

# Notes and Comments

## The NLRB and Deference to Arbitration

Arbitration of labor disputes is today "part and parcel" of the collective bargaining process.<sup>1</sup> Approximately 94 per cent of all collective agreements provide for arbitration of some or all contract disputes,<sup>2</sup> and such promises to arbitrate have been held to be specifically enforceable in federal courts.<sup>3</sup> Congress has declared that "[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement,"<sup>4</sup> and the Supreme Court has held that arbitration serves the national interest by offering an alternative to economic coercion.<sup>5</sup>

The growing popularity of arbitration as a means of resolving industrial disputes raises difficult questions as to the proper relationship of the arbitral process to the National Labor Relations Board. The jurisdiction of the arbitrator and the Board often overlap: most grievances cognizable under the terms of an arbitration clause in a collective agreement can be framed to allege an unfair labor practice,<sup>6</sup> and since a majority of collective agreements incorporate one or more provisions of the Taft-Hartley Act, many statutory violations are breaches of contract as well.<sup>7</sup>

Since Congress has declared that the Board's power 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,"<sup>8</sup> the Board has authority to consider unfair labor practice allegations whether or not an arbitrator could rule or has ruled on the same charges. The concurrent jurisdiction of the arbitrator, how-

1. *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960).

2. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. No. 1425-1, MAJOR COLLECTIVE BARGAINING AGREEMENTS I (1964).

3. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

4. Labor-Management Relations Act (Taft-Hartley Act) § 203(d) [hereinafter cited as Taft-Hartley Act or Act], 29 U.S.C. § 173(d) (1964).

5. *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960). For an excellent discussion of the implications of this view of arbitration, see Summers, *Labor Arbitration: A Private Process with a Public Function*, 34 REV. JUR. U.P.R. 477 (1965).

6. NATIONAL ACADEMY OF ARBITRATORS, *THE ARBITRATOR, THE NLRB, AND THE COURTS* 121-22 (1967) (Statement of E. Lewis).

7. Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems*, 57 COLUM. L. REV. 52, 68, 69 (1957).

8. Taft-Hartley Act § 10(a), 29 U.S.C. § 160(a) (1964).

ever, does raise a question whether the Board should exercise its authority or defer to the arbitration process.

An examination of the NLRB decisions in which an arbitrator had or could have ruled on an unfair labor practice allegation reveals that the Board has wavered in both word and deed with respect to deference. The Board's first major statement on deference to arbitration came in 1955, when it stated in *Spielberg Mfg. Co.*<sup>9</sup> that, to promote the statutory policy of encouraging the voluntary resolution of disputes, it would not reconsider arbitrators' awards on their merits if: (1) the proceedings were fair and regular; (2) all the parties had consented to be bound by the arbitrator's decision; and (3) the award was not inconsistent with the policies of the labor laws.

The sensible sounding if rough-hewn standards enunciated in *Spielberg* were soon abandoned, however, as the Supreme Court began to lavish unqualified praise upon the arbitral process. First, in *Lincoln Mills*,<sup>10</sup> the Court held agreements to arbitrate specifically enforceable in the federal courts. Then, in the *Steelworkers Trilogy*<sup>11</sup> the Court narrowed the scope of judicial review of arbitration awards, proclaiming the arbitrator's expertise as superior to that of the "ablest judge."<sup>12</sup> The Court in these cases had no occasion to comment explicitly upon the relationship between the arbitrator and the NLRB in disputes involving collective agreements, but the Court's high regard for arbitration as a technique for settling a wide range of labor controversies was not lost upon the Board. In *International Harvester Co.*<sup>13</sup> the Board drastically extended its carefully formulated *Spielberg* doctrine and stated that it would refuse to adjudicate unfair labor practice claims arising from the same facts as an arbitrated contract dispute unless the arbitration proceedings were "tainted by fraud, collusion, unfairness, or serious procedural irregularities or . . . the award was clearly repugnant to the purposes and policies of the Act."<sup>14</sup> The Board elaborated upon its "clearly repugnant" test by announcing that arbitrators' findings on questions of law would stand unless they were "palpably

9. 112 N.L.R.B. 1080 (1955). For the purposes of this Note, willingness of the Courts of Appeals to enforce Board rulings is irrelevant; consequently, citations to Courts of Appeals cases reviewing N.L.R.B. decisions will not be given.

10. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

11. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

12. *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960).

13. 138 N.L.R.B. 923 (1962).

14. *Id.* at 927.

wrong.”<sup>15</sup> Further, in a series of later decisions the Board went beyond deference to actual arbitration awards and refused to hear unfair labor practice claims which were subject to an arbitration clause, whether the parties had in fact resorted to arbitration or not.<sup>16</sup>

The joint abdication of Board and Court to arbitration reached its highwater mark in *Carey v. Westinghouse Electric Corp.*<sup>17</sup> There the Supreme Court compelled an employer to arbitrate an inter-union dispute in the teeth of the Court’s own concessions that the arbitrator was powerless to bind all parties to the dispute and that the Board alone could render a decision binding on the employer and on both rival unions.

Although the Board rivalled the Supreme Court in praising arbitration,<sup>18</sup> the rhetoric of *International Harvester* was never thoroughly implemented in practice. Even in the heyday of the deference doctrine between 1960 and 1964, the Board in fact deferred in only about 23 per cent of the cases in which the issue of arbitration was discussed.<sup>19</sup> By the time the Supreme Court decided *Carey*, moreover, even the Board’s rhetorical infatuation had begun to subside in the face of its own experience with cases involving arbitration. The Board has since withdrawn from its most extreme phrasings of the “clearly repugnant” and “palpably wrong” test.<sup>20</sup> Similarly, the Board’s General Counsel, Arnold Ordman, has recently denied that the Board generally requires exhaustion of contract remedies before deciding unfair labor practice claims.<sup>21</sup> Moreover, under the critical test of what the Board has done in practice, the proportion of cases in which the Board has deferred to arbitration has fallen from 23 per cent to 12 per cent of the cases in which the deference issue was discussed during the period 1965-67.<sup>22</sup>

#### I. The Merits of Board Deference to Arbitration

The Board has never clearly set forth the factors which should determine its policy with regard to arbitration of those contract disputes

15. *Id.* at 929.

16. *See, e.g.,* Flintkote Co., 149 N.L.R.B. 1561 (1964); Dubo Mfg. Corp., 142 N.L.R.B. 431 (1963).

17. 375 U.S. 261 (1964).

18. *See, e.g.,* Flintkote Co., 149 N.L.R.B. 1561 (1964); Raley’s Supermarkets, 143 N.L.R.B. 256 (1963); International Harvester Co., 138 N.L.R.B. 923 (1962); Hercules Motor Corp., 136 N.L.R.B. 1648 (1962).

19. *See* Appendix A, Table I, *infra*.

20. *See, e.g.,* Westinghouse Elec. Corp., 162 N.L.R.B. No. 81, 64 L.R.R.M 1032 (Jan. 9, 1967).

21. Ordman, *Arbitration and the NLRB—A Second Look*, in *THE ARBITRATOR, THE NLRB, AND THE COURTS*, *supra* note 6, at 55-56.

22. *See* Appendix A, Tables I and II, *infra*.

which may also involve unfair labor practice claims. On the one hand, Congress has expressed a policy in favor of private resolution of disputes between employers and unions within the collective bargaining framework,<sup>23</sup> and arbitration is the technique of private dispute resolution contracted for by the parties to the collective agreement. On the other hand, three factors militate against allowing the arbitrator's settlement of a dispute to be final in all cases. First, and perhaps most important, a dispute may involve some policy of federal labor law other than the policy of free collective bargaining between union and employer. While the arbitrator's function in settling a dispute normally is only to discern the intent of the parties to the collective agreement,<sup>24</sup> the Act explicitly protects interests which may not be reflected in the union-employer bargaining process. For instance, Section 8(a)(3) forbids discharge of an employee "to encourage or discourage membership in any labor organization";<sup>25</sup> this section expresses an affirmative policy which cannot be overridden by any bargain between employer and union. Similarly, Section 9 gives the Board authority to define "appropriate" bargaining units;<sup>26</sup> thus clauses in collective agreements purporting to provide for the settlement of the boundaries of a bargaining unit should not be allowed to override the Board's judgment of the appropriate boundaries. Arbitrators, whatever their expertise in discerning the "common law of the shop," do not pretend to be experts at statutory interpretation;<sup>27</sup> indeed, many of them are not even lawyers.<sup>28</sup>

23. § 203(d) of the Taft-Hartley Act, 29 U.S.C. § 173(d) (1964), provides in pertinent part: "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."

24. An arbitrator . . . is the creature and servant of the parties selected to determine disputes arising under the system of private law found in the collective bargaining contract and in the practices and customs which illuminate the nature and extent of the promises and arrangements evidenced by that contract. He has a limited charter "in a system of self government created by and confined to the parties." The arbitrator, therefore, determines private rights and private duties stemming from a private contract [footnotes omitted].

Ordman, *The Arbitrator and the NLRB—A Second Look*, in *THE ARBITRATOR, THE NLRB, AND THE COURTS*, *supra* note 6, at 48-49. See also Fuller, *Collective Bargaining and the Arbitrator*, in *NATIONAL ACADEMY OF ARBITRATORS, COLLECTIVE BARGAINING AND THE ARBITRATOR'S ROLE 8* (M. Kahn ed. 1962); P. HAYS, *LABOR ARBITRATION*, ch. 2 (1965); Shulman, *Reason, Contract and Law in Labor Relations*, 68 *HARV. L. REV.* 999 (1955).

25. Taft-Hartley Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (1964).

26. Sections 9(a) and 9(b) of the Taft-Hartley Act, 29 U.S.C. §§ 159(a), (b) (1964).

27. For an extensive discussion of the authority and qualifications of arbitrators to interpret statutory policy, see *THE ARBITRATOR, THE NLRB, AND THE COURTS*, *supra* note 6, at 47-228.

28. In a 1962 survey of its members, the National Academy of Arbitrators (NAA), a highly selective association of professional arbitrators, found that only 87 of the 175 respondents had a basic law degree (LL.B. or J.D.). *Survey of Arbitration in 1962*,

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Second, arbitration proceedings bind only the parties to the contract who have consented to arbitration.<sup>29</sup> Yet many labor disputes, notably controversies over the jurisdiction of unions and the assignment of work, involve an employer and two unions; such disputes may involve two conflicting collective agreements. Since disputes of this kind cannot be concluded by bilateral arbitration, Board deference to the arbitrator's decision has little point.<sup>30</sup>

Third, the structure of arbitration creates the danger of procedural unfairness in certain cases. Arbitrators are chosen and paid by the parties to the collective agreement, the union and the employer. When disputes reflect a clash of interests between these parties, economic self-interest forces the arbitrator to take full account of the claims of both. But in some cases an employee or group of employees may have interests which run counter to those of both union and management. Here the arbitrator has a natural tendency to look to the interests of the parties upon whose continued support depends his tenure or his chances of being hired again. Where, for example, a dissident member of a local union wishes to press a grievance against the employer, it requires no extraordinary cynicism to doubt that an arbitrator hired by the local and the employer will be sympathetic to his claims.<sup>31</sup>

These three factors favoring nondeference correspond roughly to those originally proposed by the Board in *Spielberg*, and the principle of that case—that where any of the three is present, the Board will not defer—provides the foundation for a coherent doctrine to govern the overlapping jurisdiction of the Board and the arbitrator. To develop a set of rules which will give predictability to the Board's treatment of arbitration awards, the likely presence or absence of these factors must be analyzed in each of the important classes of unfair labor practice cases to which an arbitration award might be relevant.

