\item \textsuperscript{90} \textit{Independent Lift Truck Builders Union v. Hyster Co.}, 2 F.3d 233 (7th Cir. 1993). For a discussion of the \textit{Hyster} decision, see infra notes 110-13 and accompanying text.
\item \textsuperscript{91} 2 F.3d 233 (7th Cir. 1993).
\item \textsuperscript{92} Id. Although the Seventh Circuit acknowledged that the reasoning in \textit{Litton} is “less than clear,” it found that \textit{Litton} stands for the rule that where the questions of arbitrability and the merits are one, the court must determine both. Id. at 236. For a further discussion of \textit{Hyster}, see supra note 38.
\item \textsuperscript{93} Id. The \textit{Litton} Court pointed to \textit{AT&T Technologies, Inc. v. Communications Workers of America}, 475 U.S. 643 (1986), a case where the lower courts initially found the issues as to arbitrability and the merits the same, as authority for the proposition that the court must determine the issue of arbitrability. \textit{Litton Fin. Printing Div. v. NLRB}, 501 U.S. 190, 208-09 (1991). The Supreme Court noted that “[w]hether or not a company is bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the court, and a party cannot be forced to ‘arbitrate the arbitrability question.’ ” Id. (quoting \textit{AT&T Technologies}, 475 U.S. at 651). Therefore, the majority reasoned, courts could not avoid that duty because it required interpretation of a provision of a CBA. Id. at 209.
\item \textsuperscript{94} See \textit{Litton}, 501 U.S. at 216 (Marshall, J., dissenting) (stating that “the right to have layoffs made according to the \textit{standard} of qualified seniority could vest under the contract”); see also \textit{Corcoran}, supra note 3, at 1086 (agreeing with \textit{Litton}}
trates how easily this mistake is made.\textsuperscript{95} For example, in \textit{Nolde} the issue in dispute was whether severance pay was a right vested under the expired CBA, and thus, subject to arbitration.\textsuperscript{96} The Supreme Court noted that while the dispute arose after the CBA expired, it clearly arose under the contract which contained a clause providing for severance pay.\textsuperscript{97} In \textit{Nolde}, the merits of the dispute involved a separate inquiry from arbitrability, yet the lower court held that the issue was not arbitrable because the employees' right to severance pay expired with the termination of the agreement—a ruling based on the merits of the claim.\textsuperscript{98}

In \textit{AT&T Technologies, Inc. v. Communications Workers of America},\textsuperscript{99} the dispute concerned the interpretation given to the contract clause gov-

\begin{itemize}
\item Corcoran notes that seniority is given sacrosanct treatment in many shops. \textit{Id.} It may be a determining factor when deciding layoffs, transfers, promotions, vacation scheduling and other employment decisions. \textit{Id.} Thus, seniority is a right capable of vesting in the contract. \textit{Id.}

Professor Summers commented that under either settled contract principles, or the principles announced in the \textit{Steelworkers Trilogy}, the result in \textit{Litton} should have been determined by the arbitrator. Summers, supra note 9, at 1031. Instead, Summers noted that Justice Kennedy “brazenly” decided the case on the merits. \textit{Id.} \textit{Litton}, in fact, typifies the case where a court mistakenly decides arbitration is precluded because the underlying claim is moot, rather than looking to see whether the contract required arbitration. For a discussion of cases decided like \textit{Litton}, see infra notes 96-104 and accompanying text.

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95. For a discussion of the specific cases, see infra notes 96-104 and accompanying text.

96. \textit{Nolde Bros. Inc. v. Local No. 358, Bakery & Confectionery Workers Union}, 430 U.S. 243, 244 (1977). The union argued that the severance wages provided for were comparable to “accrued” or “vested” rights, earned by employees during the term of the contract, and thus were analogous to vacation pay, but payable only on termination of employment. \textit{Id.} at 248. In addition, the severance-pay clause did not explicitly state that the employees' right to severance-pay expired if the events triggering payment did not occur during the life of the contract. \textit{Id.} at 249. \textit{Nolde Brothers} contended that because severance-pay was a creation of the CBA, its substantive obligation to provide such benefits ended with the contract. \textit{Id.} The CBA in dispute expired on July 21, 1973. \textit{Id.} at 246. The parties engaged in negotiations for a new CBA until August 31, when \textit{Nolde Brothers}, faced with a threatened strike after the union's rejection of its latest proposal, informed the union that it intended to close the bakery permanently. \textit{Id.} at 247. The union then instituted a § 301 action seeking to compel \textit{Nolde Brothers} to arbitrate the severance-pay issue. \textit{Id.}

97. \textit{Id.} at 249.

