

# Labor Law: Collective Bargaining Agreements: Arbitration Required After Expiration of Contract. (*Nolde Brothers, Inc. v. Local 358, Bakery and Confectionary Workers Union*)

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which has a disproportionate racial impact must also be shown to have a discriminatory purpose to sustain an equal protection challenge. If purposeful discrimination cannot be shown, then disproportionate racial impact alone will, at best, trigger a rational basis standard of review, easily satisfied by bar examiners. Depending on the amount of inconsistency and subjectivity exhibited by the examiners in passing or failing examinees, there may be sufficient arbitrariness displayed to overturn a decision on individuals' entrance to the state bar. With respect to review procedures, personal review by the examinees themselves might well be required to satisfy due process, unless the state supreme court determines that its own inherent powers of review are sufficient.

THOMAS L. MILLER

**Labor Law—Collective Bargaining Agreements—Arbitration Required After Expiration of Contract**—In the recent case of *Nolde Bros., Inc. v. Local 358, Bakery & Confectionary Workers Union*,<sup>1</sup> the Supreme Court held that a party to a collective bargaining agreement may be required to arbitrate a dispute concerning severance pay pursuant to the arbitration clause of the agreement, even though the dispute arose after the agreement terminated and after the employer went out of business at the plant employing the disputing employees. The Court decided that the employer's duty to arbitrate survived the termination of the agreement and extended to disputes which first arise after the employer-employee relationship had been completely severed.

However, *Nolde* leaves a major question unanswered: The majority opinion never states how the employer's legally enforceable obligation to arbitrate beyond the term of the contract arises. The Court has previously held that the duty imposed on parties to submit disputes to arbitration is founded in a collective bargaining agreement.<sup>2</sup> But in *Nolde* the dispute arose after the agreement had been terminated. Therefore, the

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1. 97 S. Ct. 1067 (1977).

2. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); see also *Hilton Davis Chem. Co.*, 185 N.L.R.B. 58 (1970), wherein the NLRB also states that a party's obligation to arbitrate arises out of a contract.

holding in *Nolde* announces a duty to arbitrate, unfounded in precedent, that is not based only in contract. This view of the duty to arbitrate is inconsistent with traditional legal reasoning, and as the dissent points out, with national labor policy.

As early as *United Steelworkers v. Warrior & Gulf Navigation Co.* in 1960, the Court has recognized that the collective bargaining agreement governs the parties' obligation to submit disputes to arbitration.<sup>3</sup> Through the medium of the agreement the courts can determine the scope of the arbitral obligation and justify its enforcement. Without an agreement by the parties to be bound by a grievance arbitration procedure, the courts may not impose such a duty on an employer or a labor organization.<sup>4</sup> If the courts create a duty to arbitrate superior to that found in the collective bargaining agreement it will be a denial of the sanctity of that agreement. In effect, the court will have become a third party to the labor management relationship.

Although the Supreme Court has never directly answered the question presented in *Nolde* of how long the duty, once created, persists, several circuits have done so. In the case of *IAM Local 2369 v. Oxco Brush Division*,<sup>5</sup> the Sixth Circuit held that termination of a contract terminates the duty to arbitrate expressed in that contract. Therefore, an employer cannot be required to arbitrate disputes which were not instituted during the term of the contract.<sup>6</sup>

In the *Oxco Brush* case the court stated that as a prerequisite to enforcing a duty to arbitrate it must first be shown that a valid agreement to submit the dispute to arbitration exists at the time the dispute arose. Without a showing of an agreement the court can look no further.

The Seventh Circuit has similarly held that obligation to arbitrate disputes arises solely by agreement and cannot be imposed on a party as a matter of law.<sup>7</sup> In the *Nolde* case the Supreme Court has disregarded the reasoning of the Sixth and

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3. 363 U.S. 574; *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970); *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976).

4. *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974).

5. 517 F.2d 239 (6th Cir. 1975).

6. *Id.* at 243.

7. *O.L. Workers Local 7-210 v. American Maize Products Co.*, 492 F.2d 409 (7th Cir. 1974), *cert. denied*, 417 U.S. 969 (1974).