For purposes of this analysis, labor disputes coming before the NLRB can be classified into three broad categories. First are disputes over the boundaries of the bargaining unit, the proper representative for the employees in the bargaining unit, or the jurisdiction of competing unions over particular jobs. Second are disputes in which em-

in NATIONAL ACADEMY OF ARBITRATORS, LABOR ARBITRATION—PERSPECTIVES AND PROBLEMS 304 (M. Kahn ed. 1964). It is reasonable to speculate that the great number of arbitrators who fail to meet the relatively high standards of the NAA do not exceed the NAA's percentage of members with legal training.

29. See *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

30. See pp. 1198-1203 *infra*.

31. Cf. P. HAYS, LABOR ARBITRATION, ch. 2 (1966).

employers are charged with the pro- or anti-union discriminatory practices forbidden by Sections 8(a)(1) to (4),<sup>32</sup> or unions are charged with violations of the discrimination provisions of Section 8(b).<sup>33</sup> Third are disputes in which an employer is charged with a refusal to bargain in good faith under an existing collective agreement in violation of Section 8(a)(5).<sup>34</sup> The compartments are not watertight—for example, bargaining unit disputes often arise in the form of an 8(a)(5) allegation—but in practice they form useful and generally distinct categories.

## II. Bargaining Unit, Representation, and Work Disputes

### A. *Bargaining Unit and Representation Disputes*

The Board's statutory duty to define the appropriate bargaining unit and supervise the election of the proper bargaining representative for the employees leaves little or no scope for deference to arbitration. Congress has directed the Board to define the unit in such a way as to "assure to employees the fullest freedom in exercising the rights guaranteed by this Act;"<sup>35</sup> it has filled out the general principle with certain specific prohibitions and restrictions upon bargaining units.<sup>36</sup> The thrust of the statutory language is that bargaining units are to be constructed so as to protect the rights of individual workers who might be ignored or overridden by an opposed majority in an inappropriate unit, and so as to create a balanced economic structure within which the clash of free collective bargaining can take place.<sup>37</sup> Since the "appropriate" bargaining unit, and the proper election of its representative,

32. Taft-Hartley Act, §§ 8(a)(1)-(4), 29 U.S.C. §§ 158(a)(1)-(4) (1964).

33. Taft-Hartley Act §§ 8(b)(1), (2), 29 U.S.C. §§ 158(b)(1), (2) (1964).

34. Taft-Hartley Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1964).

35. Taft-Hartley Act § 9(b), 29 U.S.C. § 159(b) (1964).

36. § 9(b) of the Taft-Hartley Act, 29 U.S.C. § 159(b) (1964). Section 9(c)(5) of the Taft-Hartley Act, 29 U.S.C. § 159(c)(5) (1964) provides that: "[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling."

37. The determination of the appropriateness of a bargaining unit is necessarily a highly subjective task. The Board has said, "There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be 'appropriate.'" *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409, 418 (1950) (footnote omitted). Moreover, numerous factors, including the history of collective bargaining in the plant and industry, the integration of processes and management, the skills of the workers, the desires of employees, the protection of minorities, the preservation of craft distinctions, the extent of union organization, the impact on the balance of power between employer and union, must be considered and weighed in deciding whether the unit certified should be the department, craft, plant, enterprise, or multi-employer association. See A. Cox & D. Bok, *CASES AND MATERIALS ON LABOR LAW* 328-48 (6th ed. 1965). Compare *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947), with *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965).

are the pre-conditions for collective bargaining, the Board should not in these cases defer to the results of prior bargaining—the collective agreement as interpreted by an arbitrator.

In a few cases,<sup>38</sup> the Board has in effect let an arbitrator decide bargaining unit and representation issues, with unfortunate results. In *Raley's Supermarkets, Inc.*,<sup>39</sup> the Building Service Employees International Union, the petitioner, sought a unit of 14 janitors and 3 bottle sorters employed at the employer's 12 retail food stores. The other store employees were represented by the Retail Clerks Union, the intervenor, under a multi-employer collective agreement. In July 1962 the employer and the petitioning union entered into a contract covering the janitors. About the same time, the intervening union requested that the employer include the janitors and bottle sorters under its multi-employer contract. The employer refused, citing his contract with the petitioning union. Pursuant to a ruling of the Board's Regional Office, the contract between the employer and the petitioning union was cancelled; an arbitrator then decided that the janitors were included under the intervening union's collective agreement. The Board then rejected the petitioning union's claim to represent the janitors, relying solely on the arbitrator's decision, which was found to be free of procedural defects, germane to the representation issue, and not repugnant to the policy of the Act.

The Board ignored the central question in the case—a question which the arbitrator could not have considered in his job of contract interpretation. The janitors, a group of employees which concededly had not in the past been considered within the larger bargaining unit represented by the Retail Clerks, were thrust into that unit without consideration of whether their interests might be better served by a separate unit, and without any opportunity for them to choose their own bargaining representatives in accordance with the statutory secret ballot procedure.

Recently the Board has retreated from its position in *Raley's*. Two June 1966 cases presented classic bargaining unit disputes: an employer has a collective agreement with Union *A*; Union *B* seeks to represent certain employees arguably covered by that agreement; employer and Union *A* hire an arbitrator who holds that Union *A*'s col-

38. See, e.g., *Goodyear Tire & Rubber Co.*, 147 N.L.R.B. 1233 (1964); *Insulation & Specialties, Inc.*, 144 N.L.R.B. 1540 (1963); *Raley's Supermarkets, Inc.*, 143 N.L.R.B. 256 (1963).

39. 143 N.L.R.B. 256 (1963).

lective agreement covers the disputed employees. In *Hotel Employers Association*<sup>40</sup> and *Pullman Industries Inc.*<sup>41</sup> the Board refused to defer to the arbitration award, holding that bargaining unit definition was not to be decided by contract interpretation.

The hardening of the Board's attitude against arbitration emerges perhaps most clearly in *Westinghouse Electric Corp.*,<sup>42</sup> the sequel to *Carey v. Westinghouse Electric Corp.*<sup>43</sup> In *Carey* the Electrical Workers (IUE) claimed that certain employees represented by a local white collar union belonged within the IUE's ambit, and sued to compel arbitration under its collective agreement with Westinghouse. The Supreme Court held that Westinghouse had to arbitrate, despite the fact that the white collar union would not be party to the arbitration, and despite the possible noncontractual bargaining unit issues presented by the dispute. The arbitrator, in a classically Solomonic decision, split the disputed unit in half. The Board refused to defer, holding that:

Here, as in the Hotel Employers Association case, the ultimate issue of representation could not be decided by the Arbitrator on the basis of his interpreting the contract under which he was authorized to act, but could only be resolved by utilization of Board criteria for making unit determinations.<sup>44</sup>

In *Carey* the Supreme Court had compelled arbitration with these soothing words from Mr. Justice Douglas: "The superior authority of the Board may be invoked at any time. Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area."<sup>45</sup> But the arbitrator could not serve as a labor therapist where the issue—the proper definition of the bargaining unit—was logically prior to the collective agreement from which his authority sprang. When the case, long delayed by the Court's insistence on arbitration, finally reached the right forum, the Board properly decided the issue *de novo* with no reliance on the arbitrator's reading of the irrelevant collective agreement.

### B. *Jurisdictional Disputes*

Labor law has traditionally distinguished between bargaining unit representation disputes on the one hand, and so-called jurisdictional

40. 159 N.L.R.B. 143 (1966).

41. 159 N.L.R.B. 580 (1966).

42. 162 N.L.R.B. No. 81, 64 L.R.R.M. 1082 (Jan. 9, 1967).

43. 375 U.S. 261 (1964).

44. 64 L.R.R.M. at 1083 (1967).

45. 375 U.S. at 272.



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disputes on the other.<sup>46</sup> The former kind of dispute typically arises when an employer adds a substantial number of new employees, as when a new plant or a new department is added. The question then arises whether the new employees fit into an existing bargaining unit, or whether they make up a new one, and if the latter, who is to represent them. The jurisdictional dispute is typically on a smaller scale, and always involves a contest between two unions over which one will have a particular job assigned to its members. The conceptual division between the two types of disputes is often unclear; a controversy between two unions can frequently be cast either in terms of who gets the men or who gets the work.<sup>47</sup> In such a case the dispute involves drawing or redrawing the boundaries of a bargaining unit, and the rights of workers to be “appropriately” represented may be at stake. When jurisdictional disputes genuinely involve controversies over the “appropriateness” of one bargaining unit rather than another for a particular job, the Board should decide such questions without deference to any arbitration award, for the same reasons given by the Board in the more typical representational disputes discussed above.<sup>48</sup>

But the traditional distinction between representational and jurisdictional disputes does make sense in many cases. Some disputes so clearly involve only the interests of unions in claiming particular work for their existing members that they can hardly be seen as raising significant questions of the rights of individual workers to be “appropriately” represented. They are rather disputes over the extent to which the rival unions have bargained for the work in question. As such, they seem at first glance to be the precise sort of dispute best settled by arbitration.

Another defect of arbitration, however, militates against deference even in “pure” jurisdictional disputes—the bipartite nature of arbitration. The source of the arbitrator’s power is the contract between the disputants.<sup>49</sup> Just as he lacks jurisdiction over a noncontractual disagreement, he also lacks power over strangers to the contract.

46. The conventional distinction between the two is that bargaining unit and representation disputes involve the questions of which, if any, union shall represent a group of employees, and what the characteristics of that group will be, while jurisdictional disputes involve the question of which, if any, union shall have the right to have work performed by the union’s members.

47. *See, e.g., Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964), wherein the Supreme Court confessed that it was uncertain whether the controversy before it was over representation or jobs.

48. *See* p. 1196 *supra*.

49. M. TROTTA, *LABOR ARBITRATION* 81-87 (1961).

If Union *A* and Union *B* both claim the right to perform certain work, there is a jurisdictional dispute. If Union *A* has a contract with Company *C*, it may demand that *C* arbitrate its work claim under the arbitration provisions of *A*'s contract. If Union *B* also has a contract with *C*, it may demand that *C* arbitrate its grievance under *B*'s contract. The result may be that the arbitrator under *A*'s contract will award the work to *A*, while the arbitrator under *B*'s contract will award the same work to *B*. The employer may thus be subject to two conflicting arbitration awards, both of which will be binding as to him, but neither of which will bind both unions. Union *B*, which was not a party to *A*'s contract with *C*, is not bound by the arbitrator's award under that contract; similarly, Union *A*, which was not a party to *B*'s contract with *C*, is not bound by the arbitrator's award under that contract. Precisely this series of events occurred in the *News Syndicate Co.* case.<sup>50</sup> Not surprisingly, the Board refused to defer to either arbitration award.

Bipartite arbitration is thus futile: no single arbitrator has power over all the parties to the dispute. Tripartite arbitration would conclusively resolve jurisdictional controversies, but it can only be achieved through two means: the voluntary agreement of all disputants to be bound by the decision of a mutually acceptable arbitrator; or the compulsory submission of the dispute to an arbitrator against the wishes of one or more of the contestants.

The construction industry has been the only industry where a significant effort has been made to resolve jurisdictional issues through tripartite arbitration. The Joint Board for Settlement of Jurisdictional Disputes established by the AFL-CIO is composed of an impartial chairman and an equal number of labor and employer members. It has jurisdiction over all unions affiliated with the Building and Construction Trades Department of the AFL-CIO and all contractors employing members of unions affiliated with the Department who have signed a stipulation binding them to abide by the Joint Board's decisions.<sup>51</sup> The greatest problem of the Joint Board has been persuading employers to agree to submit jurisdictional disputes to it.<sup>52</sup> Although

50. 141 N.L.R.B. 578 (1963).

