

## LABOR ARBITRATION, THE NLRB, AND TAFT-HARTLEY SECTION 8(d): PROBLEMS OF JURISDICTIONAL CONFLICT\*

CONSTRUING Taft-Hartley section 8(d)<sup>1</sup> to authorize NLRB enforcement of arbitration awards threatens to hinder judicial activity in the field of labor arbitration. This section seeks to limit the use of strikes, lockouts, and other disruptive measures during the life of a collective bargaining agreement. It provides, in pertinent part, that an attempt to modify "terms or conditions" of a collective agreement currently in force shall be an unfair labor practice cognizable by the Board; further, it relieves either party from the duty to bargain about a proposed modification.<sup>2</sup> Although Congress believed that the terms of

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\*Local 9735, *UMW v. NLRB*, 258 F.2d 146 (D.C. Cir. 1958), *denying enforcement of International Union, UMW (Westmoreland Coal Co.)*, 117 N.L.R.B. 1072 (1957).

1. Labor-Management Relations Act § 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958).

2. *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice . . . [sixty days before taking action];

(2) offers to meet and confer with the other party . . . ;

(3) [notifies federal and state mediation agencies if no agreement is reached within thirty days; and]

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

. . . [T]he duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

Labor-Management Relations Act § 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958).

This part of 8(d) creates an exception to § 8(a)5, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)5 (1958), and § 8(b)3, 61 Stat. 141 (1947), 29 U.S.C. § 158(b)3 (1958), see *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 287 (1956); *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680, 684 (2d Cir. 1952), *enforcing* 94 N.L.R.B. 1214 (1951), which create an affirmative duty to bargain whenever a labor dispute arises.

Clause 4 has been interpreted to prohibit any strike to modify during the entire life of a contract, even though a sixty-day waiting period has elapsed. *Local 3, United Packinghouse Workers v. NLRB*, 210 F.2d 325 (8th Cir.), *cert. denied*, 348 U.S. 822 (1954). If the collective agreement contains a clause allowing reopening of certain terms, however, 8(d) does not prohibit strikes to modify reopened terms after sixty-days notice. NLRB

a labor contract would be most stable if shaped by collective bargaining,<sup>3</sup> it apparently felt that such stability would be undermined if the terms could be reopened unilaterally.<sup>4</sup> Therefore, when a dispute arises over an issue resolved by the original agreement, section 8(d) will apply.<sup>5</sup>

When, however, both parties' positions may be supported by reasonable interpretations of the agreement, the NLRB has held 8(d) inapplicable.<sup>6</sup> Thus, it has disregarded the alternative of resolving the ambiguity to determine whether a "term" is being "modified." This self-quarantine from analysis of collective agreements appears to conform with legislative policy. Other provisions of the act, which encourage peaceful private settlement of interpretation disputes,<sup>7</sup> may indicate that Congress did not envision 8(d) as an avenue

v. Lion Oil Co., 352 U.S. 282 (1957). Strikes in retaliation against employer unfair labor practices are not prohibited by 8(d). *Mastro Plastics Corp. v. NLRB*, *supra*.

3. See Labor-Management Relations Act §§ 1, 201, 61 Stat. 136-37, 152-53 (1947), 29 U.S.C. §§ 141, 171 (1958); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42, 45 (1936) (discussing congressional policy with respect to the National Labor Relations Act of 1935, 49 Stat. 449); Note, 68 *YALE L.J.* 77, 89-90 n.59 (1958).

4. If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. . . . The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

S. REP. No. 105, 80th Cong., 1st Sess. 15-16 (1947), reprinted in 1 *NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947*, at 407, 422 (1948) [hereinafter cited as *LEG. HIST.*].

5. *Local 1113, United Elec. Workers v. NLRB*, 223 F.2d 338, 342 (D.C. Cir. 1955); *Jacobs Mfg. Co.*, 94 N.L.R.B. 1214, 1227-28 (1951) (concurring opinion), *enforced*, 196 F.2d 680 (2d Cir. 1952); *John W. Bolton & Sons, Inc.*, 91 N.L.R.B. 989, 990 (1950).

6. "The provisions of section 8(d) of the Act are therefore inapplicable in this case. Regarding the question of which party correctly interpreted the contract, the Board does not ordinarily exercise its jurisdiction to settle such conflicts." *United Tel. Co.*, 112 N.L.R.B. 779, 781 (1955); *accord*, *McDonnell Aircraft Corp.*, 109 N.L.R.B. 930, 934 (1954); *International Union, UMW (Boone County Coal Corp.)*, 117 N.L.R.B. 1095, 1121 (trial examiner), *affirmed without passing on this issue, id.* at 1095 (1957); *cf.* *Consolidated Aircraft Corp.*, 47 N.L.R.B. 694, 706 (1943) (National Labor Relations Act).

Nonetheless, the Board has often attempted to ascertain whether settled terms exist by examining the history of negotiations, see *The Borden Co.*, 110 N.L.R.B. 802, 805 (1954); *Jacobs Mfg. Co.*, 94 N.L.R.B. 1214, 1227 (1951) (concurring opinion), *enforced*, 196 F.2d 680 (2d Cir. 1952), and the parties' established practices, see *California Portland Cement Co.*, 101 N.L.R.B. 1436, 1437 (1952); *Crown Zellerbach Corp.*, 95 N.L.R.B. 753 (1951); *Bowman, An Employer's Unilateral Action—An Unfair Labor Practice?*, 9 *VAND. L. REV.* 487, 514-17 (1956).

