ARBITRATION

ROBBINS v. PROSSER'S MOVING AND STORAGE CO.: THE EIGHTH CIRCUIT ALLOWS PENSION TRUSTEES TO BYPASS ARBITRATION

INTRODUCTION

When the Labor Management Relations Act of 1947 (LMRA) was passed, Congress voiced approval of arbitration by recommending that "a method agreed upon by the parties" be used to settle disputes arising from the interpretation of collective bargaining agreements. In the Steelworkers Trilogy, the Supreme Court of the United States echoed that approval by announcing a judicial preference for arbitration.

Despite this generally recognized federal labor policy which favors the use of arbitration, the United States Court of Appeals, Eighth Circuit, in Robbins v. Prosser's Moving and Storage Co., intimated that arbitration may not provide sufficient protection for pension trust benefit claims. Although employee grievance procedures must usually begin with arbitration, the Robbins court allowed pension trustees to bypass arbitration and sue in district court.

The Robbins case represents an effort to integrate federal labor policy and statutory protections provided for pension trusts. In its attempt to coordinate these two bodies of law, the Eighth Circuit overruled several prior decisions, and now stands in di-

2. Id. § 173(d).
6. Id. at 439-443.
8. Robbins, 700 F.2d at 443.
9. Id. at 435.
10. Id. at 443 (the court explicitly overruled Layne-Western Co. v. International Union of Operating Engineers, 650 F.2d 155 (8th Cir. 1981); Central States, South-
This case-note will address the reasons for the Eighth Circuit’s departure from prior case law and discuss the extent to which that departure was necessary to harmonize labor policy and pension policy.

**FACTS AND HOLDING**

The plaintiffs are trustees of pension and welfare trusts set up pursuant to section 302(c)(5) of the LMRA. Their complaints are based on collective bargaining agreements between the union and the defendant-employers.

The complaints alleged that, under the collective bargaining agreements, the defendants were required to make certain payments to the fund for each employee covered by the agreements. It was further alleged that the defendants violated the collective bargaining agreements by refusing to allow the trustees to audit payroll records and by repeatedly failing to submit payments and monthly contribution reports on time.

The defendants disputed the coverage of certain employees under the agreements and argued that interpretation of those agreements was necessary to determine liability. Because the collective bargaining agreements expressly bound the parties to arbitrate matters of contract interpretation, the defendants moved to dismiss the action on the grounds that the plaintiffs were contractually bound to arbitrate this dispute. The district court agreed with the defendants and dismissed on the grounds that the plaintiffs failed to exhaust contractual remedies.

A panel of the Eighth Circuit reversed, holding that the trustees could bypass arbitration and sue in district court. Upon re-

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13. Robbins, 700 F.2d at 435.
14. Id.
15. Id. at 435-36.
16. Id. at 436, 442.
17. Id. at 442 n.8. "The arbitration clause in the collective-bargaining agreements applies 'should difference arise between the Company and the Union or any employee of the Company as to the meaning or application of the provisions of the Agreement.'" (emphasis in original).
18. Id. at 436.
19. Id. at 434.
20. Id.
hearing en banc, the Eighth Circuit upheld its earlier ruling, holding that national pension policy voiced in federal pension legislation, along with the terms of the collective bargaining agreements, supported the right of the pension trustee to litigate without exhausting arbitral remedies.\(^2\)

**BACKGROUND**

*Enforcement of Collective Bargaining Agreements*

Section 301 of the LMRA recognizes the validity of collective bargaining agreements by granting federal court access for suits involving agreement violations.\(^2\) But, since most collective bargaining agreements contain arbitration clauses,\(^2\) employee grievances are enforced primarily through arbitration.

The presence of an arbitration clause, however, does not necessarily remove the courts from employee grievance procedure.\(^2\) In an action to compel arbitration, a court may find a dispute not arbitrable if both parties have not agreed in the contract to submit the dispute to arbitration.\(^2\)

Even after an arbitration award has been granted, a court can review the arbitrator's decision in an enforcement proceeding.\(^2\) If

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\(^2\) Id.

