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## Arbitration

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## ARBITRATION

*Communication Workers v. U.S. West District*, 847 F.2d 1475

The Communication Workers of America filed a grievance with appellant over whether certain accounting employees were covered by a collective bargaining agreement negotiated before the divestiture of AT&T. U.S. West claimed that the National Labor Relations Board (NLRB) was the proper forum for resolution of the issues, not an arbitrator. The district court ordered arbitration. This court held that disputes over arbitration clauses are to be resolved in favor of arbitrability. If the arbitrator finds in favor of the union and U.S. West believes this is an illegal extension of the represented unit, it is free to petition the NLRB for redress.

*Peterson v. Shearson/American Express, Inc.*, 849 F.2d 464

Shearson appealed an order denying its motion to compel arbitration of plaintiff's claims against it. The Tenth Circuit held that the brokerage firm had not waived its right to arbitration of the Rule 10b-5 claims, since Shearson could not have obtained an order for arbitration prior to the *McMahon* decision which held Rule 10b-5 claims to be arbitrable. (*Shearson/American Express, Inc. v. McMahon*, 107 S. Ct 2332 (1987)). The *McMahon* decision would be applied retroactively to cases pending on appeal. There is a strong federal policy favoring arbitration for dispute resolution and when a contract mandates arbitration, courts will generally enforce the arbitration clause absent a waiver. The court held, however, that the brokerage firm had waived its right to demand arbitration of the state law claims. In determining whether a party has waived its right to arbitration various factors are considered, such as whether the party's actions are inconsistent with the right to arbitrate, whether the litigation machinery has been substantially invoked and the parties were well into preparation of the lawsuit, whether the party has requested arbitration enforcement close to the trial date, and whether important intervening steps had taken place. The court held that where, as here, Shearson prepared for scheduled trial without objecting on the grounds of arbitration, the parties would have gone to trial had the district court not rescheduled prior to the time the arbitration request was made, arbitration was sought close to the trial date and important intervening steps had taken place, the right to arbitrate the state law claims is waived. Trial of the state law claim may proceed; the federal claim is subject to arbitration. Affirmed in part, reversed in part, and remanded.