7. Labor-Management Relations Act § 203, 61 Stat. 154 (1947), 29 U.S.C. § 173 (1958), states in part:

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion . . . . The failure or refusal of either party to agree to any procedure suggested

to adjustment of conflicting contract interpretations by the NLRB. Further, since proposals which would have limited the right to strike over these disputes were rejected,<sup>8</sup> Congress apparently felt that such strikes would be permissible. But Board refusal to employ 8(d) when a justifiable dispute over the meaning of a collective agreement exists may not be forthcoming when the dispute has been submitted to arbitration. Since the arbitrator is empowered by the parties to resolve their dispute,<sup>9</sup> his award could be regarded as a settled term, protected against subsequent modification by 8(d).

This was the result reached by the NLRB in the *Westmoreland Coal Co.* case,<sup>10</sup> where the management of a mine charged that a strike violated 8(d).<sup>11</sup> Paragraph 7 of the seniority clause of the 1955 master agreement between the United Mine Workers and the bituminous coal industry provided that whether workers could exercise seniority in selecting work shifts was to be settled by union and management at the local level.<sup>12</sup> A portion of the district agreements clause allowed continuation of established local practices not in conflict with any other specific provision.<sup>13</sup> Two Westmoreland workers claimed shift sen-

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by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . .

See S. REP. No. 105, 80th Cong., 1st Sess. 13-15 (1947), in 1 LEG. HIST. 419-21.

Another clause of § 8(d) itself requires the parties to bargain over "questions arising [under the contract]." Labor-Management Relations Act § 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958). The reference to questions arising under the contract probably refers to the same questions of application and interpretation mentioned in § 203. Since the last paragraph of § 8(d) removes the duty to bargain over attempted modifications, any dispute made subject to the duty to bargain in the first paragraph cannot fall within the "modification" provisions.

8. Section 2(11) of the original House bill provided that, under the general duty to bargain, parties must resolve all interpretation controversies either by resorting to arbitration when the contract so provided, or by following a complicated settlement procedure outlined by the act. If the statutory procedure failed to resolve the dispute, § 2(11) further required the union to conduct a secret strike vote before calling a strike. H.R. 3020, 80th Cong., 1st Sess. 6-10 (1947), in 1 LEG. HIST. 36-40; see H.R. REP. No. 245, 80th Cong., 1st Sess. 19-23 (1947), in 1 LEG. HIST. 310-14.

Section 2(11) was replaced by § 8(d) of the Senate bill. S. 1126, 80th Cong., 1st Sess. 16-17 (1947), in 1 LEG. HIST. 114-15. The detailed procedure required by § 2(11) was rejected in conference. H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 34 (1947), in 1 LEG. HIST. 538.

9. See generally Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955); Summers, *Judicial Review of Labor Arbitration or Alice Through the Looking Glass*, 2 BUFFALO L. REV. 1, 13-15 (1952).

10. *International Union, UMW (Westmoreland Coal Co.)*, 117 N.L.R.B. 1072 (1957), *enforcement denied*, 258 F.2d 146 (D.C. Cir. 1958).

11. 117 N.L.R.B. at 1078.

12. *Id.* at 1079.

13. *Id.* at 1093.

iority on the ground that it was an established practice at the mine.<sup>14</sup> This fact, the union maintained, entitled them to shift seniority under either provision. Management disagreed.<sup>15</sup> Pursuant to the master agreement's arbitration clause, the dispute was submitted to an "umpire," whose award was to be "binding on both parties."<sup>16</sup> The umpire, finding the union's evidence of a prior local agreement and established practices insufficient, denied the complaining workers' claim.<sup>17</sup> After the employer refused further to discuss shift seniority, the local union called a strike.<sup>18</sup>

The NLRB held that the strike was an 8(d) unfair labor practice. The Board found that no dispute over the meaning of relevant contractual provisions existed, and that the umpire's decision dealt only with a question of fact—the existence or nonexistence of established practices at Westmoreland.<sup>19</sup> Resolution of this factual issue was treated as a settled term of the original agreement "as if it had been written in *nunc pro tunc*."<sup>20</sup> The Board also ruled that the award would be a term of the original agreement even if it had dealt with conflicting substantive interpretations of the contract.<sup>21</sup> In either event, therefore, the Board held that the arbitration award denying shift seniority was protected against modification by 8(d). Turning its attention to the purpose of the strike, the NLRB found that at least one objective was to compel the employer to disregard the arbitration award "with respect to" the two workers.<sup>22</sup> This finding enabled the Board to hold that the union's strike was an attempt to modify the award.

14. *Id.* at 1080-81.

15. *Id.* at 1080-81. The mine management argued that no local agreement pursuant to paragraph 7 had been made, *id.* at 1092-93, and that no established practice existed, *id.* at 1075.

