CHAPTER 7

ARBITRATION AND/OR THE N.L.R.B.

THE HON. FRANK W. MCCULLOCH *

It is a great pleasure to be with you today. To hob-nob with the distinguished members of this select professional society and to listen in on your discussions has been a real privilege, and I am sure we are all looking forward to Secretary Wirtz's comments this evening. Prior to this good fortune, however, your President requested that I address myself this noon to the question of the N.L.R.B.'s policy in respect to cases which allegedly involve both an arbitrable grievance under a collective bargaining agreement and an unfair labor practice under the National Labor Relations Act.

The Board is keenly aware of the vital role of arbitration in the collective bargaining process. This has been a slow development, over more than a century, sometimes hastened by state or federal legislation (like the Railway Labor Act), or by war emergencies, but basically growing out of the needs of the parties and the practical and successful experiences with arbitration after the turn of the century in the printing, street railway, electrical and clothing industries.

I like to recall that the Congregational-Christian churches with which I then worked, when seeking to symbolize and institutionalize their concern for improved industrial relations in 1940, chose for their project the name of a great labor arbitrator, James Mullenbach. His pioneering work was done as impartial chairman for almost 25 years with the adjustment committee set up by Hart, Schaffner & Marx and the Amalgamated Clothing Workers. Later his great skills were drawn upon by the government under several of the "codes" in the depth of the depression. And

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recently the outstanding record of that company and that union were recognized by their inclusion in the Department of Labor's new Hall of Honor.

I often wish I could bring to bear upon our Board decisions the wisdom and practical experience that James Mullenbach and many of you have acquired through your close contact with the day-to-day problems of factory, construction site or office.

Grievance Arbitration

Even if we did not have the reminder of recent, continuing and threatened strikes affecting substantial segments of our economy, the importance of the dispute settlement role of arbitration under collective bargaining contracts would be hard to exaggerate.

And its adaptation, in various forms, to other kinds of labor controversies is to be noted in the National Joint Board for the Settlement of Disputes in the Construction Industry, the 1958 Miami Agreement of the AFL-CIO unions, and the Missile Sites Commission.

Finally, the dramatic reinforcement by judicial sanction of promises to arbitrate in *Lincoln Mills* [1] and the trilogy of Steelworkers cases [2] has given even further impetus to the use of arbitration. As the Supreme Court said in *Warrior and Gulf*:

> The grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties.[3]

It is not surprising therefore that the vast majority of all collective bargaining contracts have a grievance procedure which culminates in arbitration. Indeed, on the basis of a recent sampling survey, BNA reports that 94% of the contracts studied have such clauses. After the recent reaffirmation by the Supreme Court

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1 *Textile Workers Union of America* v. *Lincoln Mills of Ala.*, 353 U.S. 448, 40 LRRM 2113.

2 *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416; *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423.

3 363 U.S. 574, 581, 46 LRRM 2416.

in *Reliance* of the broad sweep of the Labor Board's jurisdiction, it is obvious that most of the companies having such collective bargaining contracts are engaged in interstate commerce and subject to the jurisdiction of the National Labor Relations Board.

Aribitration and the National Labor Relations Board

Statistics are not available to indicate the number of times that a party resorts to arbitration in preference to filing a charge with the Board. But to minimize delay, if for no other reason, I am sure that this is true in the majority of situations. In addition, it appears that the General Counsel generally will not issue a complaint where in his judgment the Board's *Spielberg* [4] standards, which I will discuss later, have been met. It is, therefore, the unusual cases that we at the Board see, the ones where there is a colorable reason for dissatisfaction with the contractual remedy the parties usually choose.

Before discussing the problems that have arisen from the choice of possible forums open to the parties to a collective bargaining agreement which contains an arbitration clause, we should of course note the basic difference in aims and charter between an arbitrator and the Board. The uses of the arbitral process which I have just referred to have been for the direct benefit of private parties. As Harry Shulman so well stated shortly before his death:

> A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement. They are entitled to demand that, at least on balance, his performance be satisfactory to them, and they can readily dispense with him if it is not.[5]

The National Labor Relations Board on the other hand is a quasi-judicial body established by a statute which has as its announced purpose and policy:

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[4] *Spielberg Manufacturing Company,* 112 NLRB 1080, 36 LRRM 1152.

[5] Harry Shulman: "Reason, Contract, and Law in Labor Relations," 68 *Harvard Law Review* 999, 1016.