\(^2\) Labor Management Relations Act, ch. 120, § 301(a), 61 Stat. 136, 156 (1947) (codified at 29 U.S.C. § 185(a) 91976)). “Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties . . . .”

\(^2\) The Bureau of National Affairs, Inc., Basic Patterns in Union Contracts 15 (9th ed. 1979); M. Hill & A. Sニックロピ, Remedies in Arbitration 19 (1981) (“Today approximately 96 percent of all collective bargaining agreements contain procedures for the settlement of disputes through mutual discussion and arbitration.”).

\(^2\) See notes 25-27 and accompanying text infra. Even in disputes arising under a collective agreement containing an arbitration clause, the courts can be involved in the determination of arbitrability or in reviewing an arbitrator's award.


\(^2\) E.g., Rueda v. Union Pac. R.R. Co., 180 Or. 133, —, 175 P.2d 778, 788 (1946) (listing fraud, arbitrariness, and gross mistake of fact as instances where reforming the award would be proper); see also Tamari v. Conrad, 552 F.2d 778, 781 (7th Cir. 1977) (in which the award was vacated because of the improper choice of an arbitrator); Food Handlers Local 425 v. Pluss Poultry, Inc., 260 F.2d 835, 838-39 (8th Cir. 1958) (where the award was vacated because of arbitrator's lack of remedial power).
the arbitrator acted improperly, the court may modify or vacate the award.27

In the Steelworkers Trilogy, the Supreme Court laid down the judicial ground rules for determination of arbitrability28 and the scope of judicial review of arbitration awards.29 Since the Trilogy decisions in 1960, the Court has left the Trilogy doctrine almost completely untouched.30 Therefore, a brief review of these cases is necessary to understand the federal policy as it relates to arbitration.31

In the first case of the Trilogy, United Steelworkers v. American Mfg. Co.,32 a union petitioned the district court to compel arbitration of a grievance involving the reinstatement of a union member.33 The employee had been receiving workmen's compensation for permanent disability, but it was the union's contention that the employee was now able to work and should be reinstated.34 The Sixth Circuit found the union's argument "frivolous" and "patently baseless" and found the claim not arbitrable.35 The Supreme Court reversed and ordered arbitration saying that the courts "have no business weighing the merits of the grievance...."36 The Court held that where the parties have agreed to submit questions of contract interpretation to an arbitrator, the court is "confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the

27. E.g., Resilient Floor & Decorative Covering Workers, Local Union 1179 v. Welco Mfg. Co., 542 F.2d 1029, 1032 (8th Cir. 1976); UAW v. White Motor Corp., 505 F.2d 1193, 1197 (8th Cir. 1974); Western Iowa Pork Co. v. National Bd. Packinghouse & Dairy Workers, Local No. 52, 366 F.2d 275, 277 (8th Cir. 1966) (all recognizing the court's power to modify or vacate arbitration awards).

28. American Manufacturing, 363 U.S. at 567-68 (in determining arbitrability, a court "is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract"); Warrior & Gulf Nav. Co., 363 U.S. at 582-83.

29. See Enterprise, 363 U.S. at 598.


33. Id. at 564, 566.

34. Id. at 564, 566.


In *United Steelworkers v. Warrior & Gulf Nav. Co.* 38 a union petitioned the district court to compel arbitration of a dispute concerning the company's alleged violation of a lockout provision. 39 The Fifth Circuit found the dispute nonarbitrable under a provision which excluded from arbitration "matters 'which are strictly a function of management.'" 40 Again the Supreme Court reversed, holding: "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 41

*United Steelworkers v. Enterprise Wheel & Car Corp.*, 42 the third in the Trilogy, dealt with the enforcement of an arbitration award and set forth the proper scope of judicial review for enforcement proceedings. 43 The Supreme Court in *Enterprise* held that a judge may not set aside an arbitration award merely because the arbitrator's opinion is ambiguous or because the court's interpretation of the agreement is different from that of the arbitrator. 44 An award may be set aside only if the court finds that the arbitrator exceeded the authority granted in the agreement and "did not premise his award on his construction of the contract." 45