Seventh Circuits, but has failed to state its own reasoning for taking a different view.

The facts of *Nolde* were not in dispute.<sup>8</sup> The employer, Nolde Brothers, Inc. and the union, Local 358 of the Bakery Workers, were parties to a collective bargaining agreement which was to remain in effect until July 21, 1973.<sup>9</sup> The agreement contained a provision for severance pay<sup>10</sup> for employees having three or more years of active service in the event of lay-off or displacement due to either automated labor saving devices or the closing of an entire plant. The agreement also contained a broad arbitration clause.<sup>11</sup> In May 1973 the parties began negotiations on a new contract, but no agreement was concluded by July 21, the date on which the existing contract

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8. See the opinion of the district court, *Bakery Workers Local 358 v. Nolde Bros., Inc.*, 382 F. Supp. 1354 (E.D. Va. 1974).

9. 97 S. Ct. at 1069.

10. Article IX-Wages of the agreement concerning severance pay read as follows:

Section 5. Each full-time employee who is permanently displaced from his employment with the Company by reason of the introduction of labor saving equipment, the closing of a department, the closing of an entire plant, or by lay off, shall be compensated for such displacement providing he has been actively employed by the Company for a period of at least three (3) years. An eligible employee's compensation for his displacement shall be on the basis of thirty (30) hours of severance pay, at his straight time hourly rate, for each full year or major portion of a year of active employment commencing with the fourth (4th) year following his most recent date of hire. Payment under this formula shall be limited to a maximum of nine hundred (900) hours of severance pay.

11. The arbitration clause, Article XII-Grievances and Arbitration, read as follows:

Section 1. All grievances shall be first taken up between the Plant Management and the Shop Steward. If these parties shall be unable to settle the grievance, then the Business Agent of the Union shall be called in, in an attempt to arrive at a settlement of the grievance. If these parties are unable to settle the grievance, the dispute will be settled as called for in Sections 2 and 3 of this Article.

Section 2. In the event that any grievance cannot be satisfactorily adjusted by the procedure outlined above, either of the parties hereto may demand arbitration and shall give written notice to the other party of its desire to arbitrate. No individual employee shall have the right to invoke arbitration without the written consent of the Union. The Arbitration Board shall consist of three (3) persons, one selected by the Company and one selected by the Union. The two persons selected shall agree upon a third person who shall act as Chairman of the Arbitration Board.

Section 3. The decision or award of the Arbitration Board, or a majority thereof, shall be final and binding on both parties. If the third party to arbitration is not selected in ten (10) days from receipt of notice, the Director of the U.S. Conciliation Service shall be requested to make the appointment. The expense of the neutral arbitrator shall be borne equally by the parties.

Section 4. Pending negotiations or during arbitration there shall be no strikes, lockouts, boycotts, or any stoppages of work.

was to terminate. Negotiations continued until August 20, when the union served a seven day written notice on the employer, required under the terms of the contract, of its intent to terminate the agreement. On August 31, after the contract had terminated, the employer closed down its entire Norfolk bakery. The employer paid the employees' accrued wages and vacation pay under the terminated agreement, and, in addition, wages for the four days after the termination of the contract and the closing of the plant. The employer refused to grant the union's demand for severance pay and also refused to arbitrate the matter.<sup>12</sup>

The union instituted an action in the district court under section 301 of the Labor-Management Relations Act<sup>13</sup> for an order compelling Nolde to arbitrate the dispute or, in the alternative, for an award of the severance pay. The union contended that the severance pay was a vested right which survived the expiration of the contract.<sup>14</sup> Nolde, on the other hand, contended that the employees' right to severance pay terminated with the agreement. The district court refused to grant the union relief, holding that the employees were not entitled to the severance pay because it was not a vested right.<sup>15</sup> Since the court decided the case on its merits, it never directly faced the issue of arbitration. However, in dicta, the court noted that no duty to arbitrate could be imposed on Nolde because the dispute arose only after the contract had been terminated.<sup>16</sup> Citing the Supreme Court's decision in *Gateway Coal Co. v. UMW*,<sup>17</sup> the court stated: "The duty to arbitrate is created by contract and '[n]o obligation to arbitrate a labor dispute arises solely by operation of law'."<sup>18</sup> Furthermore, as a procedural matter, the court stated that it did not have the authority under the

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12. 97 S. Ct. at 1070.

