Post-Contractual Arbitrability after Nolde Brothers: A Problem of Conceptual Clarity

Arthur S. Leonard
New York Law School, arthur.leonard@nyls.edu

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POST-CONTRACTUAL ARBITRABILITY AFTER NOLDE BROTHERS: A PROBLEM OF CONCEPTUAL CLARITY

ARTHUR S. LEONARD*

INTRODUCTION

In Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union, the Supreme Court held that a labor-management grievance dispute which arose after the expiration of a collective bargaining agreement might, under certain circumstances, be compulsorily arbitrable even though no successor agreement providing for arbitration had been entered into by the parties. In so holding, however, the Supreme Court was imprecise in articulating the factors underlying its determination, leaving to the lower courts and the National Labor Relations Board (Board) the considerable task of adopting the broadly phrased Nolde rationale—a presumption of continuing arbitrability—to differing situations where the issue of post-contractual arbitrability might be crucial. In the years since Nolde was decided, a body of inconsistent case law has emerged, sending confusing signals to employers and unions with respect to their mutual obligations to arbitrate grievances upon the termination of a labor contract.

*Associate Professor, New York Law School; B.S. 1974, Cornell University; J.D. 1977, Harvard Law School.

2. Id. at 250-55.
I. THE LEGAL CONTEXT

Executory agreements to arbitrate union-management grievance disputes, not enforceable under common law, were made enforceable as a matter of federal law with the enactment of section 301 of the Labor Management Relations Act of 1947. In Textile Workers Union v. Lincoln Mills, the Supreme Court held that the applicable law in determining questions of contract enforcement in section 301 actions was federal law, as developed primarily from the policies emanating from federal labor statutes and secondarily from not inconsistent state contract law principles. In the Steelworkers Trilogy, the Court continued to develop this substantive federal law to govern labor agreement enforcement actions by setting forth certain principles which would govern in cases involving the interpretation of grievance arbitration provisions. Foremost of these basic principles was that “arbitration 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.”

Soon after the Steelworkers Trilogy, in John Wiley & Sons v. Livingstone, the Court had to decide whether the duty to arbitrate a dispute which arose during the term of the contract could be enforced after the contract had expired. In Wiley, the union filed suit in federal district court to compel arbitration one week before the expiration of its contract. By the time the suit was before the court for decision, the contract had expired and the relationship between the union and the contracting employer had terminated. The employer had argued that the duty to arbitrate over the dispute had expired with the contract.

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7. Id. at 456-57.
9. In American Mfg., for example, the Court held that in interpreting and enforcing a collective bargaining agreement, a court's function is confined to ascertaining whether the party has made a claim which on its face is governed by the agreement, i.e., an arbitrable dispute. 363 U.S. at 567-68.
12. Id. at 554-55. One of the major issues in Wiley was the question of whether the duty to arbitrate the dispute extended to a successor employer. Id. at 554.
13. Id. at 546.
14. Id. at 551.
15. Id. at 554.
had attached to that dispute. Consequently, the later expiration of the contract had no effect upon the employer's duty to arbitrate.

In a case that came up shortly after Wiley, Piano & Musical Instrument Workers v. W.W. Kimball Co., the Court summarily reversed a Seventh Circuit ruling which had denied the existence of arbitrability with respect to a dispute which arguably began after contract expiration. The Seventh Circuit had distinguished Wiley on factual grounds. The Court's per curiam reversal merely cited Wiley with no explanation, leaving open the question of whether the time when a dispute arises is the determinative factor with respect to questions of arbitrability. The conclusion that it is not was apparently reached by the Court in Nolde.

II. THE NOLDE DECISION

On March 7, 1977, the Supreme Court announced its decision in Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union, affirming a Fourth Circuit Court of Appeals decision in which the court required an employer to arbitrate a union's post-contractual grievance with respect to the right of laid-off employees to receive severance pay under an expired collective bargaining agreement. The employer had announced its decision to close its plant only a few days after the contract had expired and while faced with a strike threat by the union. The employer had refused severance pay

16. Id. at 555.
17. Id. at 554-55.
19. 333 F.2d 761, 765 (7th Cir. 1964).
20. 333 F.2d at 763-65. Kimball, like Wiley, presented the issue of whether the duty to arbitrate continued after termination of the collective bargaining agreement, and the court's distinction was premised on factual differences between the cases. Id. Among the differences cited by the Kimball court was that in Wiley the merger took place between two companies located in the same city which would not cause a difficult transfer of employees, whereas in Kimball a transfer would be from Chicago to Indiana and would be "drastic, if not difficult." Id. at 764. Also, none of the employees in Kimball indicated a desire to transfer to the acquiring company. Id. at 765. When the dispute arose in Kimball and the Union offered to submit disputed issues to arbitration the contract had already expired. Id. at 762-63. Stating that the lay-offs at issue were "strictly in accordance with the provisions" of the collective bargaining agreement, the Kimball court held that because there was no difference between the parties regarding seniority rights during the term of the agreement, "there was no difference which became a proper subject for arbitration." Id. at 765.
22. 430 U.S. at 240-52.
24. 530 F.2d 548, 553 (4th Cir. 1975).
to the employees who were laid off as a result of the plant closing,\textsuperscript{26} claiming that their right to severance pay had expired with the contract.\textsuperscript{27} When the union demanded that the employer arbitrate its duty to pay severance,\textsuperscript{28} the employer refused, asserting that any requirement to arbitrate the dispute had also been extinguished by the expiration of the contract.\textsuperscript{29}

The union filed an action in federal district court under section 301 of the Act, seeking to compel arbitration.\textsuperscript{30} The district court held that severance pay was a creation of the contract and, as the contract had expired prior to the lay-offs, the company was under no obligation to pay it.\textsuperscript{31} Having thus resolved the dispute on its merits, the court found it unnecessary to decide whether the right to arbitrate survived the contract expiration.\textsuperscript{32} The court, however, noted that the duty to arbitrate is also a creation of the contract, and stated, citing no independent authority for this proposition, that because the dispute arose after the contract had expired, the company had no obligation to arbitrate.\textsuperscript{33}

The Fourth Circuit reversed, holding that the district court had incorrectly dealt first with the substantive issue rather than the question of arbitrability.\textsuperscript{34} Dealing briefly with the substantive issue, the court stated that the district court had incorrectly concluded that severance pay by its nature cannot be “accrued” under an expired contract.\textsuperscript{35} Rather, stated the court, the right to severance pay, whether “accrued” or not, must be determined by an interpretation of the pertinent collective bargaining agreement language, and that interpretation is properly the function of an arbitrator.\textsuperscript{36} Dealing next with the question of arbitrability, the court noted instances where the Supreme

\begin{enumerate}[26.]
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id.
\item \textsuperscript{31} Id. at 1357-58.
\item \textsuperscript{32} Id. at 1358-59.
\item \textsuperscript{33} Id. at 1359. It is noteworthy that the court failed to refer to either Wiley or Kimball in this part of its discussion.
\item \textsuperscript{34} 530 F.2d at 550. The court stated that: 

[T]he district court approached the issues backwards when it first determined whether the company's obligation for severance pay survived the contract. This is a question more suitable for arbitration than judicial decision, as we explain below. Thus, the first question for the district court was whether the company's duty to arbitrate this particular issue survived the expiration of the contract.

\textit{Id.}
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id. at 550-51.
\end{enumerate}
Court had undercut the notion that arbitration could only be compelled under an existing, effective contract, most notably in Wiley.\footnote{37} Prior to \textit{Nolde}, some courts had held that only disputes arising during a contract term remained arbitrable after the contract expired—holdings which may have been based on a narrow construction of Wiley.\footnote{38} The \textit{Nolde} circuit court, seizing on broad language in \textit{Wiley}, held that \textit{Wiley} extended further.\footnote{39} If there was a dispute about the continued existence of rights alleged to exist under an expired contract, that dispute was arbitrable, even though the dispute itself did not arise until after the contract had expired, because the parties had contractually agreed to submit disputes about their rights under the contract to arbitration.\footnote{40} The \textit{Nolde} circuit court found support for its view in the Supreme Court's summary reversal in \textit{Kimball}.\footnote{41}

The holding of the Fourth Circuit, however, was narrowly stated, and after briefly discussing the dissenting views of Circuit Judge Widener,\footnote{42} the circuit court made explicit the narrowness of its holding, limiting the scope of its decision to disputes concerning rights which

\footnotesize{37. Id. at 551.  
39. 530 F.2d at 551-52. The circuit court noted that a collective bargaining agreement is not simply a contract, but rather "covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." \textit{Id.} (quoting \textit{Wiley}, 376 U.S. at 550). Therefore, although an agreement is terminated, an employer may still be compelled to arbitrate. \textit{Id.}  
40. Id. at 552.  
41. Id. In Piano & Musical Instrument Workers v. W.W. Kimball Co., 333 F.2d 761 (7th Cir.), rev'd 379 U.S. 357 (1964), the Seventh Circuit had ruled that a dispute over the rehiring of discharged employees did not require arbitration since the dispute had arisen after the termination of the parties' collective bargaining agreement. 333 F.2d at 765. The court in \textit{Nolde} interpreted the Supreme Court's summary reversal, which cited only \textit{Wiley} and the \textit{Steelworker's Trilogy}, 379 U.S. at 357, as indicating the Supreme Court's approval of the application of the principles announced in \textit{Wiley} to disputes arising after a contract's expiration. 530 F.2d at 552.  
42. Id. at 554-58 (Widener, J., concurring in part and dissenting in part). Judge Widener stated that the employer should be free to raise the question of arbitrability before the arbitrator, citing \textit{Kimball} as having a more limited effect than that attributed to it by the majority. \textit{Id.} (Widener, J., concurring in part and dissenting in part). This argument was not considered by the Supreme Court, as it was not raised by \textit{Nolde}'s counsel on appeal. 430 U.S. at 255 n.8.}
accrue during the contract’s term, even when the action which triggers assertion of these rights occurs after the termination date of the contract.43

The Supreme Court affirmed the Fourth Circuit in a decision by Chief Justice Burger, employing language much broader than that used by the Fourth Circuit.44 As characterized by the Court, the determinative fact in Nolde was that the parties disagreed as to whether the severance pay clause of the expired contract provided for accrual, during its term, of severance benefits which might be payable upon a post-contract lay-off.45 Thus, “[t]he dispute . . . although arising after the expiration of the collective-bargaining contract, clearly arises under that contract,” because resolution of the dispute requires an interpretation of the contract.46 The Court embraced the Fourth Circuit’s interpretation of prior case law47 and noted that the Wiley48 and Kimball49 decisions had implicitly rejected the notion that the time of filing a grievance would automatically control the question of arbitrability.50 The Court noted that nothing in the arbitration clause of the Nolde contract “expressly excludes from its operation a dispute which arises under the contract, but which is based on events that occur after its termination.”51 In the absence of such express exclusion, the Court would apply the strong presumption of arbitrability inherent in federal

43. Specifically, the court stated that:

[A] dispute that turns on whether parties intended certain accruable rights to be enjoyable, even after contract expiration, must be arbitrated if the contract provided for arbitration of such disputes, even if the contingency giving rise to the dispute itself transpired after expiration of the contract.

Our decision affects only those rights, like severance pay, that employees earn and that may 'vest' for future enjoyment—contingent upon a particular event.

530 F.2d at 552-53 (footnote omitted).
45. Id. at 248-49.
46. Id. at 249.
47. 530 F.2d at 551-52. The Fourth Circuit read Wiley and Kimball as supportive of the view that:
[a] dispute that turns on whether parties intended certain accruable rights to be enjoyable, even after contract expiration, must be arbitrated if the contract provided for arbitration of such disputes, even if the contingency giving rise to the dispute itself transpired after expiration of the contract.