51. K. STRAND, JURISDICTIONAL DISPUTES IN CONSTRUCTION 94 (1961).

52. There appear to be two main reasons why employers have been reluctant to submit jurisdictional disputes to the Joint Board. First, contractors seem to have a justifiable fear that the union-originated, union-dominated Joint Board is union-oriented. At the inception of the Joint Board there was considerable opposition within the AFL-CIO to allowing employers to participate in the tribunal's deliberations. K. STRAND, JURISDICTIONAL DISPUTES IN CONSTRUCTION 93 (1961). Moreover, the factors which the Joint Board stresses

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the NLRB has, on the whole, seemed quite willing to defer to the Joint Board's processes in jurisdictional disputes, in the great majority of cases it has found that the Joint Board lacked jurisdiction over one or more of the contestants.<sup>53</sup>

Arguably, the NLRB might enforce Joint Board decisions even though the employer was not a party to the proceeding. Neither the language of Section 10(k) nor the legislative history compels the conclusion that the employer is an essential party to the resolution of the jurisdictional dispute.<sup>54</sup> Congress, in enacting Sections 8(b) (4)(D) and 10(k), apparently conceived of employers as parties neutral between two competing unions, caught in the cross fire of a dispute in which they have no stake.<sup>55</sup>

The truly neutral employer's interests are fully protected by any binding award of the disputed work to one or the other of the unions. The Joint Board's award accomplishes precisely this result; thus, the statutory policy of insulating the neutral employer from inter-union

in awarding work are not the managerial concepts of productivity, efficiency and cost, but rather precedent. *Id.* 95-96.

Second, employers have enjoyed a remarkably successful record of having the NLRB award the work to whichever union the employer prefers. In only one of the 21 cases in which the Board decided on the merits disputes which the employer refused to submit to the Joint Board's jurisdiction did the NLRB fail to uphold the employer's decision as to which union should get the work. The contrast between the orientation of the NLRB and the Joint Board is most strikingly revealed by the fact that in 15 of the 17 cases where the Joint Board rendered a decision despite the employer's refusal to submit to its jurisdiction, the NLRB found that the Joint Board had awarded the work to the wrong union (*i.e.*, a union other than the one preferred by the employer).

For citations to the cases in which the NLRB decided on the merits disputes which the employer refused to submit to the Joint Board see Appendix B, *infra*.

53. Out of a total of 29 cases in which the question of deference to the Joint Board was presented, the NLRB found that the Joint Board had jurisdiction over all the parties in only eight of them. In only five of the cases is it clear that the Joint Board lacked jurisdiction over both unions, as well as over the employer. For citations to these cases, see Appendix B, *infra*.

54. Section 10(k) of the Taft-Hartley Act, 29 U.S.C. § 160(k) (1964) provides:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158[8](b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

The term "parties," as used in that section, seems to have been intended to refer solely to the rival unions. *See, e.g.*, 1 NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 480-81 (SENATE MINORITY REP. No. 105, Pt. 2, on S.1126) (1948) [hereinafter cited as LEGISLATIVE HISTORY]; *id.* 561 (HOUSE CONF. REP. 510, on H.R. 3020); 2 LEGISLATIVE HISTORY 1046 (remarks of Senator Murray); *id.* 1554-55 (remarks of Senator Morse).

55. *See, e.g.*, 1 LEGISLATIVE HISTORY 314-15 (H.R. REP. No. 245, on H.R. 3020); *cf. id.* 480-81 (SENATE MINORITY REP. No. 105, Pt. 2, on S. 1126); *id.* 583 (remarks of Representative Landis); *id.* 615 (remarks of Representative Hartley).

disputes may be fulfilled if the NLRB prohibits the losing union from interfering with the employer's grant of the work to the union designated by the Joint Board.

If the employer prefers one union to the other, it is presumably either because he feels he can bargain with the preferred union for more advantageous wages, hours, and working conditions, or because he feels that the members of the preferred union are better qualified to do the work. Yet if the unions have agreed between themselves which should get the work, or have submitted their dispute to arbitration binding upon themselves, the employer's conflict with the wage and hour demands of the winning union is arguably no longer of the jurisdictional type. It is rather a straight economic conflict between a union and an employer, to be settled by bargaining and ultimately by economic force. If the employer counters the demands of the winning union by employing other workers (whether members of the losing union or others), subsequent picketing by the winning union would not then be a violation of Section 8(b)(4)(D).

No case involving compulsory tripartite arbitration has yet come before the NLRB; but since its use in one celebrated instance—the *National Steel & Shipbuilding Co.*<sup>56</sup> dispute—the technique of involuntary tripartite arbitration has been much discussed.<sup>57</sup> In *National Steel*, the Iron Workers and the Machinists were both doing silver soldering at the Company's shipyard. The Iron Workers invoked arbitration under their contract with the employer to obtain an award that the work was either exclusively theirs or exclusively the Machinists. The Company argued that the arbitrator lacked jurisdiction to render such an award because only one union was party to the arbitration proceeding. The arbitrator held that he had the legal power to issue an order of joinder, after due notice, making a union which was not a party to the collective agreement a party to the arbitration proceeding under that contract. The Ironworkers moved for the issuance of the suggested order for a trilateral arbitration hearing. The Machinists replied that they would not enter a tripartite arbitration unless compelled to do so by the courts. After the arbitrator ordered joinder, the Ironworkers petitioned the Superior Court of California to enforce the order against the Machinists; the dispute was then settled out of court through the internal AFL-CIO jurisdictional dispute procedures.

56. 40 Lab. Arb. 625, 631, 838, 841 (1963) (Jones, Arbitrator).

57. See, e.g., articles cited notes 58 and 59 *infra*.

## The NLRB and Deference to Arbitration

Professor Bernstein<sup>58</sup> has raised persuasive arguments against the torrent of claims published by the *National Steel* arbitrator<sup>59</sup> that compulsory tripartite arbitration is the ideal forum for jurisdictional disputes. As Bernstein points out, the basis of legal enforcement of arbitration awards is the agreement of the parties to resolve their disputes in a forum of their own choice.<sup>60</sup> Under the *National Steel* technique, however, the non-party union is forced to make its case in a forum it has not chosen, before a "judge" selected by the other two parties. Thus tripartite arbitration is achieved, but only at the cost of its voluntariness, the very factor which makes it a preferred remedy under the Taft-Hartley Act.<sup>61</sup>

The NLRB provides a better forum for the settlement of jurisdictional disputes. It has jurisdiction over all the parties, it is neutral, and it can enforce its decision through court order.<sup>62</sup> To the extent that jurisdictional disputes overlap representation issues, the Board can insure that statutory standards for defining bargaining units are not sacrificed.<sup>63</sup> Furthermore, its processes are comparatively rapid in this area: the Board gives special priority to jurisdictional disputes.<sup>64</sup> Except in the case where the National Joint Board or a similar body has

58. Bernstein, *Nudging and Shoving All Parties to a Jurisdictional Dispute into Arbitration: The Dubious Procedure of National Steel*, 78 HARV. L. REV. 784 (1965).

59. Jones, *Autobiography of a Decision: The Function of Innovation in Labor Arbitration, and the National Steel Orders of Joinder and Interpleader*, 10 U.C.L.A.L. REV. 987 (1963); Jones, *An Arbitral Answer to a Judicial Dilemma: The Carey Decision and Trilateral Arbitration of Jurisdictional Disputes*, 11 U.C.L.A.L. REV. 327 (1964); Jones, *Power and Prudence in the Arbitration of Labor Disputes: A Venture in Some Hypotheses*, 11 U.C.L.A.L. REV. 675 (1964); Jones, *Compulsion and the Consensual in Labor Arbitration*, 51 VA. L. REV. 369 (1965); Jones, *On Nudging and Shoving the National Steel Arbitration into a Dubious Procedure*, 79 HARV. L. REV. 327 (1965); Jones, *Jurisdictional Dispute Arbitration: The Jostling Professors*, 14 U.C.L.A.L. REV. 347, 351 (1966) (debate with Bernstein).

60. Bernstein, *Jurisdictional Dispute Arbitration: The Jostling Professors*, 14 U.C.L.A.L. REV. 347, 351 (1965) (debate with Jones).

61. Section 203(d) of the Taft-Hartley Act, 29 U.S.C. § 173(d) (1964) provides: 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 [emphasis added]. . . .

62. The Board's jurisdiction rests on § 10(k) of the Taft-Hartley Act, 29 U.S.C. § 160(k) (1964), which provides:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title [which makes it an unfair labor practice for a union to engage in a jurisdictional dispute], the Board is empowered and directed to hear and determine the dispute. . . .  
Section 10(l) of the Act, 29 U.S.C. § 160(l) (1964), authorizes the Board to petition any district court of the United States for appropriate injunctive relief pending final adjudication by the Board of the dispute. Section 10(e) of the Act, 29 U.S.C. § 160(e) (1964) grants the Board the power to petition any court of appeals or district court of the United States for the enforcement of the Board's orders.

63. See p. 1196 *supra*.

64. 29 C.F.R. § 102.89 (1967).

jurisdiction over all the parties to a dispute—which will only be the case when all the parties have at least arguably consented to arbitration—the NLRB should settle jurisdictional disputes without deference to arbitration.

### III. Employer and Union Discriminatory Practice Cases

Although employer and union discriminatory practice cases are usually quite distinct,<sup>65</sup> there can be overlap of the two,<sup>66</sup> and since the considerations governing deference are quite similar in both types of cases, it is convenient to consider them together. In both groups of cases two of the factors militating against deference to arbitration are present: the risk that statutory policies will be ignored or misconstrued by the arbitrator, and the danger that the proceeding will be marred by bias if not outright corruption.

The first of these points is well illustrated by *Monsanto Chemical Co.*<sup>67</sup> There the arbitrator stated, in upholding the discharge of a union steward for failing to explain satisfactorily his absence from work:

I have given a good deal of thought to the dilemma which arises out of the dual jurisdiction over the essence of the unfair labor practice charges. Because the NLRB has exclusive jurisdiction in the event of a conflict, and because I believe the case can be decided on other grounds, I have chosen to ignore for purposes of decision the allegations herein contained that [the employee's] activities played a part in his discharge.<sup>68</sup>

While the arbitrator in *Monsanto* was unusually frank in disavowing consideration of statutory policies, his position is by no means unique. Much of the agenda at a recent meeting of the National Academy of Arbitrators was devoted to the question of the extent, if any, to which arbitrators should consider the policies of the labor laws when construing collective agreements.<sup>69</sup> Moreover, even when arbitrators do

65. The most typical example of an employer discriminatory practice is the discharge of an employee because of his pro-union activity. *E.g.*, National Screen Products Co., 147 N.L.R.B. 746 (1964). In marked contrast, the usual union discriminatory practice case is characterized by an attempt by the union to punish an employee for failure to support the union. *E.g.*, Allis-Chalmers Mfg. Co., 149 N.L.R.B. 67 (1964).

66. A typical example of an overlap is the case where an employer accedes to a union's demand that an employee be discharged for violation of his duties as a union member. *E.g.*, International Harvester Co., 38 N.L.R.B. 923 (1962).

67. 130 N.L.R.B. 1097 (1961).

68. *Id.* at 1099.