16. See *id.* at 1075. The grievance and arbitration procedure was applicable to "differences . . . as to the meaning and application of the provisions of this Agreement, . . . [differences] about matters not specifically mentioned in this Agreement, or . . . any local trouble of any kind . . ." *Id.* at 1080.

17. The union attempted to prove that an agreement had been made in 1951. The umpire rejected this evidence as inapplicable, because the alleged agreement would have been made prior to the insertion of paragraph 7 in 1952. *Id.* at 1094. The union also attempted to prove that shift seniority was nevertheless an existing practice at the mine. Since workers often choose not to exercise their seniority, however, evidence from the existing shift assignments was found inconclusive. *Ibid.*

18. *Id.* at 1081-82. The union stated that the strike would continue "until something was done about that decision [and] . . . the umpire got the full facts of the case." *Id.* at 1082. The strike ended before the NLRB procedure was completed, when one worker was allowed to transfer shifts for "family hardship" reasons. The other worker remained on the third shift. *Id.* at 1083.

19. *Id.* at 1075 n.5.

20. *Id.* at 1075.

21. *Id.* at 1076 n.5.

22. We do not believe that it can be gainsaid that when the Local struck at least one of its principal objectives was to achieve by the use of economic pressure upon Westmoreland what it had failed to attain via the grievance machinery, namely, a reversal

The District of Columbia Circuit denied enforcement.<sup>23</sup> The court first noted that under the seniority clause the question of shift seniority had been left open until settled at the local level.<sup>24</sup> Since the umpire's decision was limited to a ruling that no settlement had been made at the time of the Westmoreland dispute,<sup>25</sup> the court concluded that his award did not settle the issue of whether the union could obtain shift seniority in the future,<sup>26</sup> which, the court further reasoned, was the union's only pragmatic objective in striking.<sup>27</sup> Thus the strike related to an as yet unsettled issue, and section 8(d) could not apply. The court apparently rejected the NLRB's conclusion that the union's objective also included a demand for shift seniority which related back to the time of the original dispute.<sup>28</sup> Since the union was apparently more interested

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by Westmoreland of the umpire's adverse decision with respect to the Hager-Woods grievances.

*Id.* at 1075; see note 28 *infra*.

23. Local 9735, UMW v. NLRB, 258 F.2d 146 (D.C. Cir. 1958).

24. *Id.* at 148.

25. *Ibid.*

26. It may not in reason be said that after the umpire's decision the 1955 Agreement provided that Hager and Woods and all other employees at this mine could obtain shift seniority only by a modification of that agreement. . . . For assuming that Hager and Woods did not have shift seniority when the strike occurred, this was not because the 1955 Agreement deprived them of it, but because no arrangements permitted by that agreement had been made for such seniority at this mine.

*Id.* at 149.

Judge Burger disagreed with this conclusion. Relying upon the fact that the parties had agreed to be bound by the award, he felt that the award had settled the issue of shift seniority for the rest of the contract period. This position was reached by assuming that the parties had empowered the umpire "to make their agreement for them." *Id.* at 149.

27. "The effort of the men by striking to obtain the shift seniority which the evidence shows they believed they had was an effort to obtain what the 1955 Agreement permitted them to seek." *Id.* at 149.

28. Comparison of the Board and court opinions on this point is perplexing. The Board recognized that the arbitration award applied only to the instant grievance and disposed of that grievance by finding that no shift seniority agreement had as yet been made. 117 N.L.R.B. at 1075. The Board must have been aware, therefore, that the umpire only held that no right of shift seniority existed as of the award's date. In finding that the union sought to change this decision, the Board seemed to say that, after the ruling, the union was demanding shift seniority for the period prior to the ruling—the only time covered by the umpire's decision. The court's position that the union was concerned mainly with future rights of all workers seems to contradict the Board's finding, at least to the extent of saying that any union concern about prior rights was irrelevant in determining the real purpose of the strike.

The court blurs this apparent rejection, however, by stating that the union "obviously . . . struck against this decision of the umpire." 258 F.2d at 148. In light of the rest of Judge Fahy's opinion, it seems best to disregard this last language as hasty dictum. The only way to accommodate this finding with the rest of the court's opinion would be to read into the opinion a theory that 8(d) applies only to "terms" of the original agreement and not to "terms" subsequently imposed through the arbitration clause. Advancement of such a major interpretation of 8(d) without any explicit statement or explanation, however, seems unlikely.

in obtaining future shift seniority for all its members than in vindicating the rights of the two workers,<sup>29</sup> the court's appraisal of the strike seems more realistic than the Board's.

By disposing of *Westmoreland* on this narrow ground, however, the court did not respond to the NLRB's ruling that a prior arbitration award is a "term" of the contract within the meaning of 8(d). When a clause providing for further bargaining, such as paragraph 7, is not involved, an award will bind the parties until the contract's termination and render the court's rationale unavailable.<sup>30</sup> And by applying 8(d) to both factual and interpretative decisions, the Board's theory would embrace most, if not all, awards.<sup>31</sup> Since the NLRB will probably apply its *Westmoreland* opinion to all cases,<sup>32</sup> evaluation of the Board's theory is required.