Id. at 552.
50. 430 U.S. at 250-53.
51. Id. at 253. The arbitration clause of the collective bargaining agreement provided for a four-step procedure for all grievances. Id. at 245, 252. The Court concluded that, having failed to expressly exclude arbitration of post-termination grievances, “the parties did not intend their arbitration duties to terminate automatically with the contract.” Id. at 253.
labor policy\textsuperscript{52} because "[a]ny other holding would permit the employer to cut off all arbitration of severance pay claims by terminating an existing contract simultaneously with closing business operations."\textsuperscript{53} The Court then listed various other factors militating in favor of finding the dispute arbitrable: (1) the parties' contractual agreement to submit disputes over the meaning of the contract to arbitration rather than the courts;\textsuperscript{54} (2) the fact that the contract was drafted in the context of "well-established federal labor policy favoring arbitration as the means of resolving disputes over the meaning and effect of collective bargaining agreements;"\textsuperscript{55} and (3) the contracting parties' "confidence in the arbitration process and an arbitrator's presumed special competence in matters concerning bargaining agreements" which "does not terminate with the contract," as well as the speed and economy of arbitration.\textsuperscript{56} Thus, the same factors which led the Court to embrace arbitration as the preferred mechanism for settling labor disputes in the Steelworkers Trilogy\textsuperscript{57} were again cited by the Court as partial justification for imposing upon a protesting party the post-contractual obligation to arbitrate.\textsuperscript{58}

Various comments by the Court suggest as possible relevant considerations in determining the arbitrability of post-contractual grievances: the timeliness of the grievance presentation\textsuperscript{59} and the need to construe a provision of the expired agreement.\textsuperscript{60} As to the latter consideration, the Court stated that "where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication."\textsuperscript{61} In construing the Nolde decision, later courts and the Board have occasionally treated

\textsuperscript{52} The Court has consistently relied upon 29 U.S.C. § 173(d)(1976) as providing a strong presumption in favor of arbitrability. 29 U.S.C. § 173(d)(1976) states: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." Id.

\textsuperscript{53} 430 U.S. at 253.

\textsuperscript{54} Id. at 253-54.

\textsuperscript{55} Id. at 254.

\textsuperscript{56} Id.


\textsuperscript{58} 430 U.S. at 253-54. Indeed, the Court buttressed its policy arguments in Nolde with extensive quotations from the Steelworkers Trilogy. Id. at 253-55.

\textsuperscript{59} Id. at 255 n.8. The Court stated that due to the prompt presentation of the grievance in Nolde, it did not have to "speculate as to the arbitrability of post-termination contractual claims which . . . are not asserted within a reasonable time after the contract's expiration." Id. Later courts have seized upon these remarks and, perhaps mis-guidedly, scrutinized the question of whether the union's presentation of its post-contractual grievance was untimely. See infra notes 186-97 and accompanying text.

\textsuperscript{60} 430 U.S. at 255.

\textsuperscript{61} Id.
this brief, concluding statement as the entirety of the holding; thus, if the contract does not expressly negate the preservation of arbitration rights after its termination, and the dispute between the union and the company arguably involves a term of the expired contract, the tendency has been, with rare exceptions, to find the dispute arbitrable.

It is significant to note that the Supreme Court in Nolde had nothing to say about the careful limitations which the Fourth Circuit had imposed on its own holding. Although some later courts have seen the need for similar limitations, the majority of post-Nolde authority has broadly, and perhaps mistakenly, construed the Supreme Court’s holding not to be so delimited, but rather to authorize arbitration of almost every variety of post-expiration contractual dispute.

III. THE DUTY TO ARBITRATE POST-CONTRACTUAL DISPUTES AFTER NOLDE

A. Issues Under the National Labor Relations Act

Prior to Nolde, the Board took the position that an employer’s duty to bargain under section 8(a)(5) of the National Labor Relations Act of 1935 did not include a duty to arbitrate grievances in the ab-

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63. Compare American Sink Top & Cabinet Co., 242 N.L.R.B. 408 (1979) (employee discharged after contract expiration still entitled to arbitration of grievance since grievance based in expired contract and no indication given that parties intended arbitration provisions to end with contract’s term) with Milwaukee Typographical Union No. 23 v. Madison Newspapers, Inc., 444 F. Supp. 1223 (W.D. Wis. 1978) (where contract had expired and union does not allege events complained of arose under the expired contract, no arbitration is required) aff’d mem., 622 F.2d 590 (7th Cir. 1980).
64. See, e.g., Milwaukee Typographical Union No. 23 v. Madison Newspapers, Inc., 444 F.Supp. 1223 (W.D. Wis. 1978), aff’d mem., 622 F.2d 590 (7th Cir. 1980), discussed infra notes 128-33 and accompanying text; Rochdale Village, Inc. v. Public Serv. Employee’s Union, 605 F.2d 1290 (2d Cir. 1979), discussed infra notes 159-76 and accompanying text.
65. See, e.g., American Sink Top & Cabinet Co., 242 N.L.R.B. 408 (1979). Justices Stewart and Rehnquist, dissenting in Nolde, stated that the Court’s decision rested on a false assumption about the “continuing relationship” between the parties in a plant-closing situation, and noted that the expiration of the no-strike agreement extinguished any quid pro quo upon which a continued duty to arbitrate could be based. 430 U.S. at 255-57 (Stewart, J., dissenting). Wiley and Kimball were both distinguished on the ground that in both those cases the contracts were still in force at the time the dispute arose. Id. at 255-58 (Stewart, J., dissenting).
66. The duty to bargain is grounded in § 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1976), which provides that an employer’s refusal to bargain collectively with the representative of its employees constitutes an unfair labor practice. Conversely, a similar duty to bargain is imposed upon unions by § 8(b)(3), Id. § 158(b)(3). The scope of the duty to bargain as to both employer and union is broadly defined in § 8(d), Id. § 158(d).
sence of a presently effective collective bargaining agreement containing an arbitration clause. Thus, in Hilton-Davis Chemical Co., the Board rejected the argument that during a hiatus between effective contracts, an employer could be required to arbitrate grievances that involved employee rights subject to mandatory collective bargaining. The union had argued that the employer's continuing duty to bargain (in the absence of a contract) over individual grievances presented by the union—a duty which the Board had expressly imposed in the past also included the duty to bring those grievances before an arbitrator. The union relied on prior Board decisions holding that an employer could not unilaterally terminate operation of the contractual grievance procedure upon contract expiration. The Board stated that those cases did not go as far as the union contended, because an actual duty to arbitrate had not been imposed. The Board observed that arbitration was solely a creation of contract; thus, in the absence of an effective, valid contract, an employer's only obligation with respect to grievances was to bargain in good faith. If the expired contract con-

68. Id. at 242.
69. See Bethlehem Steel Co. (Shipbuilding Div.), 133 N.L.R.B. 1347 (1961), enforcement denied sub nom., Industrial Union of Marine and Shipbuilding Workers of Amer. v. NLRB, 320 F.2d 615 (3d Cir. 1963), cert. denied, 375 U.S. 984 (1964), where the Board stated that a grievance procedure is a mandatory bargaining subject and held that an employer's unilateral action in altering prior procedures was unlawful and in violation of its duty to bargain. 136 N.L.R.B. at 1503. But see Kingsport Publishing Corp., 165 N.L.R.B. 694, enforcement denied, 399 F.2d 660 (6th Cir. 1968), where the Board affirmed the trial examiner's ruling that the employer violated its duty to bargain by not adhering to the grievance procedure in the contract. 165 N.L.R.B. at 694-96. On appeal, however, the circuit court denied enforcement by holding that insufficient evidence was presented to show the existence of a grievance procedure under the expired contract. Accordingly, the procedure was found not to be a part of an "established operational pattern" at the company and therefore, the company had not unlawfully upset the status quo by resisting attempts to settle grievances by means other than direct negotiations with the Union. 399 F.2d at 662.

70. 185 N.L.R.B. at 241-42. During the two-month period when no agreement was in effect, twenty-eight grievances were filed. Twenty of these grievances were settled within the first three steps of the grievance procedure and the union requested that the remaining eight be submitted to arbitration. Id.
71. See Bethlehem Steel, 136 N.L.R.B. at 1503, discussed supra note 69.
72. 185 N.L.R.B. at 242-43. The Board noted that neither Bethlehem Steel nor Kingsport involved "a failure to arbitrate, but rather a failure to follow established channels for discussion . . . over employee grievances." Id. The Board maintained that Bethlehem Steel involved an employer's unilateral attempt to impose a new grievance procedure which undercut the union's representative status, and that Kingsport simply involved an employer's failure to bargain. Id.
73. Id. at 242. The parties to an arbitration agreement voluntarily and mutually agreed to surrender the use of their respective economic weapons in favor of third party determinations. Id. In the absence of such consensual surrender, the parties must attempt to reach agreement in good faith but are under no statutory mandate to reach
tained a grievance procedure, the duty to bargain in good faith included the duty to keep that procedure in place until an impasse in bargaining occurred, and then to follow the normal rules governing implementation of contract proposals upon impasse.74 However, as the duty to bargain does not include the duty to agree,75 during the contract hiatus the parties are in a state of "free" collective bargaining;76 in the absence of a no-strike clause as a quid pro quo for arbitration, there is no duty to arbitrate.77

As the dissenters in Nolde noted,78 the Supreme Court's holding was inconsistent with the analysis previously adopted by the Board in Hilton-Davis.79 It is, therefore, not surprising that the Board soon overruled Hilton-Davis in light of Nolde.80 What is surprising, however, is that the Board chose to overrule Hilton-Davis in a case where the Fourth Circuit panel in Nolde would probably have held the dispute to be non-arbitrable.81

In American Sink Top & Cabinet Co.,82 the employer had discharged an employee three months after the contract had expired.83

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74. 430 U.S. at 257 (Stewart, J., dissenting). They argued that any reason for implying a continuing duty on the part of the employer to arbitrate, as a quid pro quo for the union's offsetting, enforceable no-strike obligation, is foreclosed when the union terminates its contract and thus its obligation not to strike. Id. (Stewart, J., dissenting). This argument has been raised without success in some post-Nolde cases in an effort to oppose the imposition of a duty to arbitrate during a strike. See United Steelworkers v. Fort Pitt Steel Casting Div., 635 F.2d 1071, 1076 (3d Cir. 1980), cert. denied, 451 U.S. 985 (1981); see infra notes 198-207 and accompanying text.

75. 430 U.S. at 257 (Stewart, J., dissenting).

76. 430 U.S. at 257 (Stewart, J., dissenting). Justice Stewart maintained that the Board in Hilton-Davis viewed arbitration as an obligation that arose solely out of contract and although it was favored as a dispute resolving mechanism, it was not statutorily required. Id. (Stewart, J., dissenting).

77. 430 U.S. at 257 (Stewart, J., dissenting). Justice Stewart maintained that the Board in Hilton-Davis viewed arbitration as an obligation that arose solely out of contract and although it was favored as a dispute resolving mechanism, it was not statutorily required. Id. (Stewart, J., dissenting).

78. See American Sink Top & Cabinet Co., 242 N.L.R.B. 408 (1979), discussed infra notes 82-96 and accompanying text.

79. Id. at 257 (Stewart, J., dissenting). Justice Stewart maintained that the Board in Hilton-Davis viewed arbitration as an obligation that arose solely out of contract and although it was favored as a dispute resolving mechanism, it was not statutorily required. Id. (Stewart, J., dissenting).

80. See supra text accompanying note 43.


82. 242 N.L.R.B. 408 (1979).

83. Id. The contract had expired on May 1, 1978. On July 24, 1978 the employer discharged Richard Davis who had suffered an injury several months before and who had not been on the active payroll since. Id. at 411.
The union immediately filed a grievance, but the employer refused to deal with it, stating that "inasmuch as we do not have a valid union contract, we do not utilize the grievance procedure in any termination." The union charged that the employer's refusal to process its grievance violated section 8(a)(5). The Administrative Law Judge [ALJ], citing Hilton-Davis, agreed with the union and ordered the employer to entertain the grievance in accord with the procedures of the expired contract. The ALJ noted, however, that the employer was not obligated to arbitrate the discharge grievance, citing Justice Stewart's dissent in Nolde as well as Hilton-Davis.