69. THE ARBITRATOR, THE NLRB, AND THE COURTS, *supra* note 6, chs. III-IV.

## The NLRB and Deference to Arbitration

look to the statutes, many lack all qualifications to discern statutory objectives and apply statutory standards.<sup>70</sup> Finally, the ground upon which the Supreme Court has favored deference to arbitrators is their knowledge of industrial practices and the “common law of the shop,”<sup>71</sup> not their skill at statutory construction or their fitness to promulgate national labor policy.

The Board’s early failure to distinguish between the competence of the arbitrator to construe collective agreements and his lack of authority and ability to interpret statutory policy is epitomized by the *International Harvester Co.*<sup>72</sup> case. There the employer and the UAW were parties to a union-shop contract that expired on August 1, 1958. In April of that year an employee revoked the company’s authority to check off his union dues. On July 1 the union certified to the company that the employee was more than 60 days in arrears and requested that he be discharged for failure to pay his dues. The company refused, contending that under the Indiana right-to-work law the union-security clause was unenforceable. The union invoked the arbitration process and the arbitrator sustained the union’s position in part, holding that the employee should have been discharged during the remaining time of the contract, but rehired upon the contract’s expiration.

The Board, with two members dissenting, deferred to the arbitrator’s award. The majority argued that it was unnecessary to consider the legality of the union-shop contract under Indiana law and the right of the union to pursue its demand for the employee’s discharge after the contract expired:

We need not decide these questions . . . since it plainly appears to us that the award is not palpably wrong. To require more of the Board would mean substituting the Board’s judgment for that of the arbitrator, thereby defeating the purpose of the Act. . . .<sup>73</sup>

The judgment of the arbitrator to which the Board deferred did not merely involve his determining the intent of the parties in forming their collective agreement; it necessarily also involved an interpretation of the Indiana right-to-work law and its relation to Section 14(b) of the Taft-Hartley Act<sup>74</sup>—an important question of federal labor policy. To

70. Cf. P. HAYS, LABOR ARBITRATION, ch. 2 (1965).

71. *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960).

72. 138 N.L.R.B. 923 (1962).

73. *Id.* at 928, 929.

74. Section 14(b) of the Taft-Hartley Act, 29 U.S.C. § 164(b) (1964) provides: Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employ-

allow a private arbitrator to determine this policy subject to review only if "palpably wrong" was a remarkable misdelegation of authority.

Deference to arbitration in discriminatory practice cases creates risks that petitioning employees will be denied due process, as well as that federal statutory policies will be slighted. On the simplest level, the renowned "flexibility" of the arbitral process often means no more than procedural laxity. Fleming reports that most arbitrators take past misconduct into account in determining whether an employee is guilty of the conduct for which he was discharged, do not require that the employee have the opportunity to confront and cross-examine his accusers, take into account that an employee refuses to testify, and permit evidence obtained through improper searches and seizures to be admitted.<sup>75</sup> Such informality may be appropriate in cases where union and employer—parties of relatively equal resources—are squarely opposed on the merits of the dispute. But in many discriminatory practice cases the complaining employee's interests are not equivalent to those of the union or of the employer<sup>76</sup>—yet they are formally the parties to the arbitration, they have hired the arbitrator, and they alone have the resources to protect themselves against procedural laxity.

Motives other than protecting the individual employee may guide a union in the vigor with which it presses grievances.<sup>77</sup> Strict screening

ment in any State or Territory in which such execution or application is prohibited by State or Territorial Law.

75. R. FLEMING, *THE LABOR ARBITRATION PROCESS* ch. 7 (1965).

76. *See, e.g.*, *Star Expansion Indus. Corp.*, 164 N.L.R.B. No. 95, 65 L.R.R.M. 1127 (May 12, 1967); *Auburn Rubber Co.*, 156 N.L.R.B. 301 (1965); *Frazier-Davis Constr. Co.*, 145 N.L.R.B. 1492 (1964); *Roadway Express, Inc.*, 145 N.L.R.B. 513 (1963); *International Harvester Co.*, 138 N.L.R.B. 923 (1962); *Gateway Transp. Co.*, 137 N.L.R.B. 1763 (1962); *Walsh Constr. Co.*, 131 N.L.R.B. 260 (1961); *John I. Paulding, Inc.*, 130 N.L.R.B. 1035 (1961); *Hershey Chocolate Corp.*, 129 N.L.R.B. 1052 (1960).

77. To the uninitiated, grievance arbitration looks like a simple and logical terminal point for deciding contractual disputes on which the parties cannot agree. There are, in fact, many reasons for going to arbitration which have little or nothing to do with the merits of the dispute. The grievance procedure is not, and cannot be, isolated from the bargaining relationship between the parties to the contract. A good example is the familiar phenomenon of multiple grievances being slated for arbitration during the period of contract negotiations, but being withdrawn as soon as a contract is agreed upon. Bargaining pressure is simply being exerted through the grievance channel. There are many other institutional problems which must be taken into account. No impartial machinery which is always limited to the same two parties can survive if one side always wins. In bringing cases the parties take this into consideration. Being a political organization is an additional problem for the union. Too rigid screening of grievances can alienate needed local support. It may be better to blame an adverse decision on an arbitrator than to assert that the grievance is wholly without merit. Newly elected officers may take cases to arbitration to fulfill campaign promises, or just to gain experience for the future. In an otherwise peaceful and quiet plant an occasional arbitration may inject some color and excitement to whet the interest of committeemen. On the management side, the company may prefer to back rather than reverse an erring foreman. Or a clash in views may exist between the operating



of grievances may be a bargaining counter with which the union wins collective advantages—while the worker whose grievance has been screened out suffers an individual loss. In more extreme cases—especially where the worker with the grievance is at odds with the local union leadership—actual collusion between union and employer may lead to “rigged” arbitration awards.<sup>78</sup>

The institutional bias of arbitration towards the union and the employer is compounded by the tradition that the union has full control over the petitioning employee’s side of the case.<sup>79</sup> Procedurally, this again leads to remarkable “flexibility”; that is, the employee often cannot participate in the hearing, employ his own counsel, or conduct his own case.<sup>80</sup>

The arguments against deference where employer discriminatory practices are charged apply a fortiori to allegations of union discriminatory practices. Where arbitration is available in the latter kind of case the proceeding takes place before a “judge” selected by a hostile union and an often wholly disinterested employer. The employee is left to his own resources to present his case against a well-endowed union which is paying half of the arbitrator’s fee.

The *Star Expansion Industries Corp.*<sup>81</sup> case vividly illustrates how little protection arbitration affords the discharged worker, particularly when he is at odds with his union. There the employee, a union steward, was a militant supporter of the UE. He had led a successful campaign for the decertification of the IBEW and the certification of the rival UE; he was discharged for allegedly “talking strike,” urging

and industrial relations divisions, with the latter preferring to have the arbitrator push the company in the direction they deem desirable or inevitable.

R. FLEMING, *THE LABOR ARBITRATION PROCESS* 20-21 (1965).

78. For conflicting views as to the frequency with which rigged awards are rendered, compare P. HAYS, *LABOR ARBITRATION* 62-66 (1966), with Meltzer, *Book Review*, 34 *U. CHI. L. REV.* 211 (1966); Seitz, *Two Faces of Arbitration: Which Book Do You Read?* 19 *STAN. L. REV.* 698 (1967); Stackman, *Now, Who Shall Arbitrate?* 19 *STAN. L. REV.* 707 (1967); and Vladeck, *Book Review*, 41 *N.Y.U.L. REV.* 1021 (1966).

79. See *Vaca v. Sipes*, 386 U.S. 171 (1967). See also Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 *N.Y.U.L. REV.* 362 (1962); Comment, *Individual Control over Personal Grievances under Vaca v. Sipes*, 77 *YALE L.J.* 559 (1963). But cf. Taft-Hartley Act § 9(a), 29 U.S.C. § 159(a) (1964), which states, in pertinent part:

*Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

80. See, e.g., *Star Expansion Indus. Corp.*, 164 N.L.R.B. No. 95, 65 L.R.R.M. 1127 (May 12, 1967); *F. J. Buckner Corp.*, 163 N.L.R.B. No. 7, 64 L.R.R.M. 1273 (Feb. 27, 1967); *International Harvester Co.*, 138 N.L.R.B. 923 (1962).

81. 164 N.L.R.B. No. 95, 65 L.R.R.M. 1127 (May 12, 1967).

a slow down, and engaging in racial discrimination. Because he was discharged while the IBEW was still the recognized union, the employee was forced to seek relief under the IBEW contract. The arbitral proceeding took place before an arbitrator selected by the IBEW, and the employee was represented by an IBEW attorney who had published a letter maligning him for his activities in behalf of the UE. Not surprisingly, the arbitrator held that the discharge was for just cause.

In view of the grave dangers arbitration in employer or union discriminatory practice cases presents to statutory policies and to the due process rights of employees, the Board might properly adopt a flat rule against deference in such cases. Indeed, such a rule seems to exist in practice; after a few unfortunate examples of deference to possibly rigged or procedurally unfair awards in the early sixties,<sup>82</sup> the Board has deferred in only two discrimination cases since 1964.<sup>83</sup>

#### IV. Refusal to Bargain Cases

Claims alleging refusals to bargain during the contract term are of two main types. One type consists of cases in which the employer refuses to give the union information which it requests; the other type consists of cases in which the employer has taken some unilateral action without first negotiating to an impasse with the union and complying with the notice requirements of Section 8(d) of the Taft-Hartley Act.

##### A. *Discovery*

In a staple refusal to bargain case of the first sort, a union will request an employer to supply information which the union needs, either

82. See, e.g., *Modern Motor Express, Inc.*, 149 N.L.R.B. 1507 (1964); *Frazier-Davis Constr. Co.*, 145 N.L.R.B. 1492 (1964); *Denver-Chicago Trucking Co.*, 132 N.L.R.B. 1416 (1961); *Walsh Constr. Co.*, 131 N.L.R.B. 260 (1961); *Hershey Chocolate Corp.*, 129 N.L.R.B. 1052 (1960).

83. The two exceptions are *Schott's Bakery, Inc.*, 164 N.L.R.B. No. 59, 65 L.R.R.M. 1180 (May 4, 1967), and *Howard Elec. Co.*, 166 N.L.R.B. No. 62, 65 L.R.R.M. 1577 (June 30, 1967). In *Schott's Bakery*, the arbitrator had found that the employer acted discriminatorily and out of anti-union animus in first transferring the union president to a more onerous job, and then discharging him for his inability to perform the new work satisfactorily. Under these circumstances, deference to the arbitrator's award could in no way adversely affect the rights of the employee. In *Howard Electric*, the arbitrator also found that the employee was not discharged for just cause, but rather for his union activities. However, the arbitrator held that while the employee was entitled to back pay, he was not entitled to reinstatement, because, under the collective agreement, the employer had an absolute right to refuse to reinstate any employee. Deference in this case was highly improper. Allowing an employer who has admittedly discharged an employee because of his union activities to refuse to reinstate the employee sanctions a direct violation of § 8(a)(3) of the Taft-Hartley Act, 29 U.S.C. § 158(a)(3) (1964). See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *NLRB v. Mackay Radio & Tel. Co.*, 333 U.S. 307 (1938).

for purposes of future contract negotiations, or as evidence in a grievance proceeding; the employer will then refuse to supply the information, claiming that the collective agreement gives the union no right to demand it, or that it is irrelevant to any proper subject of collective bargaining.<sup>84</sup>

The Board has not left the union's right to discovery a matter for collective bargaining; it has rather read into Section 8(a)(5) a duty on the part of the employer to supply all information relevant to the union's task as bargaining agent "in negotiating a contract, or policing or administering a contract, or adjusting a grievance."<sup>85</sup> Given this statutory duty, the Board will not defer to collective agreements which purport to restrict more narrowly the union's right to discovery, nor to arbitration awards based on such restrictive clauses.<sup>86</sup>

The single case which departs from this statutory duty of broad discovery has since been distinguished away. In *Hercules Motor Corp.*<sup>87</sup> the employer refused to allow the union to examine the employer's data on wage rates. The union filed an 8(a)(5) charge; the employer defended on the ground that the data was irrelevant under a contract which gave the union no right to question wage rates on grounds of fairness or equity. The Board dismissed the complaint on the ground that the union had claimed that the fairness of the wages during the contract term was an arbitrable issue; whether this was so, held the Board, was itself a matter of contract interpretation reserved for the arbitrator.