13. 29 U.S.C. § 185 (1970).

14. The Court noted that the union's contention could have some merit. Nolde did pay his employees' vacation pay which had accrued under the expired contract which could indicate that other benefits such as severance pay could extend beyond the term of the contract. Furthermore, the severance pay benefits were listed under article IX of the contract entitled "Wages." The district court, however, reviewing the merits of the dispute did not consider such evidence of controlling significance. See 382 F. Supp. 1354, 1357.

15. 382 F. Supp. 1354.

16. *Id.* at 1358.

17. 414 U.S. 368 (1974).

18. 382 F. Supp. at 1359.

Uniform Arbitration Act<sup>19</sup> to order the employer to arbitrate the dispute without a showing by the union that an enforceable written agreement between the parties existed when the dispute arose.

On appeal, the United States Court of Appeals for the Fourth Circuit reversed.<sup>20</sup> The circuit court criticized the district court for deciding the case on the merits without first determining whether the dispute was subject to arbitration.<sup>21</sup> The court stated that a prerequisite to the district court's disposition of the dispute on its merits was an affirmative finding that the dispute was not subject to arbitration. If the dispute was in fact subject to arbitration, then it was within the exclusive province of the arbitrator to hear the merits of the dispute. The remaining portion of the Fourth Circuit decision is clearly reflected in the decision by the Supreme Court holding that *Nolde* was obligated to submit this dispute to the arbitral process.

In affirming the decision of the court of appeals, the Supreme Court was faced with two related, but very distinct questions. First, the Court had to determine whether the dispute over the severance pay was in fact subject to arbitration under the pre-existing contract. The second, and by far the more difficult of the two questions was whether *Nolde* was under an affirmative legal obligation to proceed with the arbitration, even though the dispute arose after the contract imposing the duty of arbitration on *Nolde* in the first instance had terminated.

The Court answered very summarily the question of whether the severance pay dispute was covered by the arbitration clause. The severance pay issue arose out of differing interpretations given to the collective bargaining agreement by the parties. The union contended that the severance pay was a vested right which was retained by the employees beyond the termination of the agreement, while the employer contended that the right to severance pay was created by the agreement and was extinguished when the agreement was terminated. Therefore, under the broad language of the collective bargaining agreement, which provided that "any grievance" between

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19. 9 U.S.C. § 4 (1970).

20. 530 F.2d 548 (4th Cir. 1975).

21. *Id.* at 550.

the parties was subject to the grievance-arbitration procedure, the dispute over the proper interpretation of the contract was subject to binding arbitration.<sup>22</sup>

Nolde then raised the second and most critical issue by contending that its duty to arbitrate ceased. Nolde contended that not only had its contracted obligation passed with the termination of the collective bargaining agreement, but that the entire employee-employer relationship was severed by the closing of the Norfolk bakery. In holding that Nolde's duty to arbitrate the severance pay dispute survived these events the Court relied on a line of reasoning which this author finds unconvincing.

The Court stated that a party's obligation under the arbitration clause of a contract may survive the termination of the contract when the dispute is arguably based upon the expired contract, even though a claim is asserted shortly after, rather than before, the termination of the contract.<sup>23</sup> Although the Court conceded that the duty to arbitrate is founded in contract and cannot be imposed on a party in the absence of a contractual obligation, the Court also pointed out that the duty to arbitrate survives termination of an agreement when the dispute arises during the existence of the agreement when proceedings are not initiated until after the agreement has terminated, or when proceedings are begun during the term of the agreement but are not yet concluded at termination.<sup>24</sup>

However, under these circumstances it is the arbitral process which extends beyond the termination of the contract, not the employer's duty to arbitrate. In the examples used by the Court the disputes all arose during the term of an existing contract, when the employer was under an affirmative contractual duty to arbitrate. Having undertaken the duty to arbitrate, it is only fair that the employer permit the arbitral process to proceed to its natural conclusion.