Analysis of congressional purpose is a possible approach. Since 8(d)'s primary objective was to remove the duty to bargain over settled issues, arguably Congress contemplated no distinction between settlement reached through private negotiation and settlement through arbitration. Some support for this interpretation of 8(d) may be found in other sections of the act which point to congressional approval of arbitration as a method of resolving disputes during the life of a collective agreement.<sup>33</sup> And, by holding that willingness to arbitrate will satisfy the affirmative duty to bargain imposed by sections 8(a)5 and 8(b)3,<sup>34</sup> the case law suggests that Congress equated arbitration with private bargaining. On the other hand, differences between the two exist which may have led Congress to restrict 8(d) to privately settled terms. Unlike arbitration, private bargaining allows both parties to explore and discuss the disputed issue, to trade concessions, and ultimately to reject a completely unacceptable demand. Arguments on the level of legislative intent, however, are inconclusive.

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29. See 117 N.L.R.B. at 1081 (trial examiner's report; quoting testimony).

30. See Wollett, *The Duty To Bargain Over the "Unwritten" Terms and Conditions of Employment*, 36 TEXAS L. REV. 863, 875 (1958).

31. The only type of arbitration award which might not be included under the Board's opinion is an award which legislates new terms for the parties. But such awards are not common; arbitration provisions generally limit the arbitrator's function to interpretation and application of the collective agreement, prohibiting any legislative additions. See Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1008 (1955). The 1955 UMW contract, however, appears to have allowed for legislative arbitration on the local level—arbitration of "any local trouble of any kind." See note 16 *supra*.

32. International Union, UMW (Boone County Coal Corp.), 117 N.L.R.B. 1095 (1957), construed the union's statutory duty to bargain in good faith to require the union to arbitrate grievances subject to an arbitration clause—a logical corollary to preventing strikes against an arbitration award. Although the D.C. Circuit refused to enforce *Boone*, 257 F.2d 211 (1958), and an earlier case employing the same theory, *Textile Workers v. NLRB*, 227 F.2d 409 (D.C. Cir. 1955), the Board implied that it would continue to follow its *Boone* opinion until the Supreme Court ruled on the issue. 117 N.L.R.B. at 1120.

33. See Labor-Management Relations Act § 203, 61 Stat. 154 (1947), 29 U.S.C. § 173 (1958).

34. *Timken Roller Bearing Co. v. NLRB*, 161 F.2d 949, 955-56 (6th Cir. 1947).

No evidence exists of 8(d)'s intended scope during the term of an agreement.<sup>35</sup>

Therefore, the Board's *Westmoreland* theory should be evaluated in terms of its impact upon other policies and procedures embodied in the Taft-Hartley Act. NLRB policing of strikes against arbitration awards may affect courts performing the same task in breach of contract suits under section 301.<sup>36</sup> Arbitration provisions themselves have been held to contain an implied "no strike" clause which will be breached if the union strikes over any arbitrable issue.<sup>37</sup> In addition, many collective agreements explicitly prohibit strikes during the life of the contract.<sup>38</sup> Thus the NLRB ought to consider the problems raised by concurrent Board-court jurisdiction over strikes against awards.

Under its *Westmoreland* theory the NLRB would initially have to determine the award's validity. Courts, in similar circumstances, have faced such questions as the arbitrability of the controversy,<sup>39</sup> the award's validity when

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35. Legislative history of 8(d) omits any discussion of its effect during the life of a contract. See, e.g., H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 34-35 (1947), in 1 LEG. HIST. 538; S. REP. No. 105, 80th Cong., 1st Sess. 24, in 1 LEG. HIST. 430. In fact, the NLRB originally interpreted § 8(d) as requiring only the sixty day waiting period at any time. *Wilson & Co.*, 105 N.L.R.B. 823, 825-26 (1953), *enforcement denied*, 210 F.2d 325 (8th Cir. 1954). For arguments supporting this position, see Note, 66 YALE L.J. 284 (1956); Note, 68 HARV. L. REV. 720 (1955). The inconclusiveness of legislative history has been cited as a justification for looking to other sources in interpreting 8(d). *NLRB v. Lion Oil Co.*, 352 U.S. 282, 303 (1956) (concurring opinion of Frankfurter, J.).

36. 61 Stat. 156 (1947), 29 U.S.C. 185(a) (1958). Arbitration awards have been enforced by federal courts under this section. See, e.g., *Kornman v. Amalgamated Clothing Workers*, 264 F.2d 733 (6th Cir. 1959), *cert. denied*, 80 Sup. Ct. 62 (1959); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 168 F. Supp. 308 (S.D.W. Va. 1958).

37. *Local 25, Teamsters Union v. W. L. Mead, Inc.*, 230 F.2d 576 (1st Cir.), *cert. denied*, 352 U.S. 802 (1956); *United Constr. Workers v. Haislip Baking Co.*, 223 F.2d 872, 877 (4th Cir.) (dictum), *cert. denied*, 350 U.S. 847 (1955); see Note, 66 YALE L.J. 284 (1956); cf. *NLRB v. Sunset Minerals, Inc.*, 211 F.2d 224 (9th Cir. 1954); *NLRB v. Dorsey Trailers*, 179 F.2d 589 (5th Cir. 1950).