The Board's later decision in *Timken Roller Bearing Co.*<sup>88</sup> rendered *Hercules* virtually meaningless. In *Timken* a union similarly requested wage data as a prelude to filing a grievance. The union stated, however, that it needed the information not only for the specific grievance alleged, but also for general purposes of "policing or administering a contract, or adjusting a grievance." Given this "general purpose," the Board invoked its statutory rule and ordered the employer to disclose the data. Though *Timken* did not expressly overrule *Hercules*, it left it no more than a pleading obstacle easily circumvented; information relevant to any issue governed by the contract can always be sought for

84. See, e.g., *Acme Indus. Co.*, 150 N.L.R.B. 1463 (1965).

85. *Hercules Motor Corp.*, 136 N.L.R.B. 1648, 1652 (1962). The rule was explicitly adopted in *Timken Roller Bearing Co.*, 138 N.L.R.B. 15 (1962).

86. See, e.g., *Square D Co.*, 142 N.L.R.B. 332 (1963); *Timken Roller Bearing Co.*, 138 N.L.R.B. 15 (1962).

87. 136 N.L.R.B. 1648 (1962).

88. 138 N.L.R.B. 15 (1962).

"general" purposes of policing and administering a contract, as well as for the purpose of pressing a single grievance.

The Supreme Court approved the Board's statutory rule of liberal discovery in the recent case of *NLRB v. Acme Industrial Corp.*<sup>89</sup> The Court even argued that the rule supported the arbitral process, noting that if unions can get whatever information seems relevant to administration of the grievance machinery, they can more intelligently decide which grievances to press to final arbitration. The Court's decision thus finally removes discovery disputes from the ranks of those in which the Board might defer to an arbitrator's decision. It confirms that the statutory right to relevant information overrides any more restrictive term in a collective agreement.

### B. *Unilateral Action*

In one important class of unfair labor practice cases, a general rule of deference to arbitration may be appropriate. Where the union challenges the right of management to act unilaterally without consulting the union, two questions are presented: (1) does the contract authorize the employer to act without obtaining the agreement of the union; and, if so, (2) does the contract allow the employer to take such unilateral action without at least attempting to reach an agreement with the union by good faith bargaining?

The Board can perhaps best leave both questions to the arbitrator. Here Section 203(d) of the Act comes into play:

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.<sup>90</sup>

Arbitration is the remedy for which the parties have bargained. In unilateral action cases, a persuasive argument can be made that no federal policy extrinsic to the contract, no procedural bias, and no inability to bind the essential parties disables the arbitrator.<sup>91</sup> If the

89. 385 U.S. 432 (1967).

90. Taft-Hartley Act § 203(d), 29 U.S.C. § 173(d) (1964).

91. Section 8(d) of the Act, 29 U.S.C. § 158(d) (1964) provides that the collective agreement shall govern the terms and conditions of employment during the contract term. Thus it may be argued that when a dispute arises during the contract term over what the terms and conditions of employment are or should be, the only relevant question is what the contract provides. This, of course, is a question appropriate for arbitral determination. Taft-Hartley Act § 203(d), 29 U.S.C. § 173(d) (1964).

Procedural bias is unlikely because the arbitrator is chosen by the parties to the dispute, the union and the employer, and is equally responsible to both. The parties are thus able to insure that the arbitrator adopts whatever degree of procedural formality

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Board refuses to take such cases before the contractual issue is arbitrated, and then refuses to review the arbitrator's reading of the contract, parties will be encouraged to settle cases of this sort through arbitration alone.

On the other hand, it can also be argued that federal policy should and does support a broad definition of the duty to bargain in cases of unilateral action by the employer. Regardless of whether management may act without reaching an agreement with the union, and if so whether the union may strike in reprisal,<sup>92</sup> a policy of encouraging the employer at least to discuss the proposed action with the union in advance might promote industrial peace.<sup>93</sup>

The implications of this analysis are best shown by example. An employer subcontracts out certain work without consulting the union. The union protests that the action violates the collective agreement. Management refuses to discuss the action, claiming that the management prerogative clause in the contract allows it to subcontract out work without bargaining with the union. The union demands ar-

they wish. See Wallen, *Arbitrators and Judges—Dispelling the Hays' Haze*, in *SOUTHWESTERN LEGAL FOUNDATION, LABOR LAW DEVELOPMENTS* 159 (1966).

Since charges of unilateral action during the contract term only arise where the disputants have a collective agreement, assuming the contract provides for arbitration, the promise to arbitrate is specifically enforceable, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), and the arbitrator's award is binding on the signatories of the agreement. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

92. Section 8(d) of the Act, 29 U.S.C. § 158(d) (1964) is concerned with the duty to bargain, not the right to act. It leaves open the question whether, after good faith bargaining, union and management may change the terms and conditions of employment, and use economic force to effectuate or frustrate the changes.

However, the implications of *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960), *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), and *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962) are that the collective agreement governs all conduct by both employer and union during the contract term, and that all disagreements about the scope of the contract must be resolved through arbitration, not by economic warfare, when arbitration is available and the dispute in question has not been specifically withdrawn from the arbitrator's jurisdiction. *But see Teamsters Local 174 v. Lucas Flour*, 369 U.S. at 105 n.14.

For a discussion of the extent to which the Supreme Court has curtailed the parties' freedom to resort to forums other than arbitration to resolve disputes during the contract term, see Summers, *Labor Arbitration: A Private Process with a Public Function*, 34 *REV. JUR. U.P.R.* 477 (1965); and Summers, *Labor Law Decisions of the Supreme Court: 1961 Term*, in *A.B.A. SECTION ON LABOR RELATIONS LAW, PROCEEDINGS* 51 (1962).

93. Cf. *FINAL REPORT OF THE INDUSTRIAL COMMISSION*, H.R. DOC. NO. 380, 57th Cong., 1st Sess. 884 (1902):

The chief advantage which comes from the practice of periodically determining the conditions of labor by collective bargaining . . . [is] that thereby each side obtains a better understanding of the actual state of the industry, of the conditions which confront the other side, and of the motives which influence it. Most strikes and lockouts would not occur if each party understood exactly the position of the other. . . .

*But see Wellington, Freedom of Contract and the Collective Bargaining Agreement*, 112 *U. PA. L. REV.* 467 (1964).

bitration on both issues: whether the employer may act unilaterally, and, if so, whether it must first at least bargain in good faith with the union. The arbitrator rules in favor of management on both issues. The union then files a charge with the NLRB, alleging that the employer has violated Section 8(a)(5)<sup>94</sup> by refusing to bargain.

The Board must decide what deference is due the arbitrator's decision that the contract authorizes the employer to act without bargaining. If it concludes that federal policy supports a broad duty to bargain, one which the parties should not be allowed to overrule lightly by their collective agreement, it should not defer to the arbitrator's reading of the contract. Rather the Board should interpret the agreement independently and refuse to find that the union has waived its right to bargain with the employer unless the contract is explicit in providing that management may take the specific action in question without bargaining.

The limited sweep of this policy must be made clear. In deciding the 8(a)(5) issue of the duty to bargain, the Board does not decide whether the contract authorizes the employer ultimately to act unilaterally if he cannot reach agreement with the union. The policy reflected in 8(a)(5), if any, relates only to the duty to bargain. Once the parties have done that, the Board has no jurisdiction to decide whether unilateral action is authorized by the contract.<sup>95</sup> Furthermore, if the union then resubmits that issue to arbitration, arguing that the Board's construction of the management prerogative clause bars unilateral action, the arbitrator need not defer to the interpretation of the contract by the Board. Even if the language of the agreement regarding the duty to bargain is similar or identical to the language defining management's authority to act unilaterally after bargaining fails, the arbitrator should realize that the strict rules of interpretation applied by the Board stem from the federal policy to encourage bargaining. His task, on the other hand, is to determine the intention of the parties. Consequently, his rules of interpretation may differ from

94. Taft-Hartley Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1964).

95. Although the Taft-Hartley bill as originally introduced in the Senate made it an unfair labor practice for either an employer or a union "to violate the terms of a collective bargaining agreement. . .," that provision was deleted from the final Act. The intention was that "[o]nce parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." H.R. REP. NO. 510, 80th Cong., 1st Sess. 42 (1917), quoted in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 452 (1957).

For an extensive analysis of the legislative history of the abortive provision making it an unfair labor practice to violate a collective agreement, see Christensen, *Arbitration, Section 301, and the National Labor Relations Act*, 37 N.Y.U.L. REV. 411 (1962).

the Board's, and he may arrive at a different construction of the same or similar language.<sup>96</sup>

In fact, the Board has neither announced whether any policy favoring a broad duty to bargain exists, nor attempted to justify any such policy. Instead, it has simply undertaken the task of interpreting contracts itself without advancing anything but ad hoc reasons for its failure to defer to arbitration. Between 1960 and 1967 the Board decided on the merits 16 of 20 such unilateral cases involving the duty to bargain despite the existence in each case of an arbitration clause covering contract interpretation.<sup>97</sup>

The Board advanced one or more of five reasons for asserting jurisdiction in these sixteen cases: (1) neither party to the contract had invoked the arbitration process; (2) the respondent had frustrated the arbitration process by refusing to process the grievance; (3) the contract was clear and unambiguous; (4) the charging party had not waived its right to bargain about the change in the working conditions; and (5) the arbitrator could not resolve the dispute.

The first reason, that neither party to the contract had invoked the arbitration process, is not wholly persuasive. While it is true that the argument that the parties bargained for arbitration loses much of its force when neither party wishes to avail itself of the bargained for forum, arbitration remains the favored forum for disputes centering around the meaning of the collective agreement. The average arbi-

96. Of course, if the union later brings a court action under § 301 of the Act, 29 U.S.C. § 185 (1964), charging that the employer has breached the contract by acting unilaterally, the judge would need to determine whether federal policy requires a strict construction of any clause allowing management to act unilaterally, or a broad construction of any no-strike clause. The problem of judicial deference to arbitration decisions is, however, beyond the scope of this Note. See generally P. HAYS, *LABOR ARBITRATION* (1966); Christensen, *Labor Arbitration and Judicial Oversight*, 19 *STAN. L. REV.* 671 (1967); Meltzer, *Ruminations about Ideology, Law, and Labor Arbitration*, 34 *U. CHI. L. REV.* 545 (1967); Wellington, *Judicial Review of the Promise to Arbitrate*, 37 *N.Y.U.L. REV.* 471 (1962); Note, *Judicial Review of Labor Arbitration Awards after the Trilogy*, 53 *CORNELL L. REV.* 136 (1967).