In extending the parties' obligation to arbitrate beyond the term of the contract the Court placed primary reliance on the

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22. 97 S. Ct. at 1069.

23. *Id.* at 1071.

24. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The Second and Sixth Circuits have also faced this issue; *Procter & Gamble Ind. Union v. Procter & Gamble Mfg. Co.*, 312 F.2d 181 (2nd Cir. 1962), *cert. denied*, 374 U.S. 830 (1963); *IAM Local 2369, v. Oxco Brush Div.*, 517 F.2d 239 (6th Cir. 1975).

case of *John Wiley & Sons, Inc. v. Livingston*.<sup>25</sup> In that case a union entered into a collective bargaining agreement with an employer, Interscience Publishers, Inc. During the term of the agreement, Interscience merged with a larger publishing firm, John Wiley & Sons, Inc., and ceased to do business as a separate entity. The Supreme Court held that John Wiley & Sons, Inc. was obligated to arbitrate with the union over the effect of the merger on the collective bargaining agreement. The issues subject to arbitration were to include questions of severance pay and seniority which would survive the term of the agreement.<sup>26</sup> However, in the *Wiley* case, the dispute actually arose during the term of the existing contract, and not, as here, after the contract had terminated.

To extend the *Wiley* rule to disputes arising after termination, the Court relied on the case of *Local 2549, Piano & Musical Instrument Workers Union v. W. W. Kimball*.<sup>27</sup> The Court's reliance on *W. W. Kimball* is the weakest part of the Court's reasoning. The *W. W. Kimball* case involved an agreement between the Piano Workers and W. W. Kimball which was to expire on October 1, 1961. In August of 1961 the employer closed the plant where the union members were employed. On October 8, 1961, only eight days after the contract formally terminated, the employer opened up a new plant operation. The members of the Piano Workers claimed that the pre-existing contract gave them priority hiring rights according to their seniority at the old plant.<sup>28</sup> In a section 301 action instituted by the union, the district court held that the hiring dispute question was arbitral, even though it arose eight days after the contract terminated and was to be answered by an arbitrator based upon his interpretation of the contract.<sup>29</sup> The Seventh Circuit reversed, holding that arbitration was improper because the employer had not violated the terms of the contract while it was in existence.<sup>30</sup> In turn, the Supreme Court reversed the Seventh Circuit in a *per curiam* decision, citing only *United*

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25. 376 U.S. 543 (1964).

26. *Id.* at 552.

27. 379 U.S. 357 (1964).

28. See the facts as were outlined by the district court, 221 F. Supp. 461 (N.D. Ill. 1963).

29. *Id.*

30. 333 F.2d 761 (7th Cir. 1964).

*Steelworkers v. American Manufacturing Co.*,<sup>31</sup> and *John Wiley & Sons, Inc. v. Livingston*.<sup>32</sup> It now may be implied from the *Nolde* decision that in the mind of the Court the *W. W. Kimball* decision stands for the proposition that termination of a contract need not end an employer's duty to arbitrate a dispute arising after the termination. However, the Court did not explain its reasoning for this serious extension of *Wiley. Nolde* leaves unclear what legal principle creates the employer's duty to arbitrate. Apparently the Court believes that the duty to arbitrate exists as long as the dispute is "arguably" generated by the terminated agreement.<sup>33</sup> Because this standard is amorphous and as yet unlimited, *Nolde* has created a substantial exposure for employers to arbitrate. The Court refused to say precisely how long after termination of the agreement the union may wait before complaining of a contractual dispute.<sup>34</sup> However, time does not seem to be an element of the legal standard announced by the Court. Therefore, so long as a complaint arises "under" the terms of a once existing collective bargaining agreement that contained an arbitration clause, the employer's duty to arbitrate mysteriously continues *ad infinitum*. Thus, although the duty to arbitrate is derived from the collective bargaining agreement, it certainly does not depend on that agreement for its vitality. By giving the arbitration clause significance independent from the collective bargaining agreement, the Court has contradicted both labor law precedent and principles of national labor policy.