To summarize, the Trilogy holdings can be capsulized in three concise rules: (1) In determining arbitrability, a court is confined to ascertaining whether the parties intended to arbitrate the particular dispute; 46 (2) In determining the intent of the parties, doubts should be resolved in favor of intent to arbitrate; 47 and (3) Judicial review of arbitration awards is limited to deciding whether the arbitrator acted within the limits of the authority granted to him in the collective bargaining agreement. 48

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37. Id.
38. Id. at 574.
39. Id. at 575-77.
40. United Steelworkers v. Warrior & Gulf Nav. Co., 569 F.2d 633 (5th Cir. 1978) (quoting the collective bargaining agreement between the union, United Steelworkers and the employer, Warrior & Gulf).
41. Warrior & Gulf, 363 U.S. at 582-83.
42. 363 U.S. 593 (1960).
43. Id.
44. Id. at 598.
45. Id.
47. Warrior & Gulf, 363 U.S. at 582-83.
48. Enterprise, 363 U.S. at 598.
Exhaustion of Contractual Remedies

In shaping federal labor policy, Congress intended to give contracting parties enough autonomy to develop mutually acceptable contract terms. In cases where the union and the employer have contractually agreed to arbitrate a given dispute, the courts have generally refused to hear that dispute unless the grievant has first attempted to seek redress through arbitration. Requiring the exhaustion of contractual remedies is consistent with the purpose of mandatory arbitration provisions, reinforces the preferred position of arbitration, and effectuates the intent of the contracting parties.

At first glance, the language of the LMRA section 301(a) might seem to give an absolute right to litigate contract violations notwithstanding an arbitration clause. However, the Supreme Court in Republic Steel Corp. v. Maddox held that an attempt to exhaust contractual remedies is a prerequisite to litigation even where section 301(a) is the jurisdictional basis for the suit. In his majority opinion, Justice Harlan said that this is so because discussion of the adequacy of grievance procedures is only speculative unless the grievant at least attempts to utilize those procedures.

Although the exhaustion requirement is applicable in most cases, several exceptions to this requirement have been implemented to avoid erosion of employee rights. Four principle exceptions to the exhaustion requirement have been recognized with respect to section 301 suits. These exceptions are listed below:

1. Wrongful Refusal

If the union has the exclusive right to invoke the arbi-

51. Mercury Oil Ref. Co. v. Oil Workers Int'l Union, CIO, 187 F.2d 980, 982 (1951) (stating that the "purpose [of arbitration] is to eliminate future disputes and litigation").
52. Warrior & Gulf, 363 U.S. at 581 (where the Court found arbitration of employee grievances preferable to litigation because "[t]he labor arbitrator performs functions which are not normal to the courts. The considerations which help him fashion judgments may indeed be foreign to the competence of the courts").
53. See note 22 supra.
55. Id. at 652.
56. Id. at 653.
Arbitration process, a wrongful refusal to process the grievance will allow the employee to litigate without exhausting contractual remedies. A breach of the union's duty of fair representation in grievance processing constitutes wrongful refusal for the purposes of this exception.

2. Repudiation
   If the employer refuses to participate in the arbitration of a given grievance, the employee may be excused from exhausting contractual remedies.

3. Futility
   It has been held that, where the effort to utilize contractual remedies would be completely futile, the exhaustion requirement can be waived.

4. Nonexclusive Procedure
   In cases where the contracting parties did not intend arbitration to be the exclusive remedial procedure, the courts will not require exhaustion. However, unless this intent is expressly revealed in the contract, the assumption is that the parties intended arbitration to be an exclusive remedy.

Arbitration has also been found to be a nonexclusive procedure when a non-waivable statutory right is asserted. A non-waivable statutory right is one which cannot be surrendered by a union through the collective bargaining process. If non-waivable statutory rights are also the subject of a collective bargaining agreement, those statutory rights may still be asserted in court without regard to whether or not they have been the subject of arbitration.