> . . . to protect the rights of the public in connection with labor disputes affecting commerce.[6]

The law which is our charter proceeds to spell out those rights and responsibilities of employees, employers and labor organizations which Congress considered of public importance, and it specifies our procedures for enforcing them. While a great deal of our work thus deals with furnishing the foundation or framework for bargaining, there are still public rights to be protected under the law after the parties have hammered out contracts for the governance of their relations.

At the same time Congress in various provisions made clear the express public policy in favor of voluntary adjustment of disputes (see Sec. 201 (a) and (b)), and concerning grievances the statute goes on to state that:

> 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.[7]

With this clear statutory guidance, the Board is commissioned to foster the use of voluntary settlement procedures, including arbitration, wherever possible; however, it must at all times also attempt to protect by its own processes the rights of all employees which are guaranteed by Sections 7 and 8 of the Act.

Concurrent Jurisdiction of the Board and the Courts

Despite the statute's express encouragement of voluntary settlement methods and the provision in Section 301 of a judicial remedy for breaches of a collective bargaining agreement, it was strongly urged by some that the pre-emption doctrine should apply to give the Board exclusive jurisdiction whenever unfair labor practices were involved.

It is clear from the very recent Supreme Court decision in *Smith* v. *Evening News Assn.*,[8] however, as was generally anticipated that in addition to any remedy that may be available under the National Labor Relations Act, there is a contract remedy for viola-

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[6] Section 1 (b) Labor-Management Relations Act.
[7] Section 203 (d) LMRA.
[8] 371 U.S. 195, 51 LRRM 2646.

tion of the terms of a collective bargaining agreement even though the violation may also constitute an unfair labor practice prohibited by statute. In the *Smith* case an employee brought suit, in the absence of a grievance and arbitration procedure, to enforce a collective bargaining contract provision that there would be "no discrimination against any employee because of his membership or activity in the [union]." The Supreme Court clearly and unequivocally stated:

> In *Lucas Flour* as well as in *Atkinson* the Court refused to apply the pre-emption doctrine of the *Garmon* case; and we likewise reject that doctrine here where the alleged conduct of the employer, not only arguably, but concededly, is an unfair labor practice within the jurisdiction of the National Labor Relations Board. The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by Section 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under Section 301.[9]

Finding concurrent jurisdiction in the courts and the Board to remedy what at one time may be both a contractual and a statutory violation, the Court went on to bury the ghost of *Westinghouse* [9a] and find that Section 301 could be utilized to vindicate purely personal rights. Had the suit been to enforce an agreement to arbitrate or to compel enforcement of an arbitrator's award rather than to obtain damages under the contract, it appears most probable that the Supreme Court would have arrived at the same result.

Despite the possibility of conflicting determinations by the two tribunals, the Court and the Board, the contract—including an arbitration remedy for a breach which may also constitute an unfair labor practice—is thus clearly sustained. Congress has decreed concurrent remedies. As the Court said in *Dowd Box Co.* v. *Courtney*,[10] it "is implicit in the choice Congress made that 'diversities and conflicts' may occur."

This danger of conflict may be mitigated by the requirement that the courts under Section 301 shall apply principles of federal law, which includes the LMRA. And short of appropriate self-restraint by the Board or a court in the event of an actual or

[9] *Id.* at p. 197.
[9a] 348 U.S. 437, 35 LRRM 2643 (1955).
[10] 368 U.S. 502, 514, 49 LRRM 2619.

irreconcilable conflict between the court and Board remedies, legal precedents suggest that the Supreme Court would give precedence to the Board remedy. There are fascinating and troublesome questions one's legal imagination can raise. But as the Court said in *Smith,* ". . . we shall face those cases when they arise."

Arbitration and Unfair Practices

This poses the basic problem facing the Board in regard to all situations where a collective bargaining agreement providing for arbitration contains substantive provisions the breach of which may also be a violation of the National Labor Relations Act. If one of the parties chooses to file a charge under the National Labor Relations Act rather than to use the contractually agreed upon method to resolve differences, or if a party files a charge to relitigate a matter already decided by an arbitrator, how hospitable should the Board be? The responsibility the Board cannot delegate is an essential consideration: that is, in honoring private claims always to guard the interests that are the subject of the Act.

The use of arbitration in situations where the conduct involved may also constitute an unfair labor practice presents a multiplicity of problems. If the Board has not worked out a comprehensive set of principles to guide it and the parties through this potential maze, we are at least consoled by your President's observation a year ago that "in cases of the type under discussion the interrelationships between arbitrators, the courts and the NLRB are somewhat amorphous and not susceptible to precise delineation." But I hope the following review of the decisions the Board has handed down may identify the problems more precisely, give a clearer idea of our direction and stimulate the fraternity of arbitrators to join us in efforts to make our concurrent jurisdictions function effectively together.