The Board agreed with the ALJ that the employer was obligated to entertain the grievance, but it modified the order to require that the employer submit the grievance to arbitration if requested by the union, on the ground that the grievance was "arguably" based on the expired contract.

The Board's broad reading of Nolde completely ignored the distinction drawn by the Fourth Circuit in its Nolde opinion. The Fourth Circuit had noted that its holding did not apply to disputes involving individual employee grievances or non-accruable rights which arise after the expiration of a collective bargaining agreement. The Board, however, read Nolde to mean that if a dispute would have been arbitrable if it occurred when the contract was in effect, it remained arbitrable even though it occurred after the contract expired, regardless of the nature of the dispute, so long as the grievance was "arguably" raised as a contractual dispute and the contract did not expressly state that the duty to arbitrate terminated with the contract's expiration.

84. Id. at 408.
85. 242 N.L.R.B. at 410. The expired contract provided for a grievance committee and, in the event of deadlock at the committee level, referral to arbitration. Id. at 411.
86. 242 N.L.R.B. at 412. The ALJ concluded that the employer was under a duty to adhere to the prevailing terms of employment, even after expiration of the contract, and that it therefore violated sections 8(a)(5) and 8(a)(1) when it refused to resolve the employee's termination under the prevailing grievance procedure. Id.
87. Id. n.13.
88. Id. at 408. The Board adopted the ALJ's finding that the employer violated the Act by refusing to abide by the grievance procedure in the expired contract. This action, the Board concluded, amounted to an unlawful unilateral change in the terms and conditions of employment. Id.
89. Id. The Board also determined that there was no reason to conclude that the parties had intended the arbitration provision to terminate with the contract. Relying on Nolde, the Board ordered arbitration with regard to the discharge of Davis. Id.
90. 530 F.2d at 553.
91. 242 N.L.R.B. at 408. Specifically, the Board noted:

In Nolde . . . however, the Supreme Court held that, where the parties to a collective-bargaining agreement have agreed to subject certain matters to a grievance and arbitration process, "the parties' obligations under their arbitration clause survive contract termination when the dispute [is] over an obligation
In *American Sink Top*, the dispute arose from a discharge which took place several months after the contract had expired. The union claimed that the discharge violated the expired contract. The Board, holding the discharge to be subject to arbitration, concluded that "[t]he grievance's basis is 'arguably'—at least—the contract, and there is no reason to conclude that the parties had intended the arbitration provisions to end with the contract's term. In light of *Nolde*, we shall order the arbitration of the discharge. . . ." Thus, for the Board, the central holding of *Nolde* was that if the contract does not state that the duty to arbitrate terminates upon contract expiration, then anything which could be arbitrated under the contract during its term can be arbitrated under the contract after its term.

In sum, the Board's present position appears to be that any grievance which is presented to the employer after a contract has expired will be subject to mandatory arbitration if two conditions are met. First, the grievance must have been arbitrable under the expired con-

arguably created by the expired agreement." . . . That obligation is not terminated merely by the parties' failure to expressly cover this situation. As the Court stated generally in *Nolde*, in the "absence of some contrary indication, there are strong reasons to conclude that the parties did not intend their arbitration duties to terminate automatically with the contract."

*Id.* (quoting *Nolde*, 430 U.S. at 252, 253) (citations omitted).

93. *Id.*
94. *Id.* at 410.
95. *Id.* at 408.
96. This broad and generalized interpretation of *Nolde* was presaged in *Goya Foods, Inc.*, 238 N.L.R.B. 1465 (1978), where the Board held that a union's duty not to strike was co-extensive with its right to arbitrate a post-contractual grievance. *Id.* at 1466. The dispute in *Goya* arose out of discharges occurring shortly before the pertinent contract had expired. After the contract expired the employees struck in support of the grievances and the employer subsequently hired strike replacements. The Board held that the strikers had no right to reinstatement because their strike violated the contractual no-strike obligation and thus was not protected under section 8(a)(1) of the Act. *Id.* at 1467-68.

An example of a contract which was found to expressly provide for the termination of the duty to arbitrate is the contract construed in *S. & W. Motor Lines*, 236 N.L.R.B. 938 (1978), modified 621 F.2d 598 (4th Cir. 1980). The pertinent contract language was:

The Grievance Committee referred to above is known as "The Piedmont Grievance Committee." The Parties agree to remain parties to the Piedmont Grievance Committee during the term of this Contract Agreement and to use the Committee as a means of peaceful settlement of Grievance [sic] during the term of this contract agreement.

236 N.L.R.B. at 949-50 n.19. The Administrative Law Judge construed this contract language to mean that the contract specifically limited the obligation to participate in the grievance procedure to "the term of the 'Contract Agreement' only." *Id.* at 949. Because resort to the grievance procedure through the Committee was a necessary prerequisite to arbitration under the contract, this constituted an express or clear negation of the presumption that the duty to arbitrate survived expiration of the contract. *Id.* at 949-50.
tract, and second, there must be no contractual language stating that
the duty to arbitrate terminates upon the expiration of the contract. This position is best supported by the duty to bargain rationale re-
jected by the Board in Hilton-Davis. That is, as arbitration of griev-
ances is a mandatory subject of bargaining, and as an employer may
not unilaterally change its policies with respect to a mandatory subject
of bargaining without first negotiating to impasse with the union, then the duty to arbitrate grievances continues past the contract term
until such time as the employer has fulfilled his bargaining duty and
thus lawfully may unilaterally suspend that policy. In this regard, it is
noteworthy that upon reaching a bargaining impasse, an employer is
free to make unilateral changes in terms and conditions of employ-
ment, so long as the employer does not implement terms more
favorable to the employees than those last offered to the union. If
this rationale is adopted by the Board for determining whether a post-
contractual duty to arbitrate exists for purposes of section 8(a)(5), the

97. But see Cardinal Operating Co., 246 N.L.R.B. 279 (1979), where the Board failed
to apply its American Sink Top ruling in a case which seemed to present the paradigm
situation under the Board’s broad interpretation of Nolde. In Cardinal, however, the
Union’s contention was that the Company had orally agreed to extend the expired con-
tract through the hiatus period, id. at 284, and no argument was made that the post-
expiration grievances were based on the expired contract. Id. at 286. Consequently,
neither Nolde nor American Sink Top are even mentioned in the decision. Cf. Digmor
Equip., 261 N.L.R.B. No. 176, 110 L.R.M. (BNA) 1209 (1982), a recent decision where
the Board applied American Sink Top to find arbitrable a post-contractual discharge.
Chairman Van de Water, however, concurred only on the ground that some of the con-
duct underlying the discharge occurred prior to the contract termination, and indicated
that he would not find arbitrable a discharge based solely on post-contractual events. Id.
at 1211 (Van de Water, Chairman, concurring).

discussion of the “duty to bargain” rationale rejected by the Board in Hilton-Davis.

99. In general, mandatory subjects of bargaining are issues relating to “wages, hours,
and other terms and conditions of employment.” 29 U.S.C. § 158(d)(1976); Allied Chemi-


101. A bargaining impasse occurs when there is a suspension of negotiations after a
bona fide but unsuccessful attempt to reach an agreement. NLRB v. Andrew Jergens
Co., 175 F.2d 130, 136 (9th Cir.), cert. denied, 338 U.S. 827, reh’g denied, 338 U.S. 882
(1949). Adamant insistence on a bargaining position with regard to a mandatory subject
of bargaining is not per se a refusal to bargain in good faith, even if it results in a bar-
gaining impasse. Chevron Oil Co. v. NLRB, 442 F.2d 1067, 1072 (5th Cir. 1971). “Con-
gress did not compel agreement . . . [but] did require collective bargaining in the hope

“Each case must turn upon its particular facts. The inquiry must always be whether or
not under the circumstances of the particular case the statutory obligation to bargain in
good faith has been met.” Id. at 153-54. For an example of a bona fide but unsuccessful

102. NLRB v. U.S. Sonics Corp., 312 F.2d 610, 615 (1st Cir. 1963); Pacific Gamble
Robinson Co. v. NLRB, 186 F.2d 106, 110 (6th Cir. 1950).
Board would avoid the problems encountered by federal courts in section 301 actions in determining, inter alia, how long the duty to arbitrate persists, or whether a particular grievance is subject to post-contractual arbitrability.

This rationale need only be invoked by the Board in cases where all of the events giving rise to a grievance have occurred after contract expiration. If the events occurred prior to expiration, then substantive arbitrability may be said to have “attached” to the events upon their occurrence, and a straightforward Wiley analysis naturally follows.

This suggested rationale raises the additional question whether the duty to arbitrate under section 8(a)(5) is or must be coextensive in time with the ability to compel arbitration under section 301. The former is really a manifestation of the complex of rules governing the duty to bargain in good faith, which is founded in statutory policy.

103. See infra text accompanying notes 186-97 & 227-31 for a discussion of cases construing the Supreme Court's cryptic “reasonable time” footnote in Nolde, 430 U.S. at 255 n.8.

104. See, e.g., Federated Metals Corp. v. United Steelworkers, 648 F.2d 856 (3d Cir.) (dispute concerning benefits accrued after contract expiration and while employees were on strike held arbitrable), cert. denied, 102 S. Ct. 567 (1981). Discussed infra notes 209-26 and accompanying text.


106. Wiley was construed by the Court in Nolde to hold that the time of filing of a grievance is irrelevant to the question of arbitrability, provided that the events giving rise to the grievance occurred prior to the expiration of the duty to arbitrate. 430 U.S. at 251-52. See supra notes 50-53 and accompanying text.

107. “Good faith” is defined in § 8(d):

To bargain collectively is the performance of the mutual obligation of the employer and the representative of 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 the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.


Lack of good faith in the bargaining process has been found in both particular acts of the parties and in their overall bargaining policy. In NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956), the Court held that management’s refusal to provide the union with information on its financial status while negotiating wage increases was not bargaining in good faith.

Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. . . . [I]t would certainly not be farfetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim.
while the latter is a matter of contract interpretation under federal labor law as developed judicially, with incidental reference to Board decisions as merely one factor or indicator of the substance of such law.\textsuperscript{108} An analogy to the general subject of breaches and unilateral changes of collective bargaining agreements provides guidance. It is by now reasonably well established that not every breach of a collective bargaining agreement is an unfair labor practice;\textsuperscript{109} only those contract breaches which concern mandatory subjects of bargaining will be held to violate section 8(a)(5), on the theory that such breaches constitute unilateral changes without prior negotiation.\textsuperscript{110} Similarly, an employer's refusal to arbitrate a dispute will violate the duty to bargain only if the employer has, by such refusal, unilaterally changed a term or condition of employment without prior negotiation.\textsuperscript{111} Thus, a court

\textit{Id.} at 152-53. In NLRB v. General Elec. Co., 418 F.2d 736 (2d Cir. 1970), the court held that an employer cannot combine "take-it-or-leave-it" bargaining methods with a widely publicized stance of unbending firmness that he is himself unable to alter a position once taken. . . . It . . . constitutes . . . an absence of subjective good faith, for it implies that the Company can deliberately bargain and communicate as though the Union did not exist . . . .

\textit{Id.} at 762-63.

108. It is clear that under section 301 arbitration can only be compelled to the extent that there is a contractual agreement to arbitrate. Blake Construction Co., Inc. v. Laborers' Int'l Union of N. Am., 511 F.2d 324, 327 (D.C. Cir. 1975); Independent Petroleum Workers of Am., Inc. v. American Oil Co., 324 F.2d 903, 904 (7th Cir.), aff'd mem., 379 U.S. 130, reh'g denied, 379 U.S. 985 (1964). The duty of the federal courts is to determine if the dispute is one which the parties intended should be subject to arbitration under the contract. In resolving this issue the applicable law is federal law as developed by the federal courts. Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448, 456 (1957). In formulating this federal contract law the courts may look for guidance to federal statutes, federal court decisions, and state court decisions as well as Board decisions. \textit{Id.} at 456-57. There is an apparent presumption in favor of finding disputes to be arbitrable if the contract has an arbitration clause. Local Union No. 4 Int'l Bhd. of Elec. Workers v. Radio Thirteen-Eighty, Inc., 469 F.2d 610, 614 (8th Cir. 1972).