In the absence of one of these exceptions, litigation of an arbi-

61. Vaca, 386 U.S. at 186 (stating that the duty of fair representation requires the union to treat members fairly in grievance procedures).
62. Id.; Moore County Carbon Co. v. Whitten, 140 S.W.2d 880, 884 (1940).
65. Staudohar, supra note 57, at 459.
67. See Barrentine, 450 U.S. at 737; Alexander 415 U.S. at 48-49.
68. Barrentine, 450 U.S. at 470; Alexander, 415 U.S. at 49.
trable dispute without exhaustion of contractual remedies has been uniformly denied. Of these four exceptions, the only one discussed in Robbins was the nonexclusive procedure exception. Within this exception, the strand of cases involving statutorily created employee rights is especially relevant in light of extensive federal regulation of pension trusts. These cases suggest that certain rights are not subject to waiver under a collective bargaining agreement.

In Alexander v. Gardner-Denver Co., the Supreme Court found that Title VII Civil Rights actions are not waivable through collective bargaining. In Alexander, the Court was asked whether an action pursuant to Title VII of the Civil Rights Act of 1964 is barred by the prior submission of the claim to binding arbitration. The Court found that arbitration could never be the exclusive procedure for vindicating Title VII actions, because Title VII vests the courts with plenary powers to enforce civil rights violations. The Court said that neither the remedy for the contractual right nor the remedy for the statutory right is destroyed simply because both rights were violated by the same act of an employer.

Later, in Barrentine v. Arkansas-Best Freight System, Inc., the Alexander holding was expanded to include wage claims under the Fair Labor Standards Act (FLSA). The Supreme Court in Barrentine held that exhaustion of non-judicial remedies was not necessary because minimum wage requirements are not

69. See notes 49-55 and accompanying text supra.
70. Neither the repudiation nor the wrongful refusal exception could be raised because the trustees never attempted to invoke an arbitration proceeding. Robbins, 700 F.2d at 436. The trustees also never tried to show that an attempt to arbitrate would have been futile.
72. See note 66 and accompanying text supra.
74. Id. at 48.
76. Alexander, 415 U.S. at 47.
77. Id.
78. Id. at 50.
80. Id. at 740.
waivable through collective bargaining.\textsuperscript{82} The Court in \textit{Barrentine} found that arbitration is an improper forum for FLSA actions because arbitrators lack knowledge of substantive law and because arbitration procedural methods are inadequate to protect statutory rights.\textsuperscript{83}

In both \textit{Alexander} and \textit{Barrentine}, it was essential that the statutory rights involved existed independent of the collective bargaining agreement.\textsuperscript{84} The \textit{Alexander} and \textit{Barrentine} cases suggested that when the courts are given plenary power to enforce minimum standards for employee rights, these rights cannot be lost through the collective bargaining process.\textsuperscript{85}

To determine whether the rights at issue in \textit{Robbins} are waivable, it is necessary to look to the federal statutes governing pension trusts.\textsuperscript{86} The right to direct court access in \textit{Robbins} depends on the nature of the rights granted under these statutes.\textsuperscript{87}

**Statutory Protection of Pension Trusts**

Generally payments by employers to employee representatives (e.g., union officials) are prohibited by the LMRA.\textsuperscript{88} However, section 302(c)(5) of the LMRA allows an employer to make periodic payments on behalf of employees to a trust created for the benefit of employees and their families and dependents.\textsuperscript{89} To qualify for section 302(c)(5) status, the trust must be for the purpose of retirement pension, health care, or health and accident insurance.\textsuperscript{90} In addition, certain safeguards are provided such as union representation on the board of trustees\textsuperscript{91} and annual audits.\textsuperscript{92}

In 1974, the Employee Retirement Income Security Act (ER-
ISA) provided additional protection for pension trusts by establishing new standards of fiduciary responsibility for those involved in the handling of pension trusts set up pursuant to section 302(c)(5) of the LMRA. ERISA also put teeth into these protective standards by providing criminal sanctions for violations and by specifying that civil enforcement could be initiated "by a participant, beneficiary, or fiduciary." These provisions added to the existing grant of federal jurisdiction for violations of collective bargaining agreements under LMRA section 301(a).