98. \textit{Id.} at 247. The district court held that the employees' right to severance pay expired with the CBA, and that as a result, there was no longer a severance-pay issue to arbitrate. \textit{Id.} The court noted that the duty to arbitrate was created by the contract, and so terminated with the contract. \textit{Id.} at 248. The Fourth Circuit reversed and held that the district court approached the case from the wrong direction. \textit{Id.} The Fourth Circuit pointed out that the first question here is whether the duty to arbitrate survived the contract. \textit{Id.} If so, then the dispute is arbitrable and the arbitrator should determine whether the severance-pay obligation survived the contract. \textit{Id.}

The employer argued that the terms of that clause, read in conjunction with the Management Prerogatives clause in the CBA, precluded the issue from arbitration. The Seventh Circuit held that in order to decide the question of arbitrability, the court would have to construe the clauses at issue and decide on the merits. Because there were "colorable arguments" on both sides, the Seventh Circuit agreed with the lower court that under these limited circumstances, the issue of arbitrability must also be decided by the arbitrator. On review, the Supreme Court remanded, holding that because the CBA contained a broadly-worded arbitration clause and did not specifically exclude disputes with respect to the clauses in question, a court could conclude that the parties intended disputes over the meaning of those clauses to be arbitrable.

The Litton Court struggled with the issue of whether qualified seniority rights, including a consideration of aptitude and ability, could vest under the contract. As the dissenters in that case pointed out, because

100. Id. at 645. Article 20 from the CBA provided that: "[w]hen lack of work necessitates Layoff, Employees shall be Laid-Off in accordance with Terms of Employment and by Layoff groups as set forth in the following [subparagraphs stating the order of layoff]." Id. n.3.

101. Id. at 646. Article 9 of the Management Prerogatives Clause stated: The Union recognizes the right of the Company (subject to the limitations contained in the provisions of this contract, but otherwise not subject to the provisions of the arbitration clause) to exercise the functions of managing the business which involve, among other things, the hiring and placement of Employees, the termination of employment, the assignment of work, the determination of methods and equipment to be used, and the control of the conduct of work.

102. Communications Workers v. Western Elec. Co., 751 F.2d 203, 204 (7th Cir. 1984), cert. granted, 474 U.S. 814 (1985), and vacated sub nom. AT&T Technologies, 475 U.S. at 643.

103. Id. at 207. The Seventh Circuit reviewed Supreme Court precedent and noted that previously decided cases cautioned courts to avoid becoming enmeshed in the merits of a labor dispute under the guise of determining arbitrability. Id. at 205-06 (reviewing Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) and Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960)). Therefore, while acknowledging that the question of arbitrability is for the courts to decide, the Seventh Circuit announced a narrow exception to that general rule where determining the arbitrability issue would entangle the court in interpretation of substantive provisions of the CBA and involve determination of the merits of the dispute. Id. at 206-07.

104. AT&T Technologies, 475 U.S. at 654-55 (Brennan, J., concurring). The question for the court was confined to the issue of whether the parties agreed to submit disputes over the interpretation of Article 20 of the CBA to arbitration. Id. at 654 (Brennan, J., concurring). The court to look to see if the issue in dispute is one controlled by the CBA. Id. (Brennan, J., concurring). If so, the court should find the dispute arbitrable under the contract provided that the CBA contained a broadly-worded arbitration clause and did not specifically exclude the disputed issue from arbitration. Id. at 654-55 (Brennan, J., concurring).

there was a strong argument that such rights vested under the contract, that question should have been left to the arbitrator to decide. In each of the preceding three cases, courts and individual justices disagreed over whether it was necessary to decide the underlying merits in order to determine arbitrability. Moreover, the cases themselves provide no doctrinal guidelines to assist future courts in making such determinations. As a general rule, the cases illustrate that courts arrive at the wrong conclusions when they look to mootness of the underlying claim as a guide for determining arbitrability. The better approach is to ignore the issue of whether or not the underlying claim survived termination of the CBA and look only to whether the duty to arbitrate survived it.

In contrast to the preceding three cases discussed, in Independent Lift Trucks Builder Union v. Hyster Co., the issues of the merits and arbitrability truly collapsed. There, the dispute revolved around whether retired employees were covered under the terms of the CBA. The Seventh Circuit noted that because regular employees were unquestionably covered under the agreement, if the term "employee" included retirees, then the grievance was both arbitrable and meritorious. Thus, while

106. Id. at 216 (Marshall, J., dissenting). Among other arguments, Justice Marshall noted that the CBA in question listed six specific ways an employee could lose seniority, none of which included termination of the agreement. Id. at 216-17 (Marshall, J., dissenting). In a separate dissenting opinion, Justice Stevens noted that determining whether seniority is a vested right should be a separate issue. See id. at 220 (Stevens, J., dissenting).