110. \textit{Id.} In \textit{Pittsburgh Plate Glass} the Supreme Court held that a unilateral modification of a term in a collective bargaining agreement was only an unfair labor practice if the modified term dealt with a mandatory subject of bargaining. \textit{Id.} at 185. Changes in terms which are merely permissive subjects of bargaining could give rise to a section 301 action for breach of contract or to grievances for arbitration, but do not violate the duty to bargain under section 8(a)(5). \textit{Id.} at 188.

111. \textit{See}, e.g., General Warehousemen and Employees Union Local No. 636 v. J.C. Penney Co., 484 F. Supp. 130 (W.D. Pa. 1980), where the employer's refusal to submit a grievance to arbitration was held not to be a violation of the duty to bargain. \textit{Id.} at 132. The duty to arbitrate was found not to be a term or condition of employment because the contract containing the arbitration clause had expired, and the arbitration clause was expressly limited to grievances arising "during the term" of the contract. \textit{Id.} at 137-38.
in a section 301 action might find that the contractual duty to arbitrate still exists, even though the employer has satisfied its statutory bargaining duty by waiting until a negotiating impasse before refusing to arbitrate grievances, and an arbitrator might find that a collective bargaining agreement has been breached, subjecting an employer to damages or remedial orders, even though the breach is not a violation of the statutory duty to bargain. Consequently, using the suggested rationale to underpin the Board's finding of an unfair labor practice for a pre-impasse, post-contractual refusal to arbitrate is not inconsistent with the Board's approach to unilateral change cases generally.

Perhaps more significantly, using the suggested rationale would allow the Board to avoid the task of having to determine whether a grievance based on post-contractual events fits within the Nolde analytical framework, a task which is none too easy given the ambiguities of the Nolde decision. Rather, the question for the Board would simply be whether the duty to arbitrate existed when the events giving rise to the grievance occurred, based upon whether the parties had reached an impasse in bargaining. Determining whether an impasse exists is a frequently occurring task in Board litigation, and the Board has developed much expertise in this area. On the other hand, the

112. See generally Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, 102 S. Ct. 2673 (1982); International Longshoremen's Ass'n v. Allied Int'l, Inc., 102 S. Ct. 1656 (1982). These two recent Supreme Court decisions with respect to the availability of injunctive relief against politically inspired work stoppages provide yet another example of this phenomenon, albeit in reverse. In each of these cases the Court held that the refusals of longshoremen to handle grain bound for the Soviet Union could not be enjoined at the employer's behest in a § 301 action; however, the employer could recover damages against the union under § 303 of the Labor Management Relations Act, 29 U.S.C. § 187 (1976), a provision authorizing damage actions for violations of the "secondary boycott" provisions of § 8(b)(4). Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, 102 S. Ct. at 2685; International Longshoremen's Ass'n v. Allied Int'l, Inc., 102 S. Ct. at 1662-63. The Court reasoned that an injunction in aid of arbitralion should not issue in these cases because the underlying dispute was not a dispute arising under the contract. Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, 102 S. Ct. at 2681 n. 12; International Longshoremen's Ass'n v. Allied Int'l, Inc., 102 S. Ct. at 1664.

113. See infra notes 252-55 and accompanying text for the Board's usual approach to unilateral change cases.

114. See supra note 3 for citations of commentaries criticizing the ambiguities of the Nolde decision.

115. See Charles D. Bonanno Linen Serv. v. NLRB, 102 S. Ct. 720 (1982) (Board's refusal to accept the existence of an impasse accorded great deference by the Court). Chief Justice Burger opined that: "Because unions and employers have important rights which arise upon impasse, the Board and the courts have acquired considerable experience in determining whether an impasse exists." Id. at 732 (Burger, C.J., dissenting). See also NLRRB v. Tex-Tan, Inc., 318 F.2d 472 (5th Cir. 1963); Taft Broadcasting Co., 163 N.L.R.B. 475 (1967), aff'd sub nom; AFTRA v. NLRB, 395 F.2d 622 (D.C. Cir. 1968). Of course, where the parties' agreement expressly negated post-contractual arbitrability, the
question whether a dispute falls within the arbitrability sphere carved out by *Nolde* is a new area of developing case law which has produced differing opinions in various federal circuit courts. As such, it is a morass which the Board should avoid, especially since there is a more clear-cut alternative for deciding these cases which is consistent with already-developed theories under section 8(a)(5).

**B. Issues in Suits Brought Under Section 301 of the Act**

The question of a continuing duty to arbitrate grievances after a contract has expired more frequently arises in the context of suits to compel or to stay arbitration brought under section 301 of the Act. It also arises in actions to confirm, enforce or vacate awards already rendered by an arbitrator. Many courts have given *Nolde* a very broad reading in this context. A few, however, have attempted to observe some of the distinctions which the Fourth Circuit mentioned in its *Nolde* decision.

In *Washington-Baltimore Newspaper Guild v. Washington Post Co.*, a case which was decided shortly after the Supreme Court announced its *Nolde* decision, the union sought to compel arbitration of refusal of a party to arbitrate a post-contractual grievance would not violate the duty to bargain. See, e.g., *General Warehousemen and Employees Union Local No. 636 v. J.C. Penney Co.*, 484 F. Supp. 130 (W.D. Pa. 1980).

116. Compare *Rochdale Village, Inc. v. Public Serv. Employees Union*, 605 F.2d 1290 (2d Cir. 1979) (scope of arbitrable grievances limited to disputes arising “under” the contract), discussed *infra* notes 159-76 and accompanying text with *Federated Metals Corp. v. United Steelworkers*, 648 F.2d 856 (3d Cir. 1981) (dispute remained arbitrable even though it arose after the expiration of the contract), discussed *infra* notes 208-31 and accompanying text.

117. See *supra* notes 99-102 for a discussion of § 8(a)(5) in the context of a refusal to arbitrate.


119. See, e.g., *Rochdale Village, Inc. v. Public Serv. Employees Union*, 605 F.2d 1290 (2d Cir. 1979) (arbitrator's award to union confirmed because the award drew its essence from the contract), discussed *infra* notes 159-76 and accompanying text.


discharges which occurred after the expiration of a contract. The court found that the parties had agreed to extend the terms of their contract, including the arbitration provisions, to cover the hiatus period until a new contract was consummated. Consequently, it was not necessary to decide whether the court could direct arbitration of the discharges in the absence of an express continuing agreement to arbitrate. The court, however, citing Nolde, noted that the dispute dealt with "arbitration requirements associated with employment discharges, with a resulting impact on the right to job security which we believe to be an 'obligation created by the expired agreement.'" Thus, although such a construction was not necessary to the case, the district court apparently read Nolde, by implication, to require arbitration of discharge grievances which arose after contract expiration, thus adopting a broad interpretation similar to that later embraced by the Board in American Sink Top.

In Milwaukee Typographical Union No. 23 v. Madison Newspapers, Inc., a suit brought by the union to compel arbitration, the union alleged that the employer was obligated to arbitrate grievances which arose subsequent to the expiration of a collective bargaining agreement. Unfortunately, the nature of the disputed issues of the grievances is not specified in the court's opinion. The union's allegation, however, was not that the grievances arose under the expired contract, but rather that they involved employer actions in derogation of terms and conditions of employment which the employer was obligated to maintain by virtue of its continuing duty to bargain. The court rejected the contention that the Nolde doctrine could be stretched so far as to cover grievances where there was no allegation that they "arose" under the expired contract. The court's decision appears to

123. Id. at 1062.
124. Id. The court's finding that the parties had agreed to extend the terms of their contract was based on "the use of the word 'terms' in Article I of the Agreement in a broad context, the failure of the parties to organize the agreement consistent with the distinction advanced by [the company], and the noticeably strong concern of the parties regarding arbitration . . ." Id.
125. Id. at 1063. The court's conclusion that "the arbitration provisions [were] 'terms' of the agreement and remained operational beyond April 1 by virtue of said agreement" made it unnecessary to decide whether the court could direct arbitration in the absence of an express continuing agreement. Id.
126. Id. n.3 (quoting Nolde, 430 U.S. at 252).
127. For a discussion of the Board's broad interpretation of Nolde in American Sink Top, see supra notes 82-96 and accompanying text.
129. Id. at 1224.
130. Id. at 1227.
131. Id. at 1225.
132. Id. at 1226-27. The court found that the complaint failed to state a cause of
be at least semantically correct, inasmuch as the Supreme Court in \textit{Nolde} did state that a dispute must "arise" under the expired contract in order to be arbitrable after the contract's expiration.\textsuperscript{133} The result, however, seems clearly inconsistent with the Board's holding in \textit{American Sink Top}.\textsuperscript{134} Inasmuch as a grievance over a post-contractual discharge must be premised upon maintaining the contractual standards of "just cause" after the expiration of the contract,\textsuperscript{135} it would seem that the union in \textit{American Sink Top} must have been advancing the same theory advanced by the union in \textit{Madison Newspapers}—that a post-contractual discharge could be challenged for lack of "just cause."\textsuperscript{136} The Board accepted this theory,\textsuperscript{137} as apparently did the District of Columbia District Court in its \textit{Washington Post} dictum,\textsuperscript{138} but the Wisconsin district court in \textit{Madison Newspapers} was apparently, without articulating its reasoning as such, applying the distinction denoted by the Fourth Circuit in \textit{Nolde}—that only grievances involving rights accrued under the expired contract could be arbitrable action because the union failed to allege that "the events of which it [was] complaining 'arose' under the contract which [had] expired." \textit{Id.} at 1227.

\textsuperscript{133} 430 U.S. at 249. In effect, the union in \textit{Madison Newspapers} was advancing the rationale which is suggested herein for determinations by the Board of whether a refusal to arbitrate a post-contractual dispute violates the duty to bargain under § 8(a)(5). \textit{See supra} notes 98-104 and accompanying text. \textit{Accord, O'Connor Co., Inc. v. Carpenter's Union Local 1408, 534 F. Supp. 484} (N.D. Cal. 1982).

\textsuperscript{134} 242 N.L.R.B. at 408. The Board in \textit{American Sink Top} held that "there [was] no reason to conclude that the parties had intended the arbitration provisions to end with the contract's term." \textit{Id. See supra} notes 82-96 and accompanying text for a discussion of \textit{American Sink Top}.

\textsuperscript{135} At least, this is the case with respect to discharges based solely on events occurring after contract expiration.

\textsuperscript{136} 242 N.L.R.B. at 410. In \textit{American Sink Top} the union contended that the company:

\textit{[W]as under a duty to adhere to the prevailing terms and conditions of employment even after the May 1 expiration of the bargaining contract, and that it consequently violated Sections 8(a)(5) and 8(a)(1) . . . when it declined the Union's July request that the . . . termination be treated under the prevailing procedure, and in so doing unilaterally disavowed the continuing operation of the grievance procedure. . . . \textit{Id. at 412. In Madison Newspapers} the union argued that: \textit{[B]ecause an employer cannot make unilateral changes in the terms and conditions governing employee members of a bargaining unit without agreement with the exclusive bargaining representative unless and until impasse has been reached, all of the terms and conditions of the expired collective bargaining agreement continued in effect up to the date of impasse. \textit{444 F. Supp. at 1225-26.}}

\textsuperscript{137} 242 N.L.R.B. at 411.