It is important to note that neither ERISA's statement of legislative intent nor any of its substantive provisions confer upon employees an absolute right to pension trust benefits. However, if a union procures rights in a pension trust through a collective agreement, ERISA does mandate substantial safeguards for the administration of that trust.

Exhaustion of Remedies in Pension Disputes

The Eighth Circuit in Robbins was asked to decide whether the legislative pension policy outlined above warrants a holding that the exhaustion of remedies requirement is not applicable to pension trusts disputes. Several federal court decisions have addressed this particular issue with results uniformly contrary to the Robbins decision.

94. Id. § 1001(b). "It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." Id.
95. Id. § 1131.
96. Id. § 1132(a)(1)(B)(3).
97. See note 22 supra (LMRA § 301(a) provided only a general grant of jurisdiction for violation of collective bargaining agreements). In Robbins, jurisdiction was alleged under the civil enforcement provisions of ERISA and LMRA. 700 F.2d at 435 n.1.
99. See note 93 supra.
100. Id. (E.g., § 1021 (which codifies a duty of disclosure and reporting) and § 1053 (which creates minimum vesting standards)).
101. Robbins, 700 F.2d at 435.
102. Trustees of Nat'l Benefit Fund for Hosp. and Health Care Employees v. Constant Care Community Health Center, Inc., 669 F.2d 213, 215 (4th Cir. 1982); Layne-Western Co. v. International Union of OperatingEng'rs, 650 F.2d 155, 159 (8th Cir. 1981); Central States, Southeast & Southwest Areas Pension Fund v. CRST, Inc., 641 F.2d 616, 617 (8th Cir. 1981); Central States, Southeast & Southwest Areas Pension Fund v. Howard Martin, Inc., 625 F.2d 171, 172 (7th Cir. 1980); Farmer v.
In *Central States, Southeast & Southwest Areas Pension Fund v. Howard Martin, Inc.*, the Seventh Circuit decided this issue in a fact situation which was essentially the same as that in the *Robbins* case. *Howard Martin* involved a collection suit in which the primary dispute was the scope of covered employees under the collective bargaining agreement.

The issue in *Howard Martin* was resolved by classifying the dispute as one requiring construction of a contract provision establishing the duty of the employer to contribute to the employee's trust fund. The *Howard Martin* court held that pension disputes containing an underlying question of contract interpretation must first be submitted to arbitration. The Seventh Circuit affirmed the district court and dismissed the *Howard Martin* case pending arbitration on those grounds.

The *Howard Martin* opinion stated that if the dispute had been a "simple collection case," the trustee would have been entitled to litigate without first resorting to arbitration. A "simple collection case" means a collection dispute which contains no underlying question of contract interpretation. Thus, if *Howard Martin* had been a "simple collection case" it would have fallen outside the arbitration clause which required arbitration of questions of interpretation.

Several Eighth Circuit decisions have applied *Howard Martin* type rationale in cases dealing with the arbitrability of pension disputes. In one such case, *Central States, Southeast and Southwest Areas Pension Fund v. CRST, Inc.*, the issue was the right to audit employee records. In requiring the trustees to arbitrate, the court stressed that the fund's existence was dependent on the


103. 625 F.2d 171 (7th Cir. 1980).
105. *Howard Martin*, 625 F.2d at 172.
106. *Id.*
107. *Id.*
108. *Id.* at 173.
109. *Id.* at 172.
110. *See id.*
111. *Id.*

112. Layne-Western Co. v. International Union of Operating Eng'rs, 650 F.2d 155, 158 (8th Cir. 1981); see also *Central States, Southeast & Southwest Areas Pension Fund v. CRST, Inc.*, 641 F.2d 616, 617-18 (8th Cir. 1981); *Farmer v. Fisher*, 586 F.2d 1226, 1229-30 (8th Cir. 1978) (the exhaustion requirement was applied in both of these cases because there was an underlying issue of contract interpretation).
113. 641 F.2d 616, 617 (8th Cir. 1981).
collective bargaining agreement.\textsuperscript{114} Since the same agreement stipulated arbitration of contract interpretation disputes, the court reasoned that a dispute as to whether a given employee is "covered" should be arbitrated pursuant to the terms of the agreement.\textsuperscript{115}