97. The 16 cases the Board has decided on the merits are: *Gravenslund Operating Co.*, 168 N.L.R.B. No. 72, 66 L.R.R.M. 1323 (Nov. 27, 1967); *W.P. Ihrle & Sons*, 165 N.L.R.B. No. 2, 65 L.R.R.M. 1205 (May 31, 1967); *Adelson, Inc.*, 163 N.L.R.B. No. 53, 64 L.R.R.M. 1346 (Mar. 13, 1967); *Scam Instrument Corp.*, 163 N.L.R.B. No. 39, 64 L.R.R.M. 1327 (Mar. 8, 1967); *Central Rufina*, 161 N.L.R.B. No. 59, 63 L.R.R.M. 1318 (Nov. 1, 1966); *American Fire Apparatus Co.*, 160 N.L.R.B. No. 104, 63 L.R.R.M. 1151 (Sept. 27, 1966); *C & S Indus., Inc.*, 158 N.L.R.B. 454 (1966); *Crescent Bed Co.*, 157 N.L.R.B. 296 (1966); *Century Papers, Inc.*, 155 N.L.R.B. 358 (1965); *Huttig Sash & Door Co.*, 154 N.L.R.B. 1567 (1965); *American Sign Co.*, 153 N.L.R.B. 537 (1965); *Puerto Rico Tel. Co.*, 149 N.L.R.B. 950 (1964); *Smith Cabinet Mfg. Co.*, 147 N.L.R.B. 1506 (1964); *Leroy Mach. Co.*, 147 N.L.R.B. 1431 (1964); *Cloverleaf Div. of Adams Dairy Co.*, 147 N.L.R.B. 1410 (1964); *Square D Co.*, 142 N.L.R.B. 332 (1963).

The four cases in which the Board deferred are: *Vickers, Inc.*, 153 N.L.R.B. 561 (1965); *Flintkote Co.*, 149 N.L.R.B. 1561 (1964); *Bemis Bros. Bag Co.*, 143 N.L.R.B. 1311 (1963) and *Montgomery Ward & Co.*, 137 N.L.R.B. 418 (1962).

trator may be more able than the Board to construe the unique mixture of written contract and "common law of the shop" which makes up a collective agreement.<sup>98</sup> Moreover, arbitration minimizes public intervention in collective bargaining, a goal of public policy quite apart from the desires of the parties.<sup>99</sup>

The second of the Board's reasons is more persuasive. If, as in *Leroy Machine Co.*,<sup>100</sup> the respondent who asks the Board to require exhaustion of arbitral remedies has frustrated the arbitration process by refusing to process grievances, the Board must either exercise jurisdiction or require the charging party to bring a Section 301<sup>101</sup> suit to compel arbitration. The latter solution would allow a recalcitrant employer to impose unwarranted delay and expense on the petitioner. A remedy which would have the advantages of promoting private resolution of grievances and securing construction of the contract by the arbitrator, and yet not permit the respondent to delay adjudication substantially, would be for the Board to withhold decision on the merits for a specified period, perhaps 60 days, pending agreement of both parties to arbitrate the dispute.

The third of the Board's reasons, that arbitration is unnecessary because the terms of the contract are plain and unambiguous, smacks of the now discredited *Cutler-Hammer* doctrine. In *International Association of Machinists v. Cutler-Hammer, Inc.*<sup>102</sup> the Appellate Division of the New York Supreme Court held that:

. . . If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration.<sup>103</sup>

The Supreme Court has explicitly disapproved of the *Cutler-Hammer* doctrine.<sup>104</sup> Criticizing the New York decision as having had "a crippling effect on grievance arbitration," and arguing that "arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement. . .," the Court has held that:

98. Cf. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

99. Samoff, *Arbitration, Not NLRB Intervention*, 18 LAB. L.J. 602 (1967).

100. 147 N.L.R.B. 1431 (1964).

101. Section 301 of the Taft-Hartley Act, 29 U.S.C. § 185 (1964) authorizes suits for the specific enforcement of arbitration agreements. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

102. 271 App. Div. 917, 67 N.Y.S.2d 317, *aff'd*, 297 N.Y. 519, 74 N.E.2d 464 (1947).

103. 271 App. Div. at 918, 67 N.Y.S.2d at 318.

104. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).



## The NLRB and Deference to Arbitration

Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.<sup>105</sup>

The Court's argument, which was directed towards the relations between the arbitrator and the federal district courts, applies as well to the Board.<sup>106</sup> Yet the Board has invoked the *Cutler-Hammer* doctrine three times in the past two years as justification for deciding arbitrable issues on the merits in unilateral action cases.<sup>107</sup> In *Century Papers*,<sup>108</sup> the Board held, without benefit of the arbitration sought by the employer, that his action in unilaterally raising the wage rate was not authorized by the contract:

But Respondent's assertion that a dispute over contract interpretation exists does not make it so. Its contention requires, of course, that we examine the contract. Having done so, we believe that Respondent's efforts to invoke a question of contract interpretation is wholly untenable and must fall in view of the plain and unambiguous provisions of the contract.<sup>109</sup>

If in fact the Board is simply reacting to contract language which it finds clear, it would do better to follow the Supreme Court and abandon *Cutler-Hammer*. Such abandonment has some costs, of course; a few employers will attempt to delay rescission of unauthorized actions by forcing arbitration on frivolous claims of contractual authorization. But the delay such employers hope to gain will be more apparent than real if the Board adopts a firm policy of accepting arbitrators' decisions that unilateral actions without bargaining are unauthorized, and grants prompt cease and desist orders on the basis of arbitration awards. Alternatively, petitioners can gain enforcement of the awards in the courts. Once employers learn that arbitration awards in this area are accepted by Board and courts, they will stop incurring the expense of futile review, and the statutory policy of private settlement of purely contractual disputes will be achieved.

105. *Id.* at 567-68.

106. The Board is even less qualified than the courts to construe collective agreements; moreover, the importance of permitting the parties to resolve contract disputes in the bargained-for forum is no whit diminished when it is the Board and not the court that is usurping the arbitrator's function.

107. *C & S Indus., Inc.*, 158 N.L.R.B. 454 (1966); *Century Papers, Inc.*, 155 N.L.R.B. 358 (1965); *Huttig Sash & Door Co.*, 154 N.L.R.B. 1567 (1965).

108. 155 N.L.R.B. 358 (1965).

109. *Id.* at 361-62.

Closely allied to the "plain and unambiguous" doctrine is the "no waiver" doctrine which the Board has advanced in no less than seven of the 16<sup>110</sup> unilateral action cases it has decided on the merits. The "no waiver" doctrine embodies two legal principles: that Section 8(d)<sup>111</sup> confers on both the employer and the union the right to bargain collectively during the contract term; and that this statutory right can be lost only if it is voluntarily relinquished.<sup>112</sup> Waiver can be inferred from the explicit terms of a contract, from the collective bargaining history, from management prerogative clauses, and from past practices of the parties.<sup>113</sup> Of course, the objective task of determining whether a union has waived its right to bargain is no different from determining whether the employer is affirmatively authorized to take the disputed action without first bargaining with the union. The waiver question is thus identical with the question of contractual interpretation, which, as argued above, should be decided by the arbitrator.

The fifth and final Board argument, that the dispute cannot be settled through arbitration because of the presence of a statutory issue, has been advanced in nine of the 16 cases in which the NLRB has decided unilateral action cases on the merits.<sup>114</sup> Of course, if the contractual and statutory questions do not overlap, there is no reason for the Board to refrain from deciding the statutory question on the merits. But at least two cases<sup>115</sup> indicate that the determination that a dispute is non-arbitrable may be no more than a restatement of the conclusion that the contract does not authorize the disputed action. In *Adams Dairy*<sup>116</sup> the employer, during the contract term, took consumer mar-

110. *Gravenslund Operating Co.*, 168 N.L.R.B. No. 72, 66 L.R.R.M. 1323 (Nov. 27, 1967); *Adelson, Inc.*, 163 N.L.R.B. No. 53, 64 L.R.R.M. 1346 (Mar. 13, 1967); *American Fire Apparatus Co.*, 160 N.L.R.B. No. 104, 63 L.R.R.M. 1151 (Sept. 27, 1966); *Puerto Rico Tel. Co.*, 149 N.L.R.B. 950 (1964); *Smith Cabinet Mfg. Co.*, 147 N.L.R.B. 1506 (1964); *Leroy Mach. Co.*, 147 N.L.R.B. 1431 (1964); *Cloverleaf Div. of Adams Dairy Co.*, 147 N.L.R.B. 1410 (1964); *Square D Co.*, 142 N.L.R.B. 332 (1963).

111. Taft-Hartley Act § 8(d), 29 U.S.C. § 158(d) (1964).

112. *Cloverleaf Div. of Adams Dairy Co.*, 147 N.L.R.B. 1410 (1964).

113. *Compare Jacobs Mfg. Co.*, 94 N.L.R.B. 1214 (1951), *with International Shoe Co.*, 151 N.L.R.B. 693 (1965); *Ador Corp.*, 150 N.L.R.B. 1658 (1965); *Shell Chemical Co.*, 149 N.L.R.B. 298 (1964); *and Shell Oil Co.*, 149 N.L.R.B. 283 (1964).

114. *Gravenslund Operating Co.*, 168 N.L.R.B. No. 72, 66 L.R.R.M. 1323 (Nov. 27, 1967); *W.P. Ihrle & Sons*, 165 N.L.R.B. No. 2, 65 L.R.R.M. 1205 (May 31, 1967); *Scam Instrument Corp.*, 163 N.L.R.B. No. 39, 64 L.R.R.M. 1327 (Mar. 8, 1967); *American Fire Apparatus Co.*, 160 N.L.R.B. No. 104 (1966), 63 L.R.R.M. 1151 (Sept. 27, 1966); *C & S Indus., Inc.*, 158 N.L.R.B. 454 (1966); *Crescent Bed Co.*, 157 N.L.R.B. 296 (1966); *American Sign Co.*, 153 N.L.R.B. 537 (1965); *Smith Cabinet Mfg. Co.*, 147 N.L.R.B. 1506 (1964); *Cloverleaf Div. of Adams Dairy Co.*, 147 N.L.R.B. 1410 (1964).

115. *Smith Cabinet Mfg. Co.*, 147 N.L.R.B. 1506 (1964); *Cloverleaf Div. of Adams Dairy Co.*, 147 N.L.R.B. 1410 (1964).

116. 147 N.L.R.B. 1410 (1964).

keting accounts from his driver-salesmen and gave them to the independent contractors. The employer argued that past practices and the history of the collective-bargaining negotiations implicitly authorized him to subcontract at will. The Board first applied the "no-waiver" doctrine to conclude that the union did not waive its right to bargain over subcontracting (*i.e.*, the contract did not affirmatively authorize subcontracting at will), and then held that the dispute was not arbitrable because the contract subjected to arbitration only disputes over interpretation of the meaning of the contract's terms, and here there was no dispute as to the meaning of any term in the contract. In short, the Board interpreted the contract not to authorize the action, thus supplanting the arbitrator's function, then concluded that the arbitrator was not needed.

Similarly, in *Smith Cabinet Mfg. Co.*<sup>117</sup> an employer unilaterally instituted a second shift with premium pay. The employer claimed that the authorization for his action could be inferred from a combination of contract provisions. The Board dismissed his argument as follows:

The law is well settled that, although a union may waive its statutory right to be consulted about a bargainable subject, such a waiver must be clear and unmistakable and will not be readily implied. . . . Tested by the applicable criteria, it appears clear to us that the foregoing contractual [*sic*] provisions, none of which advert as such to employment conditions applicable to a second-shift operation, are insufficient by far, whether considered separately or in juxtaposition, to support an inference of waiver.<sup>118</sup>

Having concluded that the contract did not authorize the action, the Board could easily move to the further conclusion that the absence of any contractual defense (*i.e.*, "valid contractual defense") rendered arbitration unnecessary.