\textsuperscript{138} 442 F. Supp. at 1063. The \textit{Washington Post} court intimated that it would have "direct[ed] arbitration after the termination of a collective bargaining agreement [because] the right to job security [was] 'an obligation created by the expired agreement.'" \textit{Id. at 1063 & n.3 (quoting Nolde, 430 U.S. at 252).}
after the contract's termination.\textsuperscript{139} Discharges did not fall within that category.\textsuperscript{140}

A broad view of \textit{Nolde} was embraced by a New York state court in \textit{Modern Sheet Metal Supply Co. v. Wolf},\textsuperscript{141} where an employer brought suit to stay an arbitration over the obligation to continue paying contributions to a welfare and pension fund after the expiration of a contract.\textsuperscript{142} A question was presented as to whether the collective bargaining agreement had actually expired, and the court held that the question whether a contract has expired, by virtue of its own terms, is arbitrable.\textsuperscript{143} Further, whether the employer was required to pay the contributions in question was also an issue for arbitration, regardless of whether the agreement had terminated, since it related to "an obligation arguably created by the "expired" agreement," and accordingly survived contract termination."\textsuperscript{144} This decision ventures far beyond the facts in \textit{Nolde} and certainly ignores the distinctions specified by the Fourth Circuit,\textsuperscript{145} dealing as it does with questions of payments due for work performed \textit{after} expiration of the contract.\textsuperscript{146}

In \textit{Textile Workers of America Local 129 v. Columbia Mills}, \textsuperscript{139} 444 F. Supp. at 1226-27. The \textit{Madison Newspapers} court articulated the \textit{Nolde} standard and then observed that "in the case before [H] the union [made] no allegation that the events of which it [was] complaining 'arose' under the contract which [had] expired . . . " \textit{Id.} at 1227. The \textit{Nolde} Court reasoned that "the parties' failure to exclude from arbitrability contract disputes arising after termination . . . afford[ed] a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship." 430 U.S. at 255.

\textsuperscript{140} 444 F. Supp. at 1226-27. The \textit{Madison Newspapers} court recognized that there "are some situations in which . . . the obligation to arbitrate survives the expiration of the contract;" however, it dismissed the claim because the union had failed to allege that "the events of which it [was] complaining 'arose' under the contract which [had] expired. . . ." \textit{Id.}

\textsuperscript{141} 61 A.D.2d 966, 403 N.Y.S.2d 267 (1st Dep't 1978).

\textsuperscript{142} \textit{Id.} at 966-67, 403 N.Y.S.2d at 267.

\textsuperscript{143} \textit{Id.} at 967, 403 N.Y.S.2d at 268. The \textit{Modern Sheet} court reasoned that when dealing with "a broad arbitration provision, the issue whether the acts or conduct of the parties terminated, modified or renewed the agreement is properly for the arbitrators to decide." \textit{Id.}

\textsuperscript{144} \textit{Id.} (quoting \textit{Nolde}, 430 U.S. at 252).

\textsuperscript{145} See \textit{supra} note 43 and accompanying text for the distinctions specified by the Fourth Circuit in \textit{Nolde}.

\textsuperscript{146} 61 A.D.2d at 967, 403 N.Y.S.2d at 268. \textit{Modern Sheet} is also contradicted by Diamond Glass Corp. v. Local 206, Glass Warehouse Workers, 682 F.2d 301 (2d Cir. 1982) (no logical indication that the union's complaint related to the period or the rights covered by the expired agreement). See also District 2 Marine Eng'rs Beneficial Ass'n v. Puerto Rico Marine Management, Inc., 537 F. Supp. 813 (S.D.N.Y. 1982) (the arbitrability of the union's claims that its members were discharged without cause depends upon whether the collective bargaining agreement was in effect at the time of the discharges).
Inc., the union brought suit seeking to compel arbitration over the employer's decision to discontinue paying certain benefits to retired employees after it had closed its business. The employees' grievance was presented while the collective bargaining agreement was still in effect, but the request to arbitrate was made after the contract had terminated. The company advanced several arguments against arbitration, among them that the grievance need not be submitted to arbitration because the demand for arbitration came after the expiration of the contract. The court held that Nolde applied, inasmuch as the dispute was over the question whether the expired contract had provided permanent benefits for retirees. This appears to be a straightforward application of the Nolde doctrine, within the spirit of the Fourth Circuit's original Nolde decision.

In Local 589, ILGWU v. Kellwood Co., the Eighth Circuit specifically rejected any notion that the determination of arbitrability should turn upon whether rights "accrued" during the term of an expired contract. The union brought suit to compel arbitration over the question whether the company was required to make pension payments to employees by virtue of an expired contract which stated that the company would "maintain" pension payments at a certain level. The company argued that pursuant to Nolde the court could not compel arbitration unless it found that the pension rights accrued during the term of a collective agreement. The court took a contrary view, noting that under Nolde the time when a dispute arose or when rights accrued is not the determinative factor with respect to questions of arbitrability. Rather, the critical question is whether the disputed obli-

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148. Id. at 528.
149. Id. at 528-29.
150. Id. at 531. The Company contended that "termination of the collective bargaining agreement released the Union from its no-strike pledge and the Company from its agreement to arbitrate, the quid pro quo for the no-strike clause." Id.
151. Id. at 531. The Columbia Mills court concluded that the "grievance [was] subject to arbitration if the Company . . . indicated its intention to eliminate the benefits provided to retirees . . . at some particular time in the future." Id.
152. Indeed, the court could have reached the same decision in this case pursuant to Wiley, because the grievance was raised prior to contract expiration. 471 F. Supp. at 528-29. Therefore, the decision is implicitly within the spirit of the Fourth Circuit's Nolde decision, as Wiley is clearly within Nolde because in Wiley the dispute had occurred prior to the expiration of the contract. 367 U.S. at 548. For a discussion of Wiley see supra notes 12-17 and accompanying text.
153. 592 F.2d 1008 (8th Cir. 1979).
154. Id. at 1011-12.
155. Id. The company had contracted to maintain pension benefits which had been in effect immediately prior to the execution of the agreement. Id.
156. Id. at 1011.
gation was arguably created by the agreement. Consequently, because the rights to a pension were "created" by the expired contract, the Eighth Circuit would hold the dispute arbitrable, regardless of when the claim to pension benefits arose.

In *Rochdale Village, Inc. v. Public Service Employees Union,* the Second Circuit embraced a much narrower, fact-limited view of *Nolde.* *Rochdale* presented a rather complicated factual maze for the court. The employer had decided to subcontract certain work performed by bargaining unit employees, but determined to avoid difficulties by waiting until after its contract had expired. The parties were negotiating for a new contract, pursuant to the union’s notification that it desired to negotiate a successor agreement to its expiring contract. No agreement on a new contract was reached by the termination date, and the next day the company subcontracted the work and the union struck. A few months later, the union demanded arbitration of the subcontracting decision, contending that the contract had not automatically expired but rather had continued in effect pursuant to an automatic renewal feature. The company brought an action to stay arbitration, the union cross-moved to compel arbitration, and the district court ordered arbitration on the issues of both contract termination and subcontracting. The arbitrator ruled that the contract had not terminated and ordered the company to cease the subcontracting relationship. The union brought an action to confirm the award, and the district court, holding that the award drew its essence from the contract, confirmed it.

The company appealed this decision to the Second Circuit, which held that the original arbitration order of the district court had been

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157. *Id.* at 1012.
158. *Id.* The employees were claiming pension benefits which arose prior to the collective bargaining agreement. The company, however, had assumed the obligation to "maintain" pre-agreement benefits. Thus, the disputed pension rights were a creation of the contract and subject to arbitration. *Id.*
159. 605 F.2d 1290 (2d Cir. 1979).
160. *Id.* at 1293.
161. *Id.*
162. *Id.*
163. *Id.* The collective bargaining agreement contained a duration clause providing for automatic renewal, subject to written notice by either party within a specified period, indicating its desire to modify, amend or terminate. *Id.* The Union contended that the Company’s termination was ineffective in that it did not comply with the duration provision. *Id.* at 1296.
164. *Id.* at 1294.
165. *Id.* The arbitrator ruled that since neither party had provided effective written notice of termination, the contract was automatically renewed. *Id.*
166. *Id.* The district court concluded that the contract termination question clearly involved an interpretation of the duration clause, and was therefore arbitrable. *Id.*
The company advanced several alternative theories in support of its argument that the contract had terminated, but only one of these theories was based directly on the contract. The Second Circuit held that the district court had wrongfully abrogated its obligation to determine questions of substantive arbitrability when it remanded to arbitration consideration of all these alternative theories. Only the expiration theory based on the contract was arbitrable, because the arbitration clause of the contract limited the scope of arbitrable grievances to disputes arising "under" the contract. Thus, the matter was remanded so that the district court could examine the company's other non-contractual arguments with respect to termination of the contract and determine whether the dispute was truly arbitrable with respect to that subject.

In the course of its analysis, the Second Circuit had this to say about Nolde:

In some circumstances the contractual obligation to arbitrate has been held to survive the termination of the agreement. [In Nolde] the Supreme Court held arbitrable a claim by the union that the contract gave employees a vested right to severance pay, even though the claim was first raised when the employer discharged the employees after the contract had terminated. Nolde does not alter the importance of the termination question in the present case because the Union's claim here is not analogous to that asserted in Nolde and because the Nolde arbitration clause extended to "any" grievance arising between the...
Thus, it appears that the Second Circuit may not be inclined to give so broad and generalized an interpretation to Nolde as has been given by others. In the Second Circuit, the claim asserted by the union must be in some sense "analogous" to that asserted in Nolde, and the terminology of the arbitration clause with respect to scope may also be pertinent to the outcome. While the Second Circuit has not thus explicitly embraced the "accrual" distinction urged by the Fourth Circuit, this distinction may be implicit in the court's brief discussion of Nolde in Rochdale.

172. 605 F.2d at 1295 n.6 (citations omitted).
173. See, e.g., American Sink Top & Cabinet Co., Inc., 242 N.L.R.B. 408 (1979) (all grievances arbitrable after termination if "arguably" arising under the contract and contract did not expressly state that duty to arbitrate terminated with expiration of contract), discussed supra text accompanying notes 82-96.
174. 605 F.2d at 1295 n.6. The court noted that the dispute in Nolde involved a claim to severance pay alleged to have accrued under the expired contract. Id. The dispute in Rochdale Village, on the other hand, involved the subcontracting of bargaining-unit work after the alleged expiration of the contract. This claim, the court concluded, was not analogous to that asserted in Nolde since it did not involve rights alleged to have accrued under the expired contract. Id. Therefore, the dispute was not subject to arbitration. Id. at 1297. The court noted, however, that the union had also asserted that the contract had not expired on the alleged termination date, and therefore, the employer violated the agreement by subcontracting bargaining unit work during the term of the contract. Id. at 1294. The question of contract termination, the court concluded, was a dispute "arising under the agreement," and was therefore arbitrable. Id. at 1295-96, 1297.
175. Id. at 1295. In Nolde, the arbitration clause provided that "any grievance" arising between the parties was subject to arbitration. 430 U.S. at 245. The language of the Rochdale agreement, however, limited the duty to arbitrate to disputes arising "under" the contract. 605 F.2d at 1296.
176. 605 F.2d at 1296. Some later Second Circuit decisions, while not dealing with the question directly, appear to provide support for this view of the Second Circuit's slowly emerging interpretation of Nolde. In Diamond Glass Corp. v. Glass Warehouse Workers, 682 F.2d 301 (2d Cir. 1982), the court upheld the district court's refusal to compel post-contractual arbitration where the union failed to allege any connection between the grievance and the expired contract. Id. at 303-04. The court commented that the union's arbitration demand "revealed no details suggesting that the events complained of had occurred during the term of the expired agreement. Nor did it state that the dispute related to any right arising under the expired agreement." Id. In Ottley v. Sheepshead Nursing Home, 688 F.2d 883 (2d Cir. 1982), a majority of the appeals court panel held that a disputed contract was still in effect at the time of a contested discharge and, thus, the discharge was arbitrable. Id. at 889-90. Citing, inter alia, Nolde and Rochdale, dissenting Judge Lumbard, who found that the contract was no longer in effect, stated:

I would hold that the duty to arbitrate survives termination of a contract only as to rights vesting or grievances which had occurred before the contract was terminated. The Supreme Court in Nolde Bros., . . . relied heavily on the fact that the union sought to arbitrate vested rights. Our decisions go no further.
In General Warehousemen Local 636 v. J.C. Penney Co., 177 the court was confronted with an arbitration clause which clearly met the test set forth by the Supreme Court in Nolde for finding that the parties had limited their arbitration agreement to the term of the contract. 178 The union was seeking an order to compel arbitration of a discharge which occurred after the expiration of a collective bargaining agreement. 179 The parties had agreed that the terms and conditions of the agreement would continue during the hiatus period, and the court wrestled with the question whether such an agreement necessarily included the obligation to arbitrate discharges. 180 It finally concluded, based partly on an analysis of the Board’s Hilton-Davis decision, 181 that such an agreement could not be construed to continue the obligation to arbitrate in the absence of an express agreement to that effect. 182 The court on its own initiative raised the question whether

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178. Id. at 132 n.1. The Nolde test required some indication that the parties intended their arbitration duties to terminate automatically with the contract in order to overcome a presumption to the contrary. 430 U.S. at 253. The provision in the General Warehousemen contract, which expressly limited arbitration to disputes arising “under and during the term of the Agreement,” 484 F. Supp. at 137-38 (emphasis added), satisfied the Nolde test.
180. Id. at 133. The company argued that while having agreed to extend the “terms and conditions of employment” until a new contract was reached, there was no agreement to extend the arbitration provision. Id.
182. 484 F. Supp. at 132 n.1. In General Warehousemen, the contract provided for a four-step grievance procedure, culminating in binding arbitration. Id. Pursuant to Hilton-Davis, the court distinguished between grievance procedures and arbitration provisions: whereas an employer may not unilaterally terminate employee grievance procedures during the post-contract hiatus, arbitration provisions may be unilaterally terminated at the expiration of the collective bargaining agreement. Id. at 135. The court concluded that the company’s offer to maintain “terms and conditions of employment” would apply to the grievance procedures, under Hilton-Davis, but could not be reasonably interpreted as an offer to maintain all terms and conditions of the contract, including the arbitration provision. Id. at 135, 137. In addition, the court noted that as the union had refused to give up the right to strike during the hiatus period, there was no quid pro quo for a continued obligation to arbitrate. Id. at 137.
Nolde applied. It is obvious why the union had not raised Nolde in its argument to the court—the arbitration provision in the expired contract specifically stated that a grievance was defined as a dispute or complaint arising “under and during the term” of the agreement. The court concluded that this language met the Nolde test for overcoming the presumption that the parties intended the arbitration duty to survive the contract.

In United Mine Workers v. Jericol Mining, Inc., the issue was raised whether a union might forfeit its right to pursue arbitration under a Nolde theory if it did not file its claim within a reasonable time after the expiration of the contract. The union in Jericol Mining was seeking arbitration of a claim for vacation pay earned during the term of an expired contract. Even though the contract had expired the previous December and a strike was then ongoing, the union filed its claim in June because the normal time for vacations had always been in June under the expired contract. When the company refused to pay the strikers vacation pay for time worked between June of the previous year and the December expiration date of the contract, the union brought suit to compel arbitration.

The court held that Nolde clearly applied to the merits of the case since the union was seeking benefits which had arguably accrued under the expired contract. The company argued, however, that the union’s claim was not advanced within a “reasonable time after the contract’s expiration,” as “required” by the Nolde decision. The court held that as the practice of the parties had always been for vacation pay to be paid in June, the union could not be charged with failing to anticipate that the company would refuse to pay in June that which had been earned by employees prior to the strike. Consequently, the claim for pay was asserted in a timely fashion, and the demand for

183. Id. at 137.
184. Id. at 138.
185. See supra note 178 and accompanying text for a discussion of the Nolde test for overcoming the presumption that the parties intended the arbitration duty to survive the contract.
187. Id. at 135.
188. Id. at 133.
189. Id.
190. Id.
191. Id. at 134-35. The union was claiming vacation pay benefits which allegedly accrued during the term and under a provision of the expired agreement. Id. at 134.
192. Id. at 135. The Nolde majority acknowledged the issue, yet refrained from speculation as to the arbitrability of post-termination contractual claims not asserted within a reasonable time after the contract’s expiration. 430 U.S. at 255 n.8.
193. 492 F. Supp. at 135.
Post-contractual arbitrability was made immediately after the claim was denied.\footnote{194} Therefore, the timeliness requirement, found by the court to be part of the requirements of \textit{Nolde}, was met.\footnote{195}

It should be noted that the Supreme Court in \textit{Nolde} specifically reserved the question whether timeliness was a factor with respect to arbitrability of post-contractual grievances.\footnote{196} Thus, the \textit{Jericol Mining} court's holding that the duty to arbitrate "would not apply to a situation in which a post-termination claim was 'not asserted within a reasonable time'"\footnote{197} is characteristic of the careless way in which \textit{Nolde} has occasionally been misconstrued by some lower federal courts and the Board.

The question whether a union strike undermines the right to arbitration under \textit{Nolde} was first considered by a court in \textit{United Steelworkers v. Fort Pitt Steel Casting}.\footnote{198} The union in \textit{Fort Pitt} was seeking to compel arbitration over a series of disputes arising from a plant closing which took place during an economic strike which followed the expiration of a collective bargaining agreement.\footnote{199} The disputes concerned various benefits which the union alleged were due the employees who were laid off in the plant closing, including severance pay, vacation pay, life insurance for retirees, deductions of social security payments from pensions, and unemployment benefit claims under the expired contract.\footnote{200} The court held that all of these questions were arbitrable pursuant to \textit{Nolde}, despite various contractual arguments advanced by the company seeking to show that certain phrases used in the contract indicated an intent to restrict arbitration to the contract's term.\footnote{201} The company also argued, however, that the continuing strike

\footnote{194. \textit{Id}.}
\footnote{195. \textit{Id}.}
\footnote{196. 430 U.S. at 255 n.8. The Court stated: Certiorari was neither sought, nor granted, on the question of the arbitrator's authority to consider arbitrability following referral, and we express no view on that matter. Similarly, we need not speculate as to the arbitrability of post-termination contractual claims which, unlike the one presently before us, are not asserted within a reasonable time after the contract's expiration. \textit{Id.} (emphasis added).}
\footnote{197. 492 F. Supp. at 135 (quoting \textit{Nolde}, 430 U.S. at 255 n.8).}
\footnote{199. 635 F.2d at 1074.}
\footnote{200. \textit{Id}.}
\footnote{201. \textit{Id}. at 1081. The company based its argument on (1) the contractual definition of "employee" as specified workers represented by the union "during the life of this Agreement;" (2) the fact that the agreement restricted filing of grievances to "employees" as defined above; and (3) the fact that a provision of the contract stated that grievances which arose prior to the agreement's commencement were arbitrable under its terms, thus showing that the parties by negative implication would have to agree on such a
by the union should have prevented any order to arbitrate, because the no-strike clause of the expired agreement was the \textit{quid pro quo} for the arbitration clause. \footnote{202} How could the company be compelled to arbitrate over grievances at a time when the union was on strike? The court rejected this argument, holding that an economic strike over new contract terms did not violate the no-strike clause, which was only intended to bar strikes over arbitrable disputes concerning \textit{interpretation} of the prior contract's terms. \footnote{203} The court observed that the \textit{quid pro quo} theory rested on a notion of coterminous interpretation—a no-strike obligation extends to the same subjects as the arbitration clause to which it is linked. \footnote{204} Thus, unless the parties had agreed that new contract terms would be subject to arbitration, the no-strike clause would not prohibit a strike over new contract terms. \footnote{205} Because the arbitration clause in Fort Pitt's contract applied only to contract interpretation grievances, the strike over new terms did not involve an arbitrable dispute and thus did not violate the no-strike clause. Consequently, the strike was no bar to arbitration of the grievances. \footnote{206}

In \textit{Federated Metals Corp. v. United Steelworkers}, \footnote{207} the Third Circuit took \textit{Nolde} a step further along the road to finding virtually every post-contractual dispute arbitrable. In \textit{Federated Metals}, a union struck for a new contract upon the expiration of the old one. \footnote{208} After six months of the strike, during which time bargaining continued, the company determined to close down its plant. \footnote{209} Several months later, various pension benefit claims were filed by employees who had

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\footnote{202} Id. at 1076.

\footnote{203} Id. at 1076-78.

\footnote{204} Id. at 1077.

\footnote{205} Id. The notion of coterminous interpretation developed in cases where a no-strike obligation was inferred from the existence of an arbitration clause. See, e.g., \textit{Gateway Coal Co. v. UMW}, 414 U.S. 368 (1974) (strike over a safety issue violated implied no-strike obligation because safety issues were arbitrable).

\footnote{206} 635 F.2d at 1076-78.

\footnote{207} Id. at 1078. The court concluded that:

Fort Pitt and the Union intended that the obligation not to strike or lockout would be coterminous with the duty to arbitrate, and that the no-strike clause would have no application to the use of economic weapons in support of either party's bargaining position. . . . We conclude that the Union's strike, which was not over the grievances it seeks to arbitrate, does not alter Fort Pitt's obligation to arbitrate the grievances that arose after termination of the Agreement.


\footnote{209} Id. at 857.

\footnote{210} Id.
lost their jobs as a result of the plant closing.\textsuperscript{211} Several employees were denied benefits on the grounds of insufficient length of service.\textsuperscript{212} These employees contended that all time up to the closing of the plant should have been counted, while the company claimed that upon the expiration of the contract and commencement of the strike, the individuals had stopped accruing service time.\textsuperscript{213} The union requested arbitration over the question whether time had continued to accrue during the strike until the plant closing.\textsuperscript{214} The company refused to arbitrate and filed a complaint in federal district court to stay the arbitration.\textsuperscript{215} In response, the union moved for an order compelling arbitration.\textsuperscript{216} The district court agreed with the union and ordered arbitration, holding that the dispute arose under the expired agreement, even though it arose after the agreement had expired, and that the union had not delayed unreasonably in filing its grievance.\textsuperscript{217} 

\textit{Federated Metals} presented several significant issues for the Third Circuit. It was an “accrual” case with a twist, in that the union was arguing for accrual of benefits after the contract had expired and while the employees were on strike.\textsuperscript{218} Furthermore, it was a case where the claim was asserted almost a year after the contract expired, and many months after the plant closed, thus raising questions of timeliness.\textsuperscript{219} 

\textsuperscript{211} Id. The pension benefits sought were “70/80” benefits. This pension plan provided for early retirement if an employee was 55 years old and his age combined with his years of continuous service service with the company totaled 70 years; or if he was under 55 years old and his age and continuous service totaled 80 years. Id. Several claims for disability were also made. Id. at 857-58.

\textsuperscript{212} Id. at 858.

\textsuperscript{213} Id.

\textsuperscript{214} Id.

\textsuperscript{215} Id.

\textsuperscript{216} Id.

\textsuperscript{217} Federated Metals Corp. v. United Steelworkers, Nos. 80-1606, 80-1607 (D. N.J. Jan. 23, 1980) (ordering arbitration of pension claims and denying arbitration of the disability claims). The district court ordered arbitration on the pension claims but denied the union's request for arbitration on the disability claims. The pension claim was held to relate to the number of years of service, a subject which was arbitrable under the Pension and Disability Agreement, while the disability claim did not relate to any subject arbitrable under that agreement. 648 F.2d at 858. \textit{See infra} note 224 for the text of the arbitration clause in the instant case.