For purposes of summary analysis, the potential conflict between arbitration and Board decisions may be examined in three general areas in which cases have arisen: the individual discharge; the refusal to supply information for purposes of collective bargaining; and disputes between competing groups of employees as to the assignment of work.

A. Discharged Employees

Let us begin by considering cases involving the employee discharge situation. It has long been recognized that the Board is not statutorily bound by an arbitration award. Section 10 (a) of the Act specifically provides that the Board's power to prevent unfair labor practices affecting commerce "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise . . ."

The Board has seen fit, however, at least since 1955, to limit its action in certain types of cases where a prior arbitration award exists. In *Spielberg Manufacturing Company* [11] the Board set forth certain basic criteria it would follow in examining cases where arbitration to test the validity of an employee's discharge had occurred prior to the Board's decision. These criteria are that "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." [12] Such criteria, by their very nature, indicate that the Board was not concerned only with deprivations of individual employees' rights, that is, possible Section 8 (a) (3) or 8 (b) (2) violations. They indicate that the Board is also concerned with the deprivation of public rights.

The Board has never clearly explicated the test of repugnancy under *Spielberg*. There are three types of cases involving this test which have come before the Board. In one the contract provision as construed and applied by arbitrators is in direct conflict with the National Labor Relations Act because it converts a protected concerted activity into a breach of contract. Representative of this type of case is *Ford Motor Company*.[13] There certain employees were found by an arbitrator to have been guilty of causing, among other things, a work stoppage in violation of a collective-bargaining agreement. He upheld their discharge. In so doing the arbitrator did not pass upon whether the work stoppage, staged to protest an unfair labor practice by the employer, was a protected activity under the National Labor Relations Act. The Board

[11] 112 NLRB 1080, 36 LRRM 1152.
[12] *Id.* at p. 1082.
[13] 131 NLRB 1462, 48 LRRM 1280.

refused to honor the arbitration award since the award upheld discharges based upon acts which were protected activities under the NLRA.

In the second type of case, where the contract clause parallels the statute, the Board has taken a different approach. In *International Harvester Company* [14] the arbitrator found that the company had violated a valid union-security clause by refusing to discharge an employee for nonpayment of dues. A majority of the Board found that in interpreting a contract clause, sanctioned by the statute, the arbitrator had not been "palpably wrong." The decision noted that "to require more of the Board would mean substituting the Board's judgment for that of the arbitrator, thereby defeating the purposes of the Act and the common goal of national labor policy of encouraging the final adjustment of disputes, 'as part and parcel of the collective bargaining process.' "

As a sidelight, you may be interested in a recent comment of Member Brown, after discussing this case, that "my own preference is to accord the greatest weight to the grievance process terminating in binding arbitration, and I am therefore disposed to accept the arbitrator's award even where I might have reached a result different from his own."

The third type of case is the so-called "pretext" case where an employee may have been discharged *either* for a violation of a contract clause completely divorced from any restriction on protected activities, *or* to penalize the employee for his union or nonunion activities, but with the assigned reason being based upon the contract clause. In such a case, the discharge may have been for a lawful or unlawful reason. For example in *Oscherwitz and Sons* [15] and *Denver-Chicago Trucking Company,*[16] employees were discharged for cursing an employer and submitting allegedly false claims, respectively. An arbitrator in the first case and a grievance procedure in the second upheld the discharge. There was no indication that the pretext contention had not been considered by the arbitrator and the adjustment committee and rejected. In these cases the Board, applying the *Spielberg* standards, honored the arbitration award and dismissed Section 8 (a) (3) charges. On

14 138 NLRB No. 88, 51 LRRM 1155.
15 130 NLRB 1078, 47 LRRM 1415.
16 132 NLRB 1416, 48 LRRM 1524.

the other hand, in *Monsanto Chemical,*[17] decided the same day as *Oscherwitz,* the Board specifically refused to honor the arbitration award because the pretext issue had been presented to the arbitrator, and he had refused to pass on it.

The Board refuses to honor awards when it is not satisfied with the fairness and regularity of the arbitration proceeding. An example is the *Honolulu Star Bulletin, Ltd.,*[18] where the discharged employee was not permitted to be accompanied by his counsel at the hearing.