107. For a discussion of the facts of each case, see supra notes 96-104 and accompanying text.

108. See Hartley, supra note 9, at 357 (commenting that after Litton, decisions must be on case-by-case basis because no clear standard emerges to guide courts).

109. See Nolde Bros., Inc. v. Bakery Workers, 430 U.S. 243 (1977). Rather than looking to whether or not the underlying claim survived the termination of a CBA, the court must first determine if the duty to arbitrate survived. Id. at 248. If so, then the dispute is arbitrable. Id.

110. 2 F.3d 233 (7th Cir. 1993).

111. Id. at 235. Of course, where the merits and the question of arbitrability are not the same, under established labor law principles, the court simply looks to the issue of arbitrability first and can ignore the merits. See also John Wiley & Sons v. Livingston, 376 U.S. 543, 547 (1964) (stating that because duty to arbitrate is contractual, before arbitration can occur, there must first be judicial determination that CBA creates that duty); Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241 (1962) ("Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of this contract entered into by the parties.").

112. Hyster, 2 F.3d at 235. This general inquiry satisfied the three basic inquiries of the parties—whether the union had standing to file a grievance on behalf of the retired employees, whether this grievance was arbitrable and whether there was any merit in the union’s grievance. Id.

113. Id. at 235-36. In 1968, the employer established a medical plan to cover retired employees. Id. at 234. Later, the company entered into a series of CBAs with the union. Id. In March and May of 1992, the company implemented changes reducing coverage of certain medical benefits for retired employees. Id. The union filed a grievance on behalf of the retired employees and one current
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the *Hyster* opinion may be the most logical reading of *Litton*, because it preserves the doctrines established in previous decisions, courts find the concept difficult to apply.114

By contrast, the solution offered by the Third Circuit in *Luden's* requires no such judicial gymnastics. The rule is relatively clear and straightforward in its application.115 Where the expired contract contains an arbitration clause, and the parties continue to behave as if they are performing under that contract, the material terms of the contract, including the arbitration clause, remain intact unless clearly repudiated.116

B. The Luden’s Approach Under Unilateral Change Doctrine

A potential problem arising under *Luden's* implied-in-fact contract theory, however, is that, if it applies to mandatory subjects of bargaining, the jurisdictional and substantive issues raised under the unilateral change doctrine are implicated.117 The Third Circuit noted that the unilateral change doctrine prohibits the employer from changing existing terms and conditions of employment that are considered subjects of mandatory bargaining during negotiations unless the parties have bargained to impasse.118 If the implied-in-fact contract incorporates these subjects of mandatory bargaining, the employer is forever bound to those terms because they cannot later be repudiated as can non-mandatory subjects of bargaining, like the arbitration provision.119 The Third Circuit neatly sidestepped this problem by holding that the implied-in-fact CBA could not incorporate subjects of mandatory bargaining.120 In fact, the *Luden's* court’s modification of the implied-in-fact contract theory with respect to
the unilateral change doctrine was entirely consistent with past precedent in the labor law context.121

C. Luden's Application of Contract Theory to Find an Implied-in-Fact CBA

The Luden's decision is most vulnerable to attack when the court attempts to fit the facts of the case to its implied-in-fact contract theory. As the dissent in Luden's states, the majority's implied-in-fact contract theory actually results in the creation of a quasi-contract because there was no "meeting of the minds" between the two parties.122 A meeting of the minds is a well-established element of an implied-in-fact contract.123 In Luden's, the employer had clearly repudiated the expired CBA in writing to the union.124 Thus, the employer did not consider any of the terms of the expired CBA to remain in effect.125

In fairness to the employer, the doctrine espoused in Luden's could only be applied prospectively. After Luden's, employers in the Third Circuit will realize that a general repudiation of the expired contract does not release them from an implied continuation of some of its terms.126 The employer in Luden's, however, could not have known that to repudiate the arbitration clause effectively, it was necessary to do so twice, because not only is the implied-in-fact contract theory in this context unique to the Third Circuit, but neither side briefed or argued the issue until requested to do so by the Third Circuit.127

121. See, e.g., Lewis v. Benedict Coal Corp., 361 U.S. 459, 470 (1960) (holding that national labor policy is important consideration in determining whether same inferences which would usually be drawn respecting third-party agreements should be drawn in this context).