The 1955 UMW agreement involved in the *Westmoreland* case presents a difficult test for this doctrine by containing both an arbitration clause and a specific provision which denied the existence of any no-strike clause. Compare *Lewis v. Benedict Coal Co.*, 259 F.2d 346 (6th Cir. 1958), *cert. granted*, 359 U.S. 905 (1959) (implied no-strike clause exists in UMW agreement), with *International Union, UMW v. NLRB*, 257 F.2d 211, 218 (D.C. Cir. 1958) (arbitration clause only a "gentleman's agreement"; strikes allowed).

38. About 37% of labor contracts contain an unconditional no-strike pledge. Conditional no-strike pledges appear in an additional 52%. 4 BNA, LABOR POLICY AND PRACTICE 255: 181 (1956). See generally Note, 106 U. PA. L. REV. 999 (1958).

39. Even if, as in the *Westmoreland* case, the arbitration clause covers all disputes, see note 16 *supra*, the court may still be troubled, see, e.g., *Harris Hub Bed & Spring Co. v. United Elec. Workers*, 121 F. Supp. 40 (M.D. Pa. 1954) (alleged breach of contract not arbitrable); *Local 90, Metal Polishers Union v. Rubin*, 85 F. Supp. 363 (E.D. Pa. 1949) (same). Compare *Dress Joint Board v. Rosinski*, 134 F. Supp. 607 (E.D. Pa. 1955) (scope of "all disputes" clause may vary, depending upon the willingness of both parties to arbi-

one party refuses to participate,<sup>40</sup> and the scope and effect of the arbitrator's decision.<sup>41</sup> Consideration of these perplexities would require the NLRB, in effect, to draft its own arbitration law.<sup>42</sup> At the same time, federal courts, under *Lincoln Mills*, will be fashioning a federal common law of arbitration.<sup>43</sup> In the absence of clear Supreme Court guidance, courts have not yet decided whether the United States Arbitration Act,<sup>44</sup> state arbitration law,<sup>45</sup> or a new

trate), with *Boston Printing Pressmen's Union v. Potter Press*, 241 F.2d 787 (1st Cir. 1957) (refusal to enforce arbitration award which legislates new terms for the parties).

A larger issue is raised by proposals that the courts should leave the issue of arbitrability mainly to the arbitrator himself. See, e.g., Summers, *supra* note 9, at 26-27; Wellington, *Judge Magruder and the Labor Contract*, 72 HARV. L. REV. 1268, 1286-1300 (1959); cf. *Local 205, United Elec. Workers v. General Elec. Co.*, 233 F.2d 85, 101 (1st Cir.), *aff'd*, 353 U.S. 547 (1956) (dictum indicating circumstances in which a court might not decide arbitrability).

40. *Industrial Trades Union v. Dunn Worsted Mills*, 131 F. Supp. 945 (D.R.I. 1955).

41. For example, a valid award must settle all the issues involved in the controversy, leaving only ministerial functions to be carried out by the parties. Compare *United Steelworkers v. Enterprise Wheel & Car Corp.*, 168 F. Supp. 308 (S.D.W. Va. 1958), with *Mercury Oil Ref. Co. v. Oil Workers, CIO*, 187 F.2d 980 (10th Cir. 1951). This issue was raised by the Trial Examiner in *Westmoreland*, who decided that the award was invalid because it did not answer the union's allegation that shift seniority was also available under the district agreements clause of the agreement. 117 N.L.R.B. at 1093.

42. See Gregory & Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. CHI. L. REV. 233, 268 (1950); TELLER, A LABOR POLICY FOR AMERICA 171 (1945). Some precedent exists for Board review of arbitration awards. See *Wertheimer Stores Corp.*, 107 N.L.R.B. 1434 (1954) (arbitration proceedings found unfair); *Monsanto Chem. Co.*, 97 N.L.R.B. 517 (1951) (award held inconsistent with national labor policy).

43. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957).

44. 9 U.S.C. §§ 1-14 (1958).

Several circuits have held the Arbitration Act applicable. See *Signal-Stat Corp. v. Local 475, United Elec. Workers*, 235 F.2d 298 (2d Cir. 1956), *cert. denied*, 354 U.S. 911 (1957) (reviewing conflicting decisions); *Local 205, United Elec. Workers v. General Elec. Co.*, 233 F.2d 85 (1st Cir.), *aff'd without deciding this issue*, 353 U.S. 547 (1956); *Local 19, Warehouse Union v. Buckeye Cotton Oil Co.*, 236 F.2d 776, 781 (6th Cir. 1956), *cert. denied*, 354 U.S. 910 (1957); *Tenney Eng'r, Inc. v. United Elec. Workers*, 207 F.2d 450 (3d Cir. 1953). But see *United Steelworkers v. Galland-Henning Mfg. Co.*, 241 F.2d 323 (7th Cir.), *rev'd on other grounds per curiam*, 354 U.S. 906 (1957); *Lincoln Mills v. Textile Workers*, 230 F.2d 81, 86 (5th Cir.), *aff'd without deciding this issue*, 353 U.S. 448 (1956); *United Elec. Workers v. Miller Metal Prods., Inc.*, 215 F.2d 221 (4th Cir. 1954). See generally Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MT. L. REV. 247 (1958); Cox, *Grievance Arbitration in the Federal Courts*, 67 HARV. L. REV. 591 (1954) (pre-*Lincoln Mills*); Mendelsohn, *Enforceability of Arbitration Agreements Under Taft-Hartley, Section 301*, 66 YALE L.J. 167 (1956); Wellington, *Judge Magruder and the Labor Contract*, 72 HARV. L. REV. 1268 (1959).