Recently, in *Gateway Transportation Company,*[19] a Trial Examiner found that a driver for the company had been discharged because of certain activity of a protected character rather than for filing two allegedly false expense vouchers. The Trial Examiner rejected an award in favor of the company since the driver had been discharged for protected activity, the arbitrator had considered the activity only in relation to a possible contractual violation, and the award was repugnant to the Act. The Board agreed with the conclusion of the Trial Examiner that the arbitration award should not be followed, but for different reasons. It held that the arbitration proceeding did not meet *Spielberg's* "due process" standards, since the employee had received notice of his arbitration hearing only two days in advance of the hearing which was to be held four days after the actual discharge. The Board also noted that the arbitration was held despite the employee's protest that he had not had time to prepare his case and the union attorney declined to present the employee's case because the employee "never came up to the local union to protest his discharge." (In the *International Harvester Company* case, *supra,* note 12, the absence of the dischargee was not considered a fatal defect since his interests were so stoutly advanced by the company in the arbitration hearing.)

The last case in this area I would like to mention is one the Board has just decided: *Raytheon Company.*[20] It depicts some of the difficulties inherent in the individual discharge case. Two employees of Raytheon were discharged for the asserted reason

[17] 130 NLRB 1097, 47 LRRM 1451.
[18] 123 NLRB 395, 43 LRRM 1449.
[19] 137 NLRB No. 186, 50 LRRM 1495.
[20] 140 NLRB No. 84, 52 LRRM 1129.

that they had incited and encouraged other employees to engage in work stoppages violative of the collective-bargaining agreement. When the case came before the arbitrator, the company's attorney stated that the jurisdiction of the arbitrator was limited to a determination of whether the contract had been violated, and the arbitrator found that it had. A majority of the Board found, however, that the alleged reason for the discharge was a pretext and stated that "Here, as in *Monsanto Chemical,* the record is clear that the arbitrator did not even purport to consider the unfair labor practice issue which the Board is called upon to decide . . ." And here also as in *Monsanto,* the assigned cause for discharge was an obvious pretext to mask the true reason for the discharges—union or concerted activities. Members Leedom and Brown dissented on the ground that the Board was not being properly receptive to the contracting parties' desire to settle their own problems. They were of the opinion that the arbitrator, whatever the limits of the submission, had thoroughly canvassed the circumstances of a possible pretext issue.

In summary, may I say that I, at least, see a clear distinction between the *Raytheon* situation where an arbitrator was apparently limited to deciding possible contract violations without regard to a lurking pretext issue, and the *International Harvester* situation where the arbitrator and the Board both have the same facts and issues presented to them. In both cases the Board is attempting to apply *Spielberg* standards.

There are no pat answers to these problems. Where an employee's discharge is upheld by a kangaroo court on the one hand, or where the discharge clearly has nothing to do with protected concerted activities, on the other, the answer is easy. But these are not the troublesome cases. As to the troublesome cases, the *Spielberg* criteria are one attempt to indicate when the Board will, and when it will not, go behind an arbitrator's award. From your standpoint, as from ours, it may be regrettable that the tests set up in *Spielberg* are not more definite and certain. However, the Board with perhaps a little prompting from the Supreme Court, is acutely conscious of the dangers lurking in a *per se* approach to the law of labor relations, and I hope you will understand our reluctance in the face of the wide variety of arbitration clauses,

adjustment machinery and fact situations, to try to lay down definite rules which may be followed in all cases.

B. Refusals to Furnish Information

A second point at which there is possible friction between arbitration and the National Labor Relations Act is where one of the parties is requested to furnish bargaining information to the other. Usually the union requests information in order to process a grievance, and the employer says the union has no right to the information. Where the employer insists that it is *not* required by the contract, may the union come directly to the Board, or should arbitration be the sole method for resolving the question?

The recent decision of the Fifth Circuit in *Sinclair Refining Company* v. *N.L.R.B.*[21] clearly raises this problem. In *Sinclair,* the union took up the question of the demotion of two employees. The reason assigned for the demotions was lack of work. The union requested certain information in order to evaluate the grievance. The employer refused to furnish the information, stating that the collective bargaining agreement gave it the sole prerogative of relieving "employees from duties because of lack of work," and so such demotions were not subject to the contractual grievance procedure. Sinclair further contended that its obligation was at an end when it offered to arbitrate the matter. The Board found that Sinclair's construction of its collective-bargaining agreement equated "lack of work" with "*alleged* lack of work" and that such reasoning provided a facile device for bypassing the grievance procedure altogether. Finding that such was not the intent of the parties, the Board ordered Sinclair to supply the requested information.

The Fifth Circuit reversed the Board on the narrow ground that "the Board proceeding may not be used to secure data for use in a grievance where determination of relevance and pertinency requires determination of the initial substantive issue of the grievance itself." In other words, the Court thought the Board was wrong in interpreting a clause which it thought should be interpreted only by the arbitrator. In addition, in dictum the

[21] 306 F.2d 569, 50 LRRM 2830 (5th Cir., 1962).