An example of another jurisdiction applying the exhaustion requirement of pension disputes is \textit{Taylor v. Bakery and Confectionary Union and Industry International Welfare Fund}.\textsuperscript{116} In \textit{Taylor}, an employee brought suit against the trust fund for benefits allegedly due.\textsuperscript{117} The collective bargaining agreement between the union and the employer provided an appeals procedure to be used in the event a claim was denied by the fund.\textsuperscript{118} The \textit{Taylor} court refused to hear the case and held that exhaustion of contractual remedies was generally a prerequisite to maintaining a lawsuit under ERISA.\textsuperscript{119}

\textbf{ANALYSIS}

The Eighth Circuit conceded the pertinence of the decision in \textit{Howard Martin} and its progeny\textsuperscript{120} but, "after analyzing the relationship between unions and § 302(c)(5) funds," departed from that line of decisions.\textsuperscript{121} The justification for that departure came from a series of public policy arguments designed to demonstrate the inadequacy of the arbitration process in protecting pension rights.\textsuperscript{122} However, as discussed below, none of these arguments presented a legal theory under which the holding could be explained.

\textbf{Trustee’s Lack of Privity}

One reason the Eighth Circuit gave for finding arbitration inadequate was that a pension trustee, not being a party to the agreement, has no power to invoke arbitration on behalf of employees.\textsuperscript{123} In \textit{Howard Martin}, the Seventh Circuit suggested this problem could be easily solved—to trigger arbitration a trustee need only request arbitration by the union.\textsuperscript{124} However, this sug-

\textsuperscript{114} Id.
\textsuperscript{115} Id. at 617-18.
\textsuperscript{116} 455 F. Supp. 816 (E.D.N.C. 1978).
\textsuperscript{117} Id. at 817.
\textsuperscript{118} Id. at 818.
\textsuperscript{119} Id. at 819.
\textsuperscript{120} Robbins, 700 F.2d at 438-39.
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 439-43.
\textsuperscript{123} Id. at 436-37.
\textsuperscript{124} 625 F.2d at 173.
gestion assumes that the union's duty of fair representation would force the union to initiate arbitration proceedings on a pension claim, and that refusal to do so would constitute a violation of the union's duty of fair representation. This breach of the unions duty would allow the aggrieved employee to litigate on his own behalf.

However, because a union may sometimes compromise some individual rights for the benefit of the group as a whole, the union's refusal to arbitrate a pension claim might not necessarily breach the duty of fair representation. If the aggrieved party is unable to allege a breach of a union duty or some other exception to the exhaustion requirement, his action will be dismissed.

Generally, the duty of fair representation is not breached unless there is a showing of treatment which is arbitrary, discriminatory, or in bad faith. However, the duty of fair representation has no precise definition and calls for application on a case-by-case basis. Therefore, as the Robbins court pointed out, it cannot be said with positive assurance that failure to arbitrate a pension dispute would constitute breach of the union's duty. Because of this perceived lack of protection for statutory rights, the Eighth Circuit disregarded the exhaustion requirement and gave the trustees in Robbins direct access to the district court. However in Warrior & Gulf, the Supreme Court said an order to arbitrate a particular dispute should be granted unless the arbitration clause cannot be interpreted to cover the dispute.

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125. CRST, 641 F.2d at 618. "[I]t would appear that in the event a dispute should arise respecting coverage, the duty of fair representation would impel the Union to invoke the grievance machinery if the Funds were to request such action." Id.

126. See notes 60-61 and accompanying text supra.


128. See generally Staudohar, supra note 52 (discussing the exhaustion of remedies requirement and exceptions to it).

129. Vaca, 386 U.S. at 190.


131. Robbins, 700 F.2d at 442. "The union may be inclined to trade off a potential pension-fund claim against some other bone of contention in its relations with the employer. And such a decision may be completely legitimate." Id.

132. Robbins, 700 F.2d at 442.

133. Warrior & Gulf, 363 U.S. at 582-83.
points out, unless an exception to the exhaustion requirement is asserted, allowing direct litigation “erodes the pronouncements of the Supreme Court in the Steelworkers Trilogy.”  