45. Some states have special labor arbitration statutes. E.g., COLO. REV. STAT. ANN. §§ 80-1-27, 80-1-31, 80-2-5 (1954); ILL. REV. STAT. ch. 10, §§ 19-30 (1957). The general arbitration statutes of other states specifically apply to labor arbitration. E.g., N.Y. CIV. PRAC. ACT § 1448 (Supp.).

Those circuits holding the Arbitration Act inapplicable have turned to state statutes or common law. See, e.g., *Lincoln Mills v. Textile Workers*, *supra* note 44, at 88; *Mercury Oil Ref. Co. v. Oil Workers, CIO*, 187 F.2d 980 (10th Cir. 1951).

common law drawn from several sources should be applied.<sup>46</sup> Since state courts are apparently permitted to participate in formulating this federal common law,<sup>47</sup> achievement of a uniform labor arbitration law will be especially difficult.<sup>48</sup> If the courts must also accommodate NLRB decisions when resolving these issues, their task would be complicated even further. In the short run, moreover, the Board's freedom to disregard circuit court decisions<sup>49</sup> will produce needless differences of outcome between forums until eventual resolution by the Supreme Court.<sup>50</sup>

While potential conflict of this nature has been avoided in other areas by ousting a court's jurisdiction over activities which might constitute unfair labor practices subject to the Board's regulation,<sup>51</sup> breach of contract suits have been largely immune from preemption. Some courts have relied on the narrow ground that contract issues in the particular case differed from unfair labor practice issues.<sup>52</sup> Other courts have rejected the preemption doctrine altogether in breach of contract cases.<sup>53</sup> Although the Supreme Court has not

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46. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957), leaves the federal court free to choose from any of these sources, or to improvise new principles necessary to achieve the general purposes of the act.

47. See *McCarroll v. Council of Carpenters*, 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958); *Karcz v. Luther Mfg. Co.*, 155 N.E.2d 441 (Mass. 1959).

48. For a discussion of the problems raised by state and federal jurisdiction over labor arbitration, see Note, 59 COLUM. L. REV. 153 (1959).

49. See, e.g., *Teamsters Union (Curtis Bros., Inc.)*, 119 N.L.R.B. 232, 245-46 (1957), *enforcement denied*, 36 CCH Lab. Cas. 65133 (D.C. Cir. 1958), *cert. granted*, 359 U.S. 965 (1959); *International Union, UMW (Boone County Coal Corp.)*, 117 N.L.R.B. 1095, 1120 (1957), *enforcement denied*, 257 F.2d 211 (D.C. Cir. 1958).

50. In addition to potential conflict over legal principles, there may also be conflicting results in the same case. Thus, in the *Deena Artware* cases, the NLRB found the union not guilty of a secondary boycott charge and ordered the employer to reinstate discharged workers with back pay. In a court action against the union, the jury found that a secondary boycott had been utilized by the union and awarded damages for the injuries suffered by the employer. The Sixth Circuit affirmed both the NLRB and the court, on the ground that both findings were supported by substantial evidence. *NLRB v. Deena Artware, Inc.*, 198 F.2d 645 (6th Cir. 1952), *cert. denied*, 345 U.S. 906 (1953); *United Brick Workers v. Deena Artware, Inc.*, 198 F.2d 637 (6th Cir.), *cert. denied*, 344 U.S. 897 (1952).

51. Actions based on state labor law, e.g., *Garner v. Teamsters Union*, 346 U.S. 485 (1953), state antitrust law, e.g., *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955), and common-law torts, e.g., *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), have been preempted.

52. *United Elec. Workers v. Worthington Corp.*, 236 F.2d 364, 370 (1st Cir. 1956); *Grunwald-Marx, Inc. v. Joint Bd. of Clothing Workers*, 343 P.2d 23 (Cal. 1959); *Post Publishing Co. v. Cort*, 334 Mass. 199, 134 N.E.2d 431 (1956); *McAmis v. Panhandle E. Pipe Line Co.*, 273 S.W.2d 789 (Mo. Ct. App. 1954). *But see In re United Steelworkers*, 206 Misc. 193, 134 N.Y.S.2d 634 (Sup. Ct. 1954) (preemption obtains despite separable issues).