The dissenting opinion, written by Mr. Justice Stewart and joined in by Mr. Justice Rehnquist, challenged the majority's extension of the employer's duty to arbitrate beyond the term of the collective bargaining agreement.<sup>35</sup> The dissent pointed out that prior cases imposed a presumption of arbitrability only when the dispute arose during the term of an agreement to arbitrate.<sup>36</sup> According to the dissent, because the majority

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31. 363 U.S. 564 (1960).

32. 530 F.2d 548 (4th Cir. 1975).

33. 97 S. Ct. at 1072.

34. *Id.* at 1074 n.8.

35. *Id.* at 1074-75.

36. The dissent distinguished the majority's interpretation of the *W. W. Kimball* case on this point. Mr. Justice Stevens interpreted the dispute over employee preferential hiring rights as having arisen during the term of the agreement and not after it had terminated.

extended the duty to arbitrate beyond the requirements of the prior case law, the majority opinion is legally unsound:

But the duty to arbitrate can arise only upon the parties' agreement to resolve their contractual differences in the arbitral forum. And the presumptive continuation of that duty even after the formal expiration of such an agreement can be justified only in terms of a web of assumptions about the continuing nature of the labor-management relationship and the importance of having available a method harmoniously to resolve differences arising in that relationship.<sup>37</sup>

The dissent found that an expansion of the employer's duty to arbitrate is inconsistent with national labor policy because it tips the delicate balance of power between labor and management established by federal laws in favor of the union. During a contract, the union relinquishes its freedom to strike in return for the employer's promise to arbitrate.<sup>38</sup> The effect of the majority opinion is to release the union from its duty not to strike while at the same time continuing to enforce the employer's duty to arbitrate.

Finally, the dissent points out that the union would not be denied a remedy if the dispute was not held to be arbitrable. The union could have instituted a section 301<sup>39</sup> action based on the employer's alleged breach of contract. Certainly this would have been a much sounder legal approach and would have provided a similar result.

The majority opinion further justifies its holding by invoking the strong federal labor policy favoring arbitration. The Court noted that nothing in the language of the arbitration clause at issue expressly excludes from its operation disputes arising after the contract had terminated.<sup>40</sup> This, of course, does not indicate a positive intention by the parties to include such disputes within the clause, but even without an express exclusion of post termination disputes, the Court feels labor policy favors an extension of the duty. After *Nolde*, the drafting of an arbitration clause will determine what disputes are arbitrable.<sup>41</sup> If the clause does not contain express language ne-

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37. 97 S. Ct. at 1074-75.

38. See *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970).

39. 97 S. Ct. at 1075.

40. *Id.* at 1073.

41. This "warning" concerning the arbitration clause is similar to that given by the

gating coverage of disputes arising after the contract has expired it will be presumed that they are included in the operation of the arbitration clause.<sup>42</sup>

#### CONCLUSION

The Court's holding in *Nolde* extends an employer's duty to arbitrate union disputes to at least some disputes which arise after the contract to arbitrate has terminated. This is not necessarily an unwise decision by the Court, but it is a badly reasoned one. *Nolde* extends the duty to arbitrate far beyond prior Court decisions, without explaining how or why. Such an arbitrary analysis of the law is regrettable, because it is just such unexplained mandates like *Nolde* which make labor-management relations unstable.

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Supreme Court in the case of *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976). In that case the Court held that a simple "no-strike" clause would not cover sympathy strikes and refused to grant a *Boys Markets* injunction forcing the parties into arbitration.

42. With this argument the Court may have been answering the dissenting opinion by circuit court Judge Widener. In his opinion Judge Widener argued that the question of arbitrability should be decided by an arbitrator in the first instance. Only if the arbitrator felt that he had the authority to act should he proceed to hear the merits of the dispute. 530 F.2d at 554-58.