There may, however, actually be some unilateral action cases where the resolution of the contract dispute will not resolve the statutory question. *W. P. Ihrie & Sons*<sup>119</sup> appears to be such a case. There the question was whether the employer's cessation of checking off dues following a vote by the bargaining unit members to withdraw their checkoff authorization violated the Act regardless of whether his conduct was authorized by the contract. Here, as in the cases involving discovery, a separate statutory policy promulgated by the Board was at stake, and deference was not in order.

117. 147 N.L.R.B. 1506 (1964).

118. *Id.* at 1508 n.2 (citations deleted).

119. 165 N.L.R.B. No. 2, 65 L.R.R.M. 1205 (May 31, 1967).

Thus, of the five reasons put forward by the Board for not deferring to arbitration in unilateral action cases, only two persuasively support non-deference on their face: the frustration of arbitration by the responding party, and the existence of a separate statutory policy which renders interpretation of the collective agreement unnecessary. The other reasons collapse into one another when examined; overtly they all express a desire on the part of the Board to deal quickly with what it regards as erroneous contractual justifications for unauthorized actions. If the Board is in fact simply essaying an objective reading of the collective agreement in such cases, a greater willingness to defer to arbitration is in order. Such a policy would leave all such purely contractual questions, even the putatively easy ones, in the forum which can most expeditiously and least intrusively deal with them—the forum of arbitration.

The possibility must also be considered, however, that the Board is not simply interpreting contract language which it finds clear, but rather is subtly furthering a policy preference for an expanded duty to bargain. By this analysis, the Board has at the very least attempted to encourage employers to bargain before unilaterally implementing management decisions by gently serving notice that it will not find that management has reserved its right to act, or that the union has waived its right to bargain over the issue, unless the contract is unequivocal in that regard. This policy may be sound. But if the Board is attempting to advance such a policy by its willingness to decide unilateral-action cases on their merits under Section 8(a) (5), its purposes would be better served by a frank announcement of policy than by disingenuous readings of collective agreements.

# The NLRB and Deference to Arbitration

## APPENDIX A

TABLE I  
RECORD OF DEFERENCE BY THE NLRB TO THE ARBITRATION PROCESS, 1960-1964\*

Type of Dispute	No. of Cases in which the NLRB Deferred	No. of Cases in which the NLRB Did Not Defer	Percentage of Cases in which the NLRB Deferred
Bargaining Unit & Representation Cases	31	32	50.0%
Jurisdictional Disputes	33	224	12.0
Employer Discriminatory Practice Cases	45	140	22.2
Union Discriminatory Practice Cases	27	68	25.0
Refusal to Bargain Cases	50	1110	31.3
Total	17	56	23.3

\* Three factors have made difficult an accurate and complete classification of Board cases involving the possibility of deference to arbitration. First, the issue of deference is not always prominently discussed in NLRB opinions; frequently, the sole mention of the existence of an arbitration provision is buried deep within a footnote to the trial examiner's report. Consequently, it is possible that some cases have not turned up either through a check of the Labor Relations Reference Manual indexes, citations in relevant Board and court decisions, or discussion of these decisions in the secondary literature. Since the LRRM indexes cite only those cases in which the Board discussed the possibility of deferring to arbitration, it is likely that the statistics are weighted somewhat in favor of the Board's deference to the arbitration process. Secondly, the Board has, all too often, failed to state its reasoning with sufficient clarity to enable the commentator to determine with confidence what, if any, weight is being given to the existence, or possibility, of an arbitration award. Third, some cases involve multiple issues, raising problems as to whether, for example, they should be classified as employer or union discriminatory cases, or whether, if the Board deferred as to some points, but not as to others, they should be considered examples of deference or non-deference. The number of marginal cases, however, is sufficiently small that it is unlikely that these cases have significantly distorted the results of the survey.

1. Goodyear Tire & Rubber Co., 147 N.L.R.B. 1233 (1964); Insulation & Specialties, Inc., 114 N.L.R.B. 1540 (1963); Raley's Supermarkets, Inc., 143 N.L.R.B. 256 (1963).

2. General Motors Corp., N.L.R.B. No. 7-RC-2793, 56 L.R.R.M. 1332 (1964); Savage Arms Corp., 144 N.L.R.B. 1323 (1963); West Virginia Pulp & Paper Co., 140 N.L.R.B. 1160 (1963).

3. McCloskey & Co., 147 N.L.R.B. 1498 (1964); Matt J. Zaich Constr. Co., 144 N.L.R.B. 133 (1963). Armco Drainage & Metal Prods. Co., 137 N.L.R.B. 1753 (1962).

4. James H. Maloy, Inc., 150 N.L.R.B. 461 (1964); Belou & Co. Acoustics, 150 N.L.R.B. 21 (1964); Joseph B. Fay Co., 149 N.L.R.B. 759 (1964); Bellezza Co., 149 N.L.R.B. 599 (1964); Cafasso Lathing & Plastering, Inc., 149 N.L.R.B. 156 (1964); E. P. Rivas, Inc., 147 N.L.R.B. 191 (1964); J. O. Veteto & Son., 146 N.L.R.B. 1242 (1964); Stephen Gorman Bricklaying Co., 146 N.L.R.B. 989 (1964); Service Elec. Co., 146 N.L.R.B. 483 (1964); Edgar H. Hughes, Inc., 144 N.L.R.B. 1358 (1963); George E. Miller Elec. Co., 144 N.L.R.B. 9 (1963); News Syndicate Co., 141 N.L.R.B. 578 (1963); Schwerman Co., 139 N.L.R.B. 1426 (1962); O. R. Karst, 139 N.L.R.B. 591 (1962); Nichols Elec. Co., 137 N.L.R.B. 1425 (1962); Binswanger Glass Co., 137 N.L.R.B. 975 (1962); Pittsburgh Plate Glass Co., 137 N.L.R.B. 968 (1962); New York Times Co., 137 N.L.R.B. 665 (1962); Frank P. Badolato & Son, 135 N.L.R.B. 1392 (1962); Pulitzer Publishing Co., 129 N.L.R.B. 958 (1960); Fluoro Elec. Corp., 128 N.L.R.B. 725 (1960); E. A. Weinel, 127 N.L.R.B. 1377 (1960).

5. Modern Motor Express, Inc., 149 N.L.R.B. 1507 (1964); Dubo Mfg. Corp., 142

TABLE II

RECORD OF DEFERENCE BY THE NLRB TO THE ARBITRATION PROCESS, 1965-1967

Type of Dispute	No. of Cases in which the NLRB Deferred	No. of Cases in which the NLRB Did Not Defer	Percentage of Cases in which the NLRB Deferred
Bargaining Unit & Representation Cases	0	511	0.0%
Jurisdictional Disputes	312	1213	20.0
Employer Discriminatory Practice Cases	214	1415	12.5
Union Discriminatory Practice Cases	0	216	0.0
Refusal to Bargain Cases	117	1218	7.7
Total	6	45	11.8

N.L.R.B. 431 (1963); Denver-Chicago Trucking Co., 132 N.L.R.B. 1416 (1961); I. Oscherwitz & Sons, 130 N.L.R.B. 1078 (1961).

6. Aerodex, Inc., 149 N.L.R.B. 192 (1964); Electric Motors & Specialties, Inc., 149 N.L.R.B. 131 (1964); Thor Power Tool Co., 148 N.L.R.B. 1379 (1964); Schreiber Trucking Co., 148 N.L.R.B. 697 (1964); National Screen Prods. Co., 147 N.L.R.B. 746 (1964); Youngstown Cartage Co., 146 N.L.R.B. 305 (1964); Roadway Express, Inc., 145 N.L.R.B. 513 (1963); Precision Fittings, Inc., 141 N.L.R.B. 1034 (1963); Raytheon Co., 140 N.L.R.B. 883 (1963); Greenwood Farms, Inc., 140 N.L.R.B. 649 (1963); Gateway Transp. Co., 137 N.L.R.B. 1763 (1962); Pontiac Motors Div., Gen. Motors Corp., 132 N.L.R.B. 413 (1961); Ford Motor Co., 131 N.L.R.B. 1462 (1961); Monsanto Chem. Co., 130 N.L.R.B. 1097 (1961).

7. Frazier-Davis Constr. Co., 145 N.L.R.B. 1492 (1964); International Harvester Co., 138 N.L.R.B. 923 (1962).

8. Associated Plumbing, Heating & Piping Contractors, 149 N.L.R.B. 39 (1964); Allis-Chalmers Mfg. Co., 149 N.L.R.B. 67 (1964); Lummus Co., 142 N.L.R.B. 517 (1963); Walsh Constr. Co., 131 N.L.R.B. 260 (1961); John I. Paulding, Inc., 130 N.L.R.B. 1035 (1961); Hershey Chocolate Corp., 129 N.L.R.B. 1052 (1960).

9. Flintkote Co., 149 N.L.R.B. 1561 (1964); Sinclair Ref. Co., 145 N.L.R.B. 732 (1963); Bemis Bros. Bag Co., 143 N.L.R.B. 1311 (1963); Montgomery Ward & Co., 137 N.L.R.B. 418 (1962); Hercules Motor Corp., 136 N.L.R.B. 1648 (1962).

10. Puerto Rico Tel. Co., 149 N.L.R.B. 950 (1964); Employers' Ass'n of Bldg. Metal Fabricators, 149 N.L.R.B. 382 (1964); Smith Cabinet Mfg. Co., 147 N.L.R.B. 1506 (1964); Leroy Mach. Co., 147 N.L.R.B. 1431 (1964); Cloverleaf Div. of Adams Dairy Co., 147 N.L.R.B. 1410 (1964); Fafnir Bearing Co., 146 N.L.R.B. 1582 (1964); Curtiss-Wright Corp., 145 N.L.R.B. 152 (1963); Square D Co., 142 N.L.R.B. 332 (1963); Perkins Mach. Co., 141 N.L.R.B. 98 (1963); Timken Roller Bearing Co., 138 N.L.R.B. 15 (1962); Sinclair Ref. Co., 132 N.L.R.B. 1660 (1961).

11. Westinghouse Elec. Corp., 162 N.L.R.B. No. 81, 64 L.R.R.M. 1082 (Jan. 9, 1967); Libby, McNeill & Libby, 159 N.L.R.B. 677 (1966); Pullman Indus. Inc., 159 N.L.R.B. 580 (1966); Hotel Employers Ass'n, 159 N.L.R.B. 143 (1966); Humble Oil & Ref. Co., 153 N.L.R.B. 1361 (1965).

12. Sundemeyer Painting Co., 155 N.L.R.B. 968 (1965); Don Cartage Co., 154 N.L.R.B. 513 (1965); Ebasco Servs., Inc., 153 N.L.R.B. 873 (1965).

13. Southwestern Constr. Co., 167 N.L.R.B. No. 23, 66 L.R.R.M. 1012 (Aug. 22, 1967); W. L. Richeson & Sons, 166 N.L.R.B. No. 115, 65 L.R.R.M. 1722 (Aug. 1, 1967); Williams Press, Inc., 166 N.L.R.B. No. 71, 65 L.R.R.M. 1528 (June 30, 1967); Egan-McKay Elec. Contractors, Inc., 164 N.L.R.B. No. 94, 65 L.R.R.M. 1143 (May 16, 1967); Don Cartage Co., 160 N.L.R.B. No. 89, 63 L.R.R.M. 1085 (Sept. 13, 1966); Reynolds Elec. & Eng. Co., 157 N.L.R.B. 1621 (1966); Layne-Western Co., 155 N.L.R.B. 695 (1965); D'Annunzio Bros., 152 N.L.R.B. 707 (1965); Decora, Inc., 152 N.L.R.B. 278 (1965); Prestress Erectors, Inc., 152 N.L.R.B. 269 (1965); Lusterlite Corp., 151 N.L.R.B. 195 (1965); Bel-Toe Foundation Co., 150 N.L.R.B. 991 (1965).