53. *Lodge 12, Int'l Ass'n of Machinists v. Cameron Iron Works, Inc.*, 257 F.2d 467 (5th Cir.), *cert. denied*, 358 U.S. 880 (1958); *Independent Petroleum Workers v. Esso Standard Oil Co.*, 235 F.2d 401 (3d Cir. 1956); *Textile Workers v. Arista Mills Co.*, 193 F.2d 529 (4th Cir. 1951); *Reed v. Fawick Airflex Co.*, 86 F. Supp. 822 (N.D. Ohio 1949).

dealt directly with this problem, *San Diego Bldg. Trades Council v. Garmon*<sup>54</sup> lends support to the result reached by most lower courts. *Garmon* seems to hold that the principal basis of preemption is the doctrine of "primary jurisdiction."<sup>55</sup> Under this theory, state and federal courts may not regulate those labor activities which Congress entrusted initially to the expertise of the NLRB. Formulation of the law of collective bargaining agreements, however, has been entrusted to the courts by section 301.<sup>56</sup> Moreover, legislative history indicates that the NLRB, and not the courts, is to withdraw from areas of potential conflict between unfair-labor-practice and breach-of-contract proceedings. The conference committee rejected proposals which would have rendered both breach of contract and violation of arbitration agreements an unfair labor practice,<sup>57</sup> because it feared that NLRB administration in this area might interfere with judicial remedies and decisions under section 301.<sup>58</sup>

But even if the preemption doctrine could be employed to avoid conflict of decision,<sup>59</sup> it would deny remedies, presently available, to parties injured by

54. 359 U.S. 236 (1959).

55. "But the unifying consideration of our [preemption] decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience . . ." *Id.* at 242; see Schwartz, *The Penumbra of State Regulation of Unfair Labor Practices*, 38 B.U.L. REV. 553 (1958); Wellington, *Labor and the Federal System*, 26 U. CHI. L. REV. 542, 556-61 (1959).

In addition to "primary jurisdiction," the Court also held that an activity protected by § 7 of the act would be withheld from judicial regulation in all circumstances. 359 U.S. at 245. Since the danger of preemption in the *Westmoreland* situation arises from potential conflict with a § 8 unfair labor practice, however, this added basis is not relevant.

56. See *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957).

57. H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 41-42 (1947), in 1 LEG. HIST. 545-46.

58. The summary of the principal differences between the conference agreement and the original bill, submitted on the Senate floor by Senator Taft, stated in part: "The provisions of the Senate amendment which conferred a right of action for damages upon a party aggrieved by breach of a collective-bargaining contract, however, were retained in the conference agreement (section 301). If both provisions had remained, there would have been a probable conflict of remedies and decisions." 93 CONG. REC. 6600 (1947), in 2 LEG. HIST. 1539; see S. MINORITY REP. No. 105, 80th Cong., 1st Sess. 13 (1947), in 1 LEG. HIST. 475 ("Obviously, the necessity for uniform decisions in such matters and the avoidance of conflicting decisional rules by judicial bodies make this legislative scheme wholly undesirable").

59. The *Garmon* case does not completely foreclose the possibility of preemption. Section 10(a) of the act provides that the power of the NLRB to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." 61 Stat. 146 (1947), 29 U.S.C. § 160(a) (1952). The significance of section 10(a) was recognized in *Lodge 12, Int'l Ass'n of Machinists v. Cameron Ironworks, Inc.*, 257 F.2d 467 (5th Cir.), *cert. denied*, 358 U.S. 880 (1958). Although *Cameron* apparently rejected the preemption doctrine altogether, the court also supported its result by the narrow argument that enforcement of a contractual duty to arbitrate would not "affect" the NLRB's unfair labor practice jurisdiction, because the Board would still be free to make a "final disposition of the matter" after arbitration. 257 F.2d at 473. Enforcement of the arbitration award, however, might be considered a "final disposition" under this narrow holding, and might therefore be held to "affect" the NLRB's jurisdiction.

resistance to an arbitration award. An employer could not receive compensatory damages from the NLRB, as he could from a court.<sup>60</sup> And preemption would bar effective injunctive relief, now offered by state courts.<sup>61</sup>

On the other hand, the only additional remedies made available by an unfair labor practice finding are an immediate temporary restraining order issued by a federal district court upon NLRB petition<sup>62</sup> and a cease and desist order issued by the NLRB after formal investigation and hearing.<sup>63</sup> The prospect of a temporary restraining order is illusory, for the NLRB seldom seeks such orders unless specifically commanded by statute.<sup>64</sup> Indeed, only two such

60. See, e.g., *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 663-64 (1954).

61. Although many states have passed anti-injunction acts, e.g., P.A. STAT. ANN. tit. 43, § 206(d) (1952), judicial construction has often narrowed their restraining effect, e.g., *Philadelphia Marine Trade Ass'n v. Local 1291, Int'l Longshoremen's Ass'n*, 382 Pa. 326, 115 A.2d 733 (1955); see Note, 106 U. PA. L. REV. 1070, 1073 n.24 (1958) (states having such statutes). Injunctive relief is apparently still available in state courts, and not affected by the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. § 104 (1958), even though the state court must follow federal substantive law under section 301. *McCarroll v. Council of Carpenters*, 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958). The NLRB's injunctive remedies are mostly ineffective against 8(d) unfair labor practices. See notes 64-65 *infra* and accompanying text.

62. Labor-Management Relations Act § 10(j), 61 Stat. 149 (1947), 29 U.S.C. § 160(j) (1958). Section 10(h) of the act makes a specific exception to § 4 of the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. § 104 (1958), which effectively prevents federal courts from issuing injunctive relief against strikes. Courts hearing a breach of contract suit under § 301 do not have jurisdiction to issue such injunctions. *A. H. Pull S.S. Co. v. Seafarers' Union*, 250 F.2d 326 (2d Cir. 1957), *cert. denied*, 355 U.S. 932 (1958); *W. L. Mead, Inc. v. Local 25, Teamsters Union*, 217 F.2d 6 (1st Cir. 1954).