Waiver of Pension Rights

In Alexander, the Supreme Court said that where waiver of a right would defeat the paramount purpose of a statute, such a right is non-waivable. The courts have generally allowed litigation of non-waivable statutory rights without prior exhaustion of contractual remedies, presumably because submission to arbitration might result in indirect waiver through forfeiture in arbitration.

However, in Alexander, the court also acknowledged that some statutory rights, such as the right to strike, are waivable. The right to strike was conferred upon employees to foster the process of bargaining, the Court said. Relinquishing that right as a concession in bargaining would not defeat the purpose of Congress and, therefore, the right to strike is a waivable right. Because waivable rights, like the right to strike, may be subjected to binding arbitration, exhaustion of contractual remedies is required to assert a waivable right in court.

The Congressional purpose behind LMRA section 302(c)(5) and ERISA is the protection of contractually created pension trusts. Using the Alexander analysis, allowing a union to bargain away statutory safeguards would appear to defeat the legislative purpose, making the right non-waivable.

In Robbins, however, the underlying issue was whether certain employees have the right to pension benefits under the collective bargaining agreements. Neither the LMRA nor ERISA create an absolute right to pension trust benefits. Since creation

134. Robbins, 700 F.2d at 443 (Henley, C.J., dissenting).
136. See notes 65A-67 and accompanying text supra.
137. Alexander, 415 U.S. at 36, 51.
138. Id.
139. Id.
140. See note 50 and accompanying text supra.
141. See 29 U.S.C. § 1001(a) (1976) which provides that:
(a) Benefit plans as effecting interstate commerce and the Federal taxing power

... is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce that disclosure be made and safeguards by provided with respect to the establishment, operation, and administration of such plans...

142. Robbins, 700 F.2d at 444 (Henley, C.J., dissenting).
143. See notes 1, 93 supra.
of absolute rights to pension benefits was not a purpose of these statutes, it seems no legislative purpose is defeated by allowing a union to waive pension benefits as a concession in bargaining.

Another characteristic of a non-waivable statutory right is that it exists independently of the collective bargaining agreement.144 The right to pension trust benefits, however, can only be obtained through collective bargaining and no pension trust can arise without a contractual basis.145 Therefore, none of the safeguards provided in the LMRA and ERISA can arise unless the trust is first created in contract. In sharp contrast, the non-waivable statutory right in Alexander and Barrentine existed without regard to any collective bargaining agreement.146 Thus, Robbins is distinguishable from these cases.147

Although the Robbins opinion frequently uses non-waiver language, the court did not base its decision on the conclusion that the right to litigate pension coverage is non-waivable.148 In fact, the opinion says [i]f the agreements in the cases before us provided in express words that trustees' claims could not come to court before questions of contract interpretation had been settled by arbitration, this would be a different case."149 In suggesting that the collective bargaining agreement might have expressly bound trustees to arbitrate coverage issues, the court impliedly concedes the waivability of these rights because non-waivable rights can never be subjected to binding arbitration.150 Therefore, if the right to pension trust benefits is waivable, some other theory must be employed to justify foregoing the requirement of exhaustion of contractual remedies.

Ascertaining Intent of Parties

Unless a non-waivable right existed in the Robbins case, the court was confined to ascertaining whether it was the intent of the parties to submit pension eligibility disputes to arbitration.151 In

144. See note 84 and accompanying text supra.
145. Robbins, 700 F.2d at 442.
146. See Alexander, 415 U.S. at 51-52; Barrentine, 450 U.S. at 739 (both of these involved Congressional enactments—clearly not products of a collective bargaining agreement).
147. Robbins, 700 F.2d at 442. “Certainly it is true that arbitration, pension funds, and health and welfare funds, are all matters of contract. They either exist or not as the parties have agreed in the collective-bargaining contract and related documents.”
148. See Robbins, 700 F.2d at 442.
149. Id.
150. See text accompanying notes 137-38 supra.
151. See note 46 and accompanying text supra. Unless one of the exceptions to exhaustion of remedies is asserted, an employee grievance will be dismissed. Ex-
short, the court was faced with the issue of the arbitrability of this dispute. As noted earlier, the *Steelworkers Trilogy* is still the touchstone in arbitrability cases.