14. Howard Elec. Co., 166 N.L.R.B. No. 62 65 L.R.R.M. 1577 (June 30, 1967); Schott's Bakery Inc., 164 N.L.R.B. No. 59, 65 L.R.R.M. 1180 (May 4, 1967).
15. Bird Trucking & Cartage Co., 167 N.L.R.B. No. 82, 66 L.R.R.M. 1179 (Sept. 28, 1967); Hribar Trucking, Inc., 166 N.L.R.B. No. 85, 65 L.R.R.M. 1155 (June 23, 1967); Illinois Ruan Transp. Corp., 165 N.L.R.B. No. 34, 65 L.R.R.M. 1296 (June 8, 1967); Star Expansion Indus. Corp., 164 N.L.R.B. No. 95, 65 L.R.R.M. 1127 (May 12, 1967); Rotax Metals, Inc., 163 N.L.R.B. No. 21, 64 L.R.R.M. 1319 (Feb. 21, 1967); F. J. Buckner Corp., 163 N.L.R.B. No. 7, 64 L.R.R.M. 1273 (Feb. 23, 1967); D C Int'l, Inc., 162 N.L.R.B. No. 129, 64 L.R.R.M. 1177 (Feb. 1, 1967); Flasco Mfg. Co., 162 N.L.R.B. No. 56, 64 L.R.R.M. 1077 (Jan. 5, 1967); Takin Bros. Freight Line, 160 N.L.R.B. No. 13, 62 L.R.R.M. 1613 (July 8, 1966); Tex-Tan Welhausen Co., 159 N.L.R.B. 1605 (1966); Auburn Rubber Co., 156 N.L.R.B. 301 (1965); Virginia-Carolina Freight Lines, 155 N.L.R.B. 447 (1965); Huttig Sash & Door Co., 155 N.L.R.B. 1567 (1965); Aetna Bearing Co., 152 N.L.R.B. 845 (1965); Mitchell Transp. Inc., 152 N.L.R.B. 122 (1965).
16. Golden State Runway & Eng. Co., 162 N.L.R.B. No. 92, 64 L.R.R.M. 1138 (Jan. 16, 1967); Woodlawn Farm Dairy Co., 162 N.L.R.B. No. 1, 63 L.R.R.M. 1495 (Dec. 13, 1966).
17. Vickers, Inc., 153 N.L.R.B. 561 (1965).
18. Gravenslund Operating Co., 168 N.L.R.B. No. 72, 66 L.R.R.M. 1323 (May 31, 1967); W. P. Ihrie & Sons, 165 N.L.R.B. No. 2, 65 L.R.R.M. 1205 (Nov. 27, 1967); Adelson, Inc., 163 N.L.R.B. No. 53, 64 L.R.R.M. 1346 (Mar. 13, 1967); Scam Instrument Corp., 163 N.L.R.B. No. 39, 64 L.R.R.M. 1327 (Mar. 8, 1967); Central Rufina, 161 N.L.R.B. No. 59, 63 L.R.R.M. 1318 (Nov. 1, 1966); American Fire Apparatus Co., 160 N.L.R.B. No. 104, 63 L.R.R.M. 1151 (Sept. 27, 1966); C & S Indus., Inc., 158 N.L.R.B. 454; Crescent Bed Co., 157 N.L.R.B. 296 (1966); Century Papers, Inc., 155 N.L.R.B. 358 (1965); Huttig Sash & Door Co., 154 N.L.R.B. 1567 (1965); American Sign Co., 153 N.L.R.B. 537 (1965); Acme Indus. Co., 150 N.L.R.B. 1463 (1965).

## APPENDIX B

### *Record of Deference by the NLRB to the Joint Board*

- I. NLRB held that all parties were subject to the jurisdiction of the Joint Board and must use its processes to settle their dispute: Sundermeyer Painting Co., 155 N.L.R.B. 968 (1965); Matt J. Zaich Const. Co., 144 N.L.R.B. 133 (1963); Armco Drainage & Metal Prod. Co., 137 N.L.R.B. 1753 (1962).
- II. NLRB deferred to an award issued by the Joint Board: Ebasco Servs., Inc., 153 N.L.R.B. 873 (1965); McCloskey & Co., 147 N.L.R.B. 1498 (1964).
- III. NLRB held that although parties were not subject to the jurisdiction of the Joint Board it would nevertheless refrain from deciding the case until it could see whether the parties would voluntarily submit to the Joint Board's jurisdiction: Don Cartage Co., 154 N.L.R.B. 513 (1965).
- IV. NLRB found that the Joint Board had jurisdiction over all the parties but nevertheless refused to defer to its decision because it determined that the Joint Board had failed to decide the issue before the NLRB: Binswanger Glass Co., 137 N.L.R.B. 975 (1962); Pittsburgh Plate Glass Co., 137 N.L.R.B. 968 (1962).
- V. NLRB refused to require the parties to invoke the Joint Board's processes, finding that all parties had not agreed to submit to the Joint Board's jurisdiction: Layne-Western Co., 155 N.L.R.B. 695 (1965); Prestress Erectors, Inc., 152 N.L.R.B. 269 (1965); Belou & Co. Acoustics, Inc., 150 N.L.R.B. 21 (1964); Frank P. Badolato & Son, 135 N.L.R.B. 1392 (1962).
- VI. NLRB refused to honor a Joint Board award because one or more of the disputants had not agreed to be bound by its decisions: Southwestern Constr. Co., 167 N.L.R.B. No. 23, 66 L.R.R.M. 1012 (Aug. 22, 1967); Egan-McKay Elec. Contractors, Inc., 164 N.L.R.B. No. 94, 65 L.R.R.M. 1143 (May 16, 1967); D'Annunzio Bros., 152 N.L.R.B. 707 (1965); Lusterlite Corp., 151 N.L.R.B. 195 (1965); Bel-Toe Foundation Co., 150 N.L.R.B. 991 (1965); James H. Maloy, Inc., 150 N.L.R.B. 461 (1964); Joseph B. Fay, Co., 149 N.L.R.B. 759 (1964); Bellezza Co., 149 N.L.R.B. 599 (1964); Cafasso Lathing & Plastering, Inc., 149 N.L.R.B. 156 (1964); J. O. Veteto & Son, 146 N.L.R.B. 1242 (1964); Stephen Gorman Bricklaying Co., 146 N.L.R.B. 989 (1964); Service Elec. Co., 146 N.L.R.B. 483 (1964); Edgar H. Hughes Co., 144 N.L.R.B. 1358 (1963); George E. Miller Elec. Co., 144 N.L.R.B. 9 (1963); O. R. Karst, 139 N.L.R.B. 591 (1962); Nichols Elec. Co., 137 N.L.R.B. 1425 (1962); Fluoro Elec. Co., 128 N.L.R.B. 725 (1960).

VII. NLRB found that the Joint Board lacked jurisdiction over the rival unions: Egan-McKay Elec. Contractors, Inc., 164 N.L.R.B. No. 94, 65 L.R.R.M. 1143 (May 16, 1967); Bel-Toe Foundation Co., 150 N.L.R.B. 991 (1965); Service Elec. Co., 146 N.L.R.B. 483 (1964); George E. Miller Elec. Co., 144 N.L.R.B. 9 (1963); Nichols Elec. Co., 137 N.L.R.B. 1425 (1962).

VIII. NLRB, in cases where the employer refused to submit to the Joint Board's jurisdiction, upheld the employer's decision as to which union should get the work: Southwestern Constr. Co., 167 N.L.R.B. No. 23, 66 L.R.R.M. 1012 (Aug. 22, 1967); Laync-Western Co., 155 N.L.R.B. 695 (1965); D'Annunzio Bros., 152 N.L.R.B. 707 (1965); Prestress Erectors, Inc., 152 N.L.R.B. 269 (1965); Lusterlite Corp., 151 N.L.R.B. 195 (1965); Bel-Toe Foundation Co., 150 N.L.R.B. 991 (1965); James H. Maloy, Inc., 150 N.L.R.B. 461 (1964); Belou & Co. Acoustics, 150 N.L.R.B. 21 (1964); Joseph B. Fay Co., 149 N.L.R.B. 759 (1964); Bellezza Co., 149 N.L.R.B. 599 (1964); Cafasso Lathing & Plastering, Inc., 149 N.L.R.B. 156 (1964); J. O. Veteto & Son, 146 N.L.R.B. 1242 (1964); Stephen Gorman Bricklaying Co., 146 N.L.R.B. 989 (1964); Service Elec. Co., 146 N.L.R.B. 483 (1964); Edgar H. Hughes Co., 144 N.L.R.B. 1358 (1963); George E. Miller Elec. Co., 144 N.L.R.B. 9 (1963); O. R. Karst, 139 N.L.R.B. 591 (1962); Nichols Elec. Co., 137 N.L.R.B. 1425 (1962); Frank P. Badolato & Son, 135 N.L.R.B. 1392 (1962); Fluoro Elec. Corp., 128 N.L.R.B. 725 (1960).

IX. NLRB in cases where the employer refused to submit to the Joint Board's jurisdiction, failed to uphold the employer's decision as to which union should get the work: Egan-McKay Elec. Contractors, Inc., 164 N.L.R.B. No. 94, 65 L.R.R.M. 1143 (May 16, 1967).

X. NLRB, in cases where the Joint Board rendered a decision despite the employer's refusal to submit to its jurisdiction, found that the Joint Board had awarded the work to the right union: Egan-McKay Elec. Contractors, Inc., 164 N.L.R.B. No. 94, 65 L.R.R.M. 1143 (May 16, 1967); Lusterlite Corp., 151 N.L.R.B. 195 (1965).

XI. NLRB, in cases where the Joint Board rendered a decision despite the employer's refusal to submit to its jurisdiction, found that the Joint Board had awarded the work to the wrong union (*i.e.*, a union other than the one preferred by the employer): Southwestern Constr. Co., 167 N.L.R.B. No. 23, 66 L.R.R.M. 1012 (Aug. 22, 1967); D'Annunzio Bros., 152 N.L.R.B. 707 (1965); Bel-Toe Foundation Co., 150 N.L.R.B. 991 (1965); James H. Maloy, Inc., 150 N.L.R.B. 461 (1964); Joseph B. Fay Co., 149 N.L.R.B. 759 (1964); Bellezza Co., 149 N.L.R.B. 599 (1964); Cafasso Lathing & Plastering, Inc., 149 N.L.R.B. 156 (1964); J. O. Veteto & Son, 146 N.L.R.B. 1242 (1964); Stephen Gorman Bricklaying Co., 146 N.L.R.B. 989 (1964); Service Elec. Co., 146 N.L.R.B. 483 (1964); Edgar H. Hughes Co., 144 N.L.R.B. 1358 (1963); George E. Miller Elec. Co., 144 N.L.R.B. 9 (1963); O. R. Karst, 139 N.L.R.B. 591 (1962); Nichols Elec. Co., 137 N.L.R.B. 1425 (1962); Fluoro Elec. Corp., 128 N.L.R.B. 725 (1960).