122. Luden's, 28 F.3d at 365 (Alito, J., dissenting). Judge Alito noted that "[b]ecause the court does not seem to be concerned about the meaning that the parties attached to their putative agreement, the court's decision does not appear to be based on a contract that is implied in fact. . . ." Id. (Alito, J., dissenting).

123. See Baltimore & O.R.R. Co. v. United States, 261 U.S. 592, 597 (1923) (holding that implied-in-fact contract is "founded on a meeting of the minds, which . . . is inferred, as a fact, from conduct of the parties showing in the light of the surrounding circumstances, their tacit understanding"); Hickman v. United States, 135 F. Supp. 919, 922 (W.D. La. 1955) (stating that criteria for whether there is implied-in-fact contract rests on consent inferred from circumstances showing mutual intention to contract).

124. Luden's, 28 F.3d at 350.

125. Id. The employer's letter informed the union that Luden's wished to terminate the 1988 CBA "effective 10:01 a.m. Monday, May 13, 1991." Id.

126. For a discussion of precisely how an employer must repudiate the implied continuation of some of the expired CBA's terms, see infra notes 128-31 and accompanying text.

127. Luden's, 28 F.3d at 354. The Third Circuit declined to follow other courts' lead in finding that Litton impliedly overruled Nolde. Id. Instead, it requested that the parties file supplemental memoranda concerning whether, under federal common law of CBAs, the Third Circuit should recognize an implied-in-fact CBA arising from the parties' conduct after the expiration of the 1988 CBA. Id. At that point, Luden's argued vigorously that their letter terminating the expired CBA amounted to a repudiation of an implied-in-fact CBA. Id. at 360.
IV. PRACTICAL APPLICATION

In the aftermath of the *Luden's* decision, it is crucial that both employers and unions understand and follow the steps provided by the court after the expiration of the CBA. First, the termination of a CBA alone does not manifest the "clear, particularized intent" necessary to disavow its terms and prevent some of the expired CBA's provisions from being immediately revived as part of an implied-in-fact CBA. A generalized repudiation of the expired CBA affects only future disputes arising after such notice, and will not affect disputes involving pre-expiration facts or accrued rights under either the original or implied-in-fact CBA. Second, the implied-in-fact CBA may be expressly repudiated, or repudiated by conduct. Thus, based on the facts of *Luden's*, the party who wishes to repudiate the CBA must expressly or by unmistakable conduct repudiate both the expired CBA as well as the implied-in-fact CBA.

In its application, the approach the Third Circuit outlined in *Luden's* offers many advantages. First, the rule allows courts to avoid deciding cases involving post-expiration arbitrability on the merits. Second, the rule furthers well-established labor law principles including the presumption in favor of arbitrability and CBAs in general to lessen industrial strife. Finally, the rule is simpler to understand and apply than the rule announced in *Litton*, and so would tend to reduce arbitrary decisions among the courts. In an era where labor relations have become increasingly strained, it is imperative that courts continue to favor arbitration as the best means of peacefully resolving labor disputes. Those courts which have not yet considered the issue are urged to adopt the *Luden's*

128. *Id.* at 360. Termination of a CBA only serves to end the terms that both parties intended to terminate. *Id.* When termination occurs, either party may still "repudiate the implied-in-fact terms unilaterally at any time [after termination] without providing the notice required were the CBA still in effect." *Id.*

129. *Id.* at 361 n.24 (citing Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 205 (1991) (listing three types of disputes that could arise after expiration of CBA)).

130. *Id.* at 357 n.16. While noting the impossibility of providing a recipe for future conduct in order to preclude the formation or terminate the existence of an implied-in-fact arbitration provision, the court noted that either a lockout or strike would sufficiently evince a party's desire not to be bound. *Id.*

131. *Id.* at 360-61.

132. For a discussion of the benefits of a rule enabling courts to avoid deciding cases involving arbitration on their merits, see supra notes 115-16, and accompanying text. The *Luden's* court's approach avoids the criticism raised by Justice Marshall's dissent in *Litton*, and by numerous commentators, that decisions after *Litton* will involve courts in a case-by-case review of the merits, thus, potentially leading to more litigation. For a discussion of Justice Marshall's dissent in *Litton*, see supra note 106 and accompanying text.

133. For a discussion of the national policy underlying the NLRA, see supra notes 17-19 and accompanying text.

134. For a discussion of the differing interpretations of the *Litton* decision, see supra notes 73-78 and accompanying text.
solution, as it offers the fairest treatment to both parties in a difficult situation.

Ramona Mariani