\textsuperscript{218} 648 F.2d at 859-60. This is to be distinguished from the usual accrual case where the benefits have accrued during the life of the contract. \textit{See, e.g.,} Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionary Workers Union, 430 U.S. 243 (1977). The union and Federated Metals disagreed over whether the time after the termination of the agreement should be included when calculating the continuous service of employees for purposes of pension and disability benefits. The court viewed this dispute as one “over the number of years of continuous service” and thus arbitrable under the Pension and Disability Agreement. 648 F.2d at 860.

\textsuperscript{219} \textit{See infra} notes 227-31 and accompanying text.
Before the Third Circuit, the company argued that *Nolde* dealt only with a situation where benefits accrued while the contract was in effect. The company emphasized the Fourth Circuit's language in *Nolde*, expressly limiting its holding in that regard. The Third Circuit, however, rejected this characterization of *Nolde*, finding instead that the controlling issue was whether the dispute would ultimately be resolved by construing the expired contract. The court proceeded to brand as "esoteric" the argument that arbitrability should depend upon whether a benefit has "vested" or "accrued" at a certain time, noting that the parties might have agreed in their contract that a particular benefit would accrue after the termination of the contract. Since the disputed issue was within the scope of the arbitration clause, and involved an interpretation of the contract, and there was no express provision or clear implication that the arbitration clause was to terminate with the contract, then the dispute remained arbitrable even though it arose after the expiration of the contract.

The company in *Federated Metals* also argued that the significant

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220. *Id.* at 860-61.

221. *Id.* at 861. See *supra* note 43 and accompanying text for the Fourth Circuit's language in *Nolde*.

222. 648 F.2d at 861. The court stated:

[The *Nolde* Court] found it significant that both the union's claim for the benefits and the company's refusal to pay them were based on differing perceptions of the expired collective bargaining agreement. . . . The Court reasoned that "it is clear that, whatever the outcome, the resolution of the claim hinges on the interpretation ultimately given the contract clause providing for severance pay. The dispute, therefore, although arising after the expiration of the collective-bargaining contract, clearly arises under the contract."

*Id.* (quoting *Nolde*, 430 U.S. at 249) (emphasis in original).

223. *Id.*

224. *Id.* at 860. The arbitration clause of the Pension and Disability Agreement provided in pertinent part:

If any difference shall arise between any employee . . . and the Company as to:

(a) the number of years of continuous service of an employee;

(b) the age of such employee; or

(c) whether permanent and total disability did or did not result from the cause listed . . . ,

the question may be submitted by either party for arbitration to the American Arbitration Association.

*Id.* at 858 n.5. The court concluded that "this dispute is over the number of years of continuous service" and is therefore "one of the three issues subject to arbitration." *Id.* at 860.

225. *Id.* at 861. The Pension and Disability Agreement had to be interpreted to determine whether employees continued to accumulate service credit time after the expiration of the agreement, as the union claimed, or whether the termination of the agreement constituted a break, whereby service credit time would no longer accrue, as the company contended. *Id.* at 861-62.

226. *Id.* at 882.
lapse of time before presentation of the grievances violated the principle "alluded to" in \textit{Nolde} that grievances must be presented within a reasonable time.\footnote{Id. In \textit{Federated Metals}, the pension claims were filed nine months after the contracts expired and three months after the public announcement to close the plant. The union filed a request for arbitration after the claims were denied by the employer. \textit{Id.} at 857-58. \textit{Federated Metals} contended that arbitration should not be required because the union's claims were not asserted "within a reasonable time after the agreement had expired." \textit{Id.} at 859 (citing \textit{Nolde}, 430 U.S. 243 (1977)).} The court disagreed, construing such reasonable time "requirement" to mean that the union could not unreasonably delay in presenting its grievances for arbitration once they had arisen.\footnote{Id. at 862. The court stated: "Although there may be some situations in which so much time has elapsed since the contract expired that to order arbitration would be unfair despite the fact that the union has not delayed unreasonably, we do not believe that this is such a case." \textit{Id.} The court thus rejected the company's argument that the "reasonable time" principle referred to the actual time elapsed since the termination of the contract. The critical inquiry, the court noted, was whether the union had delayed unreasonably in its demand for arbitration once the dispute had arisen. \textit{Id.}} In the instant case, the grievances did not arise until the company denied claims for pension benefits filed several months after the plant had closed, and the union filed its demand for arbitration promptly after such denial.\footnote{648 F.2d at 862. For a discussion of \textit{Fort Pitt}, see supra notes 198-207 and accompanying text. The \textit{Fort Pitt} court noted that the grievances did not arise until after \textit{Fort Pitt} had closed the plant and asserted that it had no obligation to comply with the arbitration provision. Since the union did not delay unreasonably in asserting its claim for arbitration, the length of time between the termination of the contract and the demand for arbitration did not absolve \textit{Fort Pitt} of its duty to arbitrate the grievances. 635 F.2d at 1078. The \textit{Federated Metals} court noted that the two cases were similar in that both involved grievances that arose while the parties were negotiating for a new agreement after the old agreement had expired. 648 F.2d at 862. In such cases the court felt the proper inquiry was whether the union had delayed unreasonably in asserting the disputed claim, not whether an unreasonable time had elapsed since the expiration of the old contract. \textit{Id.}} The court noted the parallel to its prior holding in \textit{Fort Pitt},\footnote{648 F.2d at 857-58.} where the court had held that there was no unreasonable delay when, through no fault of the union, the grievance itself did not arise until well after the expiration of the contract.\footnote{648 F.2d at 862. For a discussion of \textit{Fort Pitt}, see supra notes 198-207 and accompanying text. The \textit{Fort Pitt} court noted that the grievances did not arise until after \textit{Fort Pitt} had closed the plant and asserted that it had no obligation to comply with the arbitration provision. Since the union did not delay unreasonably in asserting its claim for arbitration, the length of time between the termination of the contract and the demand for arbitration did not absolve \textit{Fort Pitt} of its duty to arbitrate the grievances. 635 F.2d at 1078. The \textit{Federated Metals} court noted that the two cases were similar in that both involved grievances that arose while the parties were negotiating for a new agreement after the old agreement had expired. 648 F.2d at 862. In such cases the court felt the proper inquiry was whether the union had delayed unreasonably in asserting the disputed claim, not whether an unreasonable time had elapsed since the expiration of the old contract. \textit{Id.}}

This review of the federal case law on post-contractual arbitrability under the \textit{Nolde} decision illustrates how the Supreme Court's supposedly definitive ruling has left many questions unanswered, due at least in part to the Court's ambiguously worded decision which was unclear as to the basis for its finding of arbitrability.\footnote{648 F.2d at 857-58.} If the \textit{Nolde} grievance remained arbitrable (even though it arose after contract ex-
piration) because it involved a claim for benefits which arguably accrued or were earned during the term of the expired contract,\textsuperscript{233} then those decisions finding arbitrable post-contractual discharges or claims for benefits earned after contract termination, are probably wrong.\textsuperscript{234} If, on the other hand, the underlying rationale of the Supreme Court's decision is that the parties must be presumed to intend that arbitrability survives contract expiration, without regard to the nature of the grievance, unless the contract expressly or by clear implication limits post-contractual arbitrability,\textsuperscript{235} then those decisions finding arbitrable post-contractual disputes which do not fit within the accrual theory are correct.\textsuperscript{236}

The Supreme Court's opinion by itself is too ambiguous to resolve this fundamental disagreement. The policy considerations cited by the Court,\textsuperscript{237} however, seem to support the "accrual" theory better than the "presumption of continuing arbitrability" theory. Thus, while the Court, in support of the "presumption theory," notes the fact that the parties negotiated within the context of a national labor policy which encourages arbitration and presumes arbitrability in doubtful cases,\textsuperscript{238} at the same time, the parties were not conducting negotiations in a context where a court had already articulated the idea that arbitration clauses had to be expressly self-limiting in order to expire with the contract. Indeed, the Hilton-Davis decision would have led negotiating parties to believe exactly the opposite, i.e., that the arbitration duty would always expire with the contract unless it was expressly extended by agreement of the parties.\textsuperscript{239} Parties negotiating in the context of pre-Nolde case law could not have been expected to know what the

\begin{itemize}
  \item \textsuperscript{233} This is the interpretation suggested by the Fourth Circuit in its Nolde decision, 530 F.2d at 552, discussed supra note 43 and accompanying text, and the Second Circuit in Rochdale Village, Inc. v. Public Serv. Employees Union, 605 F.2d at 1296, discussed supra notes 172-76 and accompanying text.
  
  \item \textsuperscript{234} See, e.g., Federated Metals Corp. v. United Steelworkers, 648 F.2d 856 (3d Cir. 1981) (dispute over pension benefit claims was arbitrable even though the claims arose after the expiration of the contract); Local 589, ILGWU v. Kellwood Co., 592 F.2d 1008 (8th Cir. 1979) (dispute over pension payments was arbitrable regardless of when the claim arose since the pension rights were created by the expired contract).
  
  \item \textsuperscript{235} See General Warehousemen Local 636 v. J.C. Penney Co., 484 F. Supp. 130 (W.D. Pa. 1980) (contract language held to overcome the presumption that the parties intended the duty to arbitrate to survive the contract). See also Federated Metals Corp. v. United Steelworkers, 648 F.2d 856 (3d Cir. 1981) (narrow arbitration clause held not to demonstrate parties' intent to have clause terminate with the contract).
  
  \item \textsuperscript{236} See cases cited supra note 234.
  
  \item \textsuperscript{237} See supra notes 52-56 and accompanying text.
  
  \item \textsuperscript{238} 430 U.S. at 254-55.
  
  \item \textsuperscript{239} For a discussion of Hilton-Davis, see supra notes 67-77 and accompanying text. The Hilton-Davis Board had held that since the duty to arbitrate was a creation of contract, the duty would expire with the contract. 185 N.L.R.B. at 242.
\end{itemize}
Court in Nolde says they were presumed to know.\textsuperscript{240} Furthermore, the Court's statement that the parties' agreement to arbitrate grievances demonstrates their special confidence in the ability of an arbitrator to resolve their disputes during the term of an agreement\textsuperscript{241} bears little relationship to the question whether they wanted post-contractual disputes to be arbitrable. Once a contract has expired, the intricate "package" of rights and responsibilities which it represents, among which the grievance arbitration clause is merely one factor, no longer pertains. The employer's agreement that arbitration is a preferable mechanism for resolving contractual disputes may be based on an understanding of that total "package" and its functioning which does not, in whole or in part, treat the question whether the employer would have agreed to arbitration in the absence of some or all of the rest of the "package." Thus, it should not be presumed that the parties, by agreeing to arbitration as part of the "package," wished their disputes to remain arbitrable after contract termination merely because they preferred an arbitrator to a judge as their decision-maker during the contract term. This is a presumption which clearly underlies the Court's resort to quotations from the Steelworker's Trilogy about the preference for arbitrators as dispute settlers.\textsuperscript{242} Parties may just as rea-

\textsuperscript{240} The Nolde Court stated that the parties must have been conscious of the federal labor policy favoring arbitration to resolve labor disputes and the Court's use of a strong presumption favoring arbitration to effectuate the policy. 430 U.S. at 254-55. The Court cited Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), as support for the presumption of arbitrability as well as the presumption of knowledge of this policy on behalf of the parties. 430 U.S. at 254-55.

\textsuperscript{241} Id. at 253-54.

\textsuperscript{242} Id. The Court stated:

By their contract the parties clearly expressed their preference for an arbitral, rather than a judicial, interpretation of their obligations under the collective bargaining agreement. Their reasons for doing so, as well as the special role of arbitration in the employer-employee relationship, have long been recognized by this Court:

The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed. [United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)].

Indeed, it is because of his special experience, expertise, and selection by the parties that courts generally defer to an arbitrator's interpretation of the collective bargaining agreement:

[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his. [United Steelworkers v. Enterprise
reasonably be presumed to intend that post-contractual grievances, in common with all labor-management disputes, will be subject to resolution according to the relative economic strengths of the parties, as is the case in the absence of a contractual arbitration mechanism. Why is there presumed an intention that arbitrability will continue, when the parties have agreed to a provision for termination of the contract? It would be more rational to presume that where a contract has a termination provision, the parties intended to terminate all aspects of the agreement, unless the agreement contains language expressly negating this presumption as to a particular provision.