63. Labor-Management Relations Act § 10(b), 61 Stat. 146-47 (1947), 29 U.S.C. § 160(b) (1958).

64. The NLRB is commanded by statute to seek temporary restraining orders from a district court when the complaint charges a violation of §§ 8(b)4 (A), (B) and (C). Labor-Management Relations Act § 10(l), 61 Stat. 149 (1947), 29 U.S.C. § 160(l) (1958). When § 8(d) or other unfair labor practice violations are charged, the Board is given discretion whether or not to seek the order. Labor-Management Relations Act § 10(j), 61 Stat. 149 (1947), 29 U.S.C. § 160(j) (1958). A survey of tables 3 and 18 of the *NLRB Annual Reports* for 1953 through 1958 illustrates the infrequency of § 10(j) petitions:

<i>Fiscal year ending June 30:</i>	1953	1954	1955	1956	1957	1958
Unfair labor practice complaints issued:*	906	755	438	635	591	695
No. of § 10(j) injunctions sought:	1	6	1	1	2	7
No. of § 10(j) injunctions issued:	0	4	0	0	2	4

\*Adjusted by subtracting number of 10(l) injunctions sought.

Only about forty 10(j) injunctions have ever been sought. See *N.Y. Times*, Oct. 6, 1959, p. 30, col. 6.

orders restraining 8(d) violations have been found.<sup>65</sup> Cease and desist orders, while more likely to be issued, will also have little immediate value to the injured party. Since the time lapse between filing the charge and final decision is about one year,<sup>66</sup> the original dispute will probably be settled by other means. While an unfair labor practice finding also allows the injured party to utilize retaliatory measures which, in other circumstances, might themselves be considered unfair practices,<sup>67</sup> a strike against an arbitration award is a breach of contract which alone will probably justify the same retaliatory activities.<sup>68</sup>

Since, therefore, 8(d) remedies would not contribute substantially to arbitration enforcement, no reason exists for expanding Board jurisdiction under 8(d) to invite a conflict of forums which Congress indicated should be resolved in favor of the courts.<sup>69</sup> Arbitration awards should thus be excluded from "terms" as used in section 8(d). If the Board concludes from its own examination of the contract, established practices, and past negotiations of the parties that a reasonable dispute over the meaning of the contract exists,<sup>70</sup> it should continue to observe the policy of not applying 8(d).<sup>71</sup> Similar NLRB independence from an arbitrator's factual findings, although not a necessary adjunct of this policy, would provide an additional safeguard against 8(d) encroachment upon the courts' jurisdiction over labor arbitration.

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65. *Curry v. Union de Trabajadores de la Industria*, 86 F. Supp. 707 (D.P.R. 1949) (strike against Puerto Rican cement industry); see *Wall Street Journal*, Oct. 7, 1959, p. 2, col. 3 (temporary restraining order issued against New Orleans locals of the International Longshoremen's Association).

66. See *Hearings on Proposed Revisions of the Labor Management Relations Act of 1947 Before the Senate Committee on Labor and Public Welfare*, 83d Cong., 1st Sess., pt. 1, at 531 (1953). A similar study showed that an additional average time of 8.5 months was consumed if the NLRB order was reviewed by a Court of Appeals. *Id.* at 556.

67. Section 8(d) specifically allows the employer to discharge workers who violate the provision. See note 2 *supra*; *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956) (union retaliatory strike during the sixty day waiting period prior to termination of the collective agreement permitted); *Local 1113, United Elec. Workers v. NLRB*, 223 F.2d 338 (D.C. Cir. 1955) (employer retaliation). *But see* *Mid-West Metallic Prods., Inc.*, 121 N.L.R.B. No. 164, 42 L.R.R.M. 1552 (1958) (union strike against unfair labor practice of employer held unprotected, because it was also in breach of contract).

68. *NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 344 (1939) (breach of contract unprotected activity under § 7, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1958)); *NLRB v. Sunset Minerals, Inc.*, 211 F.2d 224 (9th Cir. 1954) (same); *W. L. Mead, Inc.*, 113 N.L.R.B. 1040 (1955) (reviewing authorities); H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 39 (1947), in 1 LEG. HIST. 543 (provision making strikes in breach of contract unprotected activity withdrawn from act as "unnecessary").

69. See notes 56-58 *supra* and accompanying text.

70. While previous NLRB cases have held that the fact of arbitration can be regarded as evidence of a genuine dispute over the meaning of the contract, see *McDonnell Aircraft Corp.*, 109 N.L.R.B. 930, 934 (1954); *International Union, UMW (Boone County Coal Corp.)*, 117 N.L.R.B. 1095, 1123 (1957) (finding of trial examiner), often one party may agree to arbitrate a groundless demand merely out of respect for the arbitral process. If 8(d) remedies are denied such a party, the NLRB would be penalizing the use of peaceful methods of adjusting grievances.

71. See note 6 *supra* and accompanying text.