In determining the intent of the parties, the court in *Robbins* suggested that arbitration was not warranted because the agreements did not unambiguously subject the trustee's rights and obligations to the union's privilege of invoking the arbitration process under the collective bargaining agreement. However, *Warrior & Gulf* does not require that a given dispute be unambiguously subjected to arbitration: "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail. . . ."

The only evidence mentioned by the court to suggest that the intent of the parties was not to arbitrate this dispute is a section of the trust agreement which authorizes the trustees to take necessary steps to insure that the beneficiaries' rights are protected, "including *institution and prosecution of . . . any legal proceedings. . . ." This provision, however, does not make resort to legal proceedings imperative upon the trustee. The mention of legal proceedings might even be construed as a referral to remedies in "simple collection cases" for which *Howard Martin* provided immediate court access.

Even if construed to allow direct litigation, the terms of the trust agreement apply only to the employees who are eligible for trust benefits under the collective bargaining agreement. The fiduciary duties of the trustees inure only to the benefit of those eligible for trust benefits under the collective bargaining agreement. Therefore, even if it were assumed that the trust agreement gives the trustee direct court access, the trustee could only use that court access to carry out his duty to the beneficiaries of

cect for the non-waivable right exception, the only other exception raised in *Robbins* is the intent of the parties. See notes 57-67 and accompanying text *supra*.

152. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 169 (3d ed. 1973) (one kind of arbitrability issue is whether a particular dispute is covered by the arbitrability clause).

153. See note 30 *supra*.


156. *Robbins*, 700 F.2d at 442 (emphasis in original).

157. See *id*.


159. See *Robbins*, 700 F.2d at 442.

160. *Id*. 
the trust.\textsuperscript{161} To determine who those beneficiaries are, it is necessary to look to the collective bargaining agreement.\textsuperscript{162} Both federal judicial policy and the applicable collective bargaining agreement state that matters of contract interpretation should be decided in the arbitral forum.\textsuperscript{163}

**CONCLUSION**

Although LMRA and ERISA create statutory safeguards for the administration of pension trusts,\textsuperscript{164} the Robbins court did not find that the right to litigate eligibility for pension trust funds is non-waivable.\textsuperscript{165} The Eighth Circuit held that pension trustees are not bound to arbitrate pension eligibility unless an unambiguous contract provision binds them to do so.\textsuperscript{166} This holding is confusing in light of the Trilogy doctrine which raises a presumption in favor of arbitrability which is only rebuttable by specific exception or "the most forceful of evidence."\textsuperscript{167} The effect of the Robbins decision is to create the opposite presumption.

Because the court was not able to give pension eligibility rights a non-waivable status, an employer may still negotiate for a contract provision which forces arbitration of pension eligibility. The Robbins decision only forces that employer to draft that provision so as to avoid ambiguity.

Since the Robbins decision does not preclude submission of pension eligibility claims to arbitration, the beneficiaries of pension trusts have been given little added protection. The Eighth Circuit could have provided at least as much protection by granting absolute court access to trustees upon the union's refusal to arbitrate. This solution would have given beneficiaries added protection without departing from accepted arbitrability policy.

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\textsuperscript{161} See id.

\textsuperscript{162} See id.

\textsuperscript{163} American Manufacturing, 363 U.S. at 569, Warrior & Gulf, 363 U.S. at 582 (these two cases of the Trilogy outline the standards for arbitrability); Robbins, 700 F.2d at 442 n.8 ("The arbitration clause in the collective-bargaining agreements applies 'should difference arise between the Company and the Union of any employee of the Company as to the meaning or application of the provisions of the Agreement.'" (emphasis in original)).

\textsuperscript{164} See notes 87-99 and accompanying text supra.

\textsuperscript{165} Robbins, 700 F.2d at 443.

\textsuperscript{166} Id. at 442.

\textsuperscript{167} Warrior & Gulf, 363 U.S. at 584-85.