Given the faulty policy support for the "continuing presumption" interpretation of Nolde, a sounder basis for the Supreme Court's finding of arbitrability is the "accrual" theory which was suggested by the Fourth Circuit and apparently concurred in by the Second Circuit. Thus, the problem for a district court in deciding a post-contractual arbitrability case is one of conceptualizing the claim presented for arbitration. If the grievance claim involves an issue which the contracting parties apparently intended to be covered by their expired agreement, such as a claim for benefits earned during the term of the agreement, or a claim that a provision of the agreement continued in effect beyond the agreement's termination, then the claim would remain arbitrable, even though it was presented for arbitration after the agreement had expired. On the other hand, if the claim raised by the grievning party involves only post-contractual issues, such as a post-contractual discharge which has no factual "relation back" to events prior to the contract's expiration, then the dispute would not be arbitrable. Of crucial significance in this analysis is the question of when the operative facts underlying the grievance occurred, not when the grievance itself arose.

Thus, in the Nolde case, although the grievance arose after the contract expired, the operative facts predated contract expiration

243. See, e.g., 430 U.S. at 255 (Stewart, J., dissenting).
244. 530 F.2d at 552. See supra notes 39 & 40 and accompanying text for a discussion of the Fourth Circuit's "accrual theory" under Nolde.
245. See Rochdale Village, Inc. v. Public Serv. Employees Union, 605 F.2d 1290 (2d Cir. 1979), discussed supra notes 159-76 and accompanying text.
246. See, e.g., Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, 430 U.S. 243 (1977) (dispute over amount of severance pay benefits earned during term of contract found to be arbitrable).
247. See, e.g., Milwaukee Typographical Union No. 23 v. Madison Newspapers, Inc., 444 F. Supp. 1223 (W.D. Wis. 1978) (employer had no duty to arbitrate post-contractual discharge where union failed to allege that grievance arose under expired contract), discussed supra notes 128-33 and accompanying text.
248. 430 U.S. at 247. See supra note 25 and accompanying text.
and so an interpretation of the expired contract was clearly called for. In addition, it was not unreasonable to assume that the parties, having agreed at the commencement of their contract to include an arbitration provision to govern contract interpretation disputes, intended that disputes over the meaning of the severance provision would be arbitrable, even though such disputes might have arisen after the contract (and the severance provision) had expired.

IV. CONCLUSION

The problem of determining whether a claim arising after the termination of a contract is arbitrable is really a problem of conceptualization, and the difficulty in applying the Nolde decision arises because the Supreme Court did not address the problem with sufficient conceptual clarity. Furthermore, the rather different analysis suggested herein for deciding cases in the Labor Board forum under section 8(a)(5), as opposed to the judicial forum under section 301, provides a further instance of the need for conceptual clarity. Thus, the Board's decision in American Sink Top seems inappropriate from a policy perspective because the Board did not clearly articulate a rationale consistent with the mode of analysis usually applied in cases involving unilateral changes of terms of an expired contract.

Where it is charged that section 8(a)(5) has been violated by a refusal to arbitrate a post-contractual grievance, the Board should apply the mode of analysis normally applied in cases where an unlawful unilateral change of an employment condition is alleged. Because the question of grievance arbitration is a mandatory subject of bargaining, the parties may not abrogate the arbitration requirement of their expired contract until an impasse in bargaining has occurred. Prior to impasse, the failure to arbitrate any grievance which would have been subject to the grievance arbitration procedure had it arisen

249. Id. at 244-47. According to the contract, an individual's severance pay was in part determined by his length of employment. Thus employees working during the term of the contract arguably accrued severance benefit rights during that time. Id. at 245 n.2.

250. See supra notes 232-36 and accompanying text. See also supra note 3 and accompanying text.

251. 242 N.L.R.B. at 408. Instead, the Board stated that the employer was required to arbitrate the discharge grievance since it "arguably" arose under the expired contract. Id. This analysis is appropriate in a § 301 action but a different approach is necessary in a § 8(a)(5) action. See infra text accompanying notes 252-55.


253. See NLRB v. Silver Spur Casino, 623 F.2d 571, 583 (9th Cir. 1980); Chicago Magnesium Castings Co. v. NLRB, 612 F.2d 1028, 1034 (7th Cir. 1980).

during the contract term, will constitute a refusal to bargain in good faith, regardless of whether the grievance itself is conceptualized as an “accrual case.”\textsuperscript{255} In the same manner, if it is charged that a party has refused to arbitrate a grievance which arose after a bargaining impasse had occurred, there will be no unlawful refusal to bargain, because once the impasse has occurred, the parties (in this instance, usually the employer) are free to implement terms less favorable than those offered at the negotiation table,\textsuperscript{256} and so an employer may suspend the arbitration process, again regardless of whether the grievance can be conceptualized as an “accrual case.” This mode of analysis provides a consistent, clearly defined rule by which employers and unions should be able to resolve with reasonable certainty the question of whether their statutory bargaining duty obliges them to submit particular post-contractual grievances to arbitration. Viewed in this light, it can be seen that American Sink Top,\textsuperscript{257} as a result of faulty conceptualization, represents a misapplication of the Nolde case—the question presented in Nolde was purely one of contract interpretation, not of the statutory duty to bargain.\textsuperscript{258} Thus, the Nolde result really had no bearing on the question before the Board in American Sink Top.\textsuperscript{259}

In cases arising under section 301, where a party claims that a grievance is arbitrable although it arose after the expiration of the pertinent collective bargaining agreement, a different conceptual problem is presented to the court—the question whether, as a matter of contract construction, the particular grievance in issue remains subject to arbitration because it requires an interpretation of the expired contract.\textsuperscript{260} It is here that the conceptual fuzziness of the Supreme Court’s

\textsuperscript{255} See generally Seattle-First Nat’l Bank v. NLRB, 638 F.2d 1221, 1227-28 (9th Cir. 1981).


\textsuperscript{257} 242 N.L.R.B. 408 (1979).

\textsuperscript{258} 430 U.S. at 244. The Court stated that the issue was “whether a party to a collective-bargaining contract may be required to arbitrate a contractual dispute over severance pay pursuant to the arbitration clause of that agreement. . . .” Id. (emphasis added).

\textsuperscript{259} This is not to say that the result in American Sink Top is wrong. Under this analysis, the Board should have determined whether the negotiations had reached an impasse and not whether the dispute was “arguably” based upon a contract that did not expressly provide for the expiration of the arbitration provision upon contract termination. Assuming that no impasse had occurred at the time the discharge grievance was filed, the Board’s decision that the grievance was arbitrable would be correct. Only if an impasse had been reached would the employer have been free to suspend the arbitration process under § 8(a)(5).

\textsuperscript{260} The importance of the interpretation requirement is evidenced by the Court’s statement in Nolde: “However, it is clear that, whatever the outcome, the resolution of that claim hinges on the interpretation ultimately given the contract clause providing for severance pay.” 430 U.S. at 249. See also Federated Metals Corp. v. United Steelworkers, 648 F.2d 856 (3d Cir. 1981). The Federated Metals court stated: “The dispute here, like
The Nolde decision causes trouble. The Supreme Court appears, at one point in its opinion, to limit the question of contract construction to interpretation of the grievance arbitration provision, without regard to the nature of the grievance. Applying a presumption that the parties intended all grievances to remain arbitrable after contract expiration unless they specified otherwise, the Court would apparently look solely at the arbitration provision language and, if it found no express or clearly implied intention to limit the arbitration duty temporally, the Court would hold the post-contractual dispute to be arbitrable. Elsewhere in its opinion, however, the Court analyzed the nature of the grievance itself, and found significant a conceptualization of the Nolde grievance requiring an authoritative substantive construction of the expired contract, regardless of the time when the claim arose, because the claim related to benefits alleged to have been earned while the contract was in effect.

Clearly, the Court’s two modes of contract analysis cannot be considered in isolation from each other if a sensible rule is to emerge. Consistent with the fundamental policy expression, reiterated by the Nolde Court, that the duty to arbitrate is a duty created entirely by contract, it appears most reasonable to use a mode of analysis that looks for a positive indication in the contract that a particular grievance is, at least arguably, subject to arbitration, rather than a mode of analysis that assumes all grievances to be arbitrable unless clearly or impliedly rendered non-arbitrable by the contract. Consequently, it is clear that the conceptualization of the grievance—its classification as involving either issues of “accrual of benefits” during the contract’s term or other issues requiring a construction of the expired contract’s

that in Nolde, turns on differing interpretations of the expired Pension and Disability Agreement. . . .” Id. at 861.

261. See supra note 3 and accompanying text.

262. 430 U.S. at 252-55. This is evidenced by the Court’s statement that “there is nothing in the arbitration clause that expressly excludes from its operation a dispute which arises under the contract, but which is based on events that occur after its termination.” Id. at 253. While the Court noted that the contract’s silence did not establish the parties’ intent to have post-termination disputes arbitrated, there were strong policy considerations to support that conclusion. Id. For a discussion of these policy considerations, see supra notes 52-56 and accompanying text.

263. 430 U.S. at 255. The Court opined: “In short, where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication.” Id.

264. Id. at 248-50.

265. Id. The authoritative substantive construction of the expired contract is required to determine whether the parties intended the severance pay clause to terminate with the contract or to allow for the realization of accrued rights after the agreement had expired. Id. at 249. The resolution of the dispute would therefore depend upon the interpretation given to the severance pay clause. Id.

266. Id. at 250-51.
terms—is the first step in determining post-contractual arbitrability. Once the grievance is so conceptualized, it is then appropriate to examine the expired contract's arbitration provision to determine whether arbitrability has nonetheless been extinguished by an express or implied temporal limitation in that provision.\footnote{267}

The result may be that a grievance which is not arbitrable under this section 301 analysis must be arbitrated prior to a bargaining impasse due to the section 8(a)(5) duty to maintain conditions of employment after contract expiration.\footnote{268} Conversely, the result may be that a grievance no longer subject to the statutory duty because an impasse in bargaining has occurred, must nonetheless be arbitrated because it requires an interpretation of the expired contract and there is no language in that expired contract expressly or impliedly extinguishing arbitrability of post-contractual grievances.\footnote{269} This apparently paradoxical set of results, however, is not unusual in the field of labor relations, and employers and unions have learned to deal with such paradoxes and to consider their courses of action appropriately.\footnote{270}

Thus, the inconsistent case law developments spawned by Nolde's conceptual murk\footnote{271} are really unnecessary, as straightforward applications of the principles already developed under sections 8(a)(5) and 301 make clear. Perhaps the existing split in circuit authority will lead the Supreme Court during the 1980's to reconsider this issue in a way that will provide some needed light to guide unions, employers, the labor relations bar and authoritative decision-makers on the Labor Board and on the bench.\footnote{272}

\footnote{267. This examination of the arbitration provision is required under Nolde since the parties could limit the arbitration clause in the contract. \textit{Id.} at 252-53.}

\footnote{268. For a discussion of the arbitrability of disputes under § 8(a)(6), see supra notes 97-115 and accompanying text.}

\footnote{269. This would be consistent with the result in American Sink Top & Cabinet Co., 242 N.L.R.B. 408 (1979). In \textit{American Sink Top} the Board did not consider whether an impasse in bargaining had been reached but determined that the dispute was arbitrable since it "arguably" involved an interpretation of the contract. See supra notes 82-96 and accompanying text.}

\footnote{270. Thus, for example, an employer may unilaterally modify a contract term dealing with a non-mandatory subject of bargaining without incurring any § 8(a)(5) liability, but the employer remains liable to the union for breach of contract under § 301. See Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971). For a discussion of \textit{Pittsburgh Plate Glass}, see supra note 110.}

\footnote{271. See supra note 3 and accompanying text.}