Court went to great lengths to point out that it believed that the Board should defer to arbitration just as the courts do under Section 301 of the Act.

But, with deference, the courts under Section 301 have the responsibility of resolving questions of arbitrability, as distinct from the merits of the dispute. So too, the Board in determining whether there is a duty to submit information may, as it thought it had in *Sinclair Refining,* encounter questions of arbitrability.

With all due respect, I believe that the Court misconceived the problem. It is one thing to say that whether there is a contractual right to certain information should be settled in the first instance by the contractual device of arbitration, but something else to say that where a party has both a statutory and contractual right to information, that the statutory right must always give way.

There may also be public rights to be protected. Judge Rives, in his dissent in *Sinclair,* clearly indicated this to be his view when he stated at the outset of his opinion:

> Whether or not the Union was entitled to grieve over the Company's determination of a "lack of work," it is nonetheless true that both under the Act and under the express terms of the contract the Union had a right to show, if it could, that the demotions of the two pipefitter helpers were in fact motivated by other considerations, and that such action was being taken to discriminate against them as members of the Union.[22]

Judge Rives did not cite his opinion on this same problem in *Lodge 12 IAM* v. *Cameron Iron Works,* [23] but well he might have. That case involved a suit under Section 301 to compel arbitration of a grievance regarding a discharge. The company raised the argument of pre-emption by the Board. After citing Section 10 (a) of the Act, Judge Rives stated:

> Will the submission of a contract violation, which is also an unfair labor practice, to arbitration "affect" this power of the Board? Certainly not. Since the Board's power is plenary in all respects, "neither the existence of an agreement to arbitrate nor a rendered award can preclude the Board from exercising its statutory jurisdiction." . . . Even though the Board is not bound by an arbitration award, it may find that compliance with the

[22] *Id.* at page 579.
[23] 257 F.2d 467, 42 LRRM 2431 (5th Cir., 1958).

> award is not violative of the Act, or it may even, in the exercise of its discretionary power, decline action because an award has been made or arbitration is possible.[24]

The Board has dealt with the refusal to supply information in two cases subsequent to its decision in *Sinclair*. In one, *Hercules Motor Corp.*,[25] cited by the Court in *Sinclair*, the Board (Member Fanning dissenting) found that it would not effectuate the policies of the Act for the Board to intervene where the parties had failed to use the contractual remedy available to them. In the other case, *Timken Roller Bearing Co.*,[26] the Board found a refusal to bargain because of a failure to furnish information and ordered its production. The *Timken* case is presently on appeal in the Sixth Circuit.

In this area, as in the individual discharge cases, it is almost impossible for the Board to lay down rules which will allow advance determination as to how it will exercise its discretion. A rule that the Board will never allow a party to come to the Board rather than rely on a contractual remedy would not appear consonant with Congressional intent, but then neither would a rule that the Board will always intervene. However, we at the Board recognize that the statute requires us to use discretion. *Smith* v. *Evening News Assn.* reaffirms that the Board is not pre-empted from finding an unfair labor practice merely by the authority given to the courts in Section 301 to deal with breaches of a collective-bargaining agreement. But the court likewise noted that the Board has on prior occasions declined to exercise its jurisdiction over unfair labor practices where in its judgment federal labor policy would best be served by leaving the parties to other processes of the law (citing *Spielberg* and *Consolidated Aircraft Corp.*[27]). Another example of the Board's application of this principle is to be seen in our decision in *Montgomery Ward and Co.*[28] last May where one of the reasons for dismissing the complaint was to give "full play" to the grievance procedure established by the parties, which included binding arbitration.

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[24] *Id.* at p 473 (footnotes omitted).
[25] 136 NLRB No. 145, 50 LRRM 1021.
[26] 138 NLRB No. 1, 50 LRRM 1508.
[27] 47 NLRB 604, 12 LRRM 44.
[28] 137 NLRB No. 41, 50 LRRM 1162.

In concluding this discussion of our treatment of refusals to supply information, I should merely note that if relevant information is requested to police or administer a contract without regard to the prosecution of a specific grievance under the contract, the Board of course has ordered such information to be furnished.

C. *Jurisdictional Work Disputes*

The third area which I would like to discuss with you is one involving the conflicting claims of two unions that their members are entitled to perform certain work. The best way to introduce the subject is by discussing the case of *Local 1505 IBEW* v. *Local 1836 IAM,* in which certiorari was granted on November 19, 1962, by the Supreme Court. (It appears likely, however, that the case may be mooted since the parties are attempting to settle the matter themselves.) In that case Local 1505 of the Electricians was the certified representative of all production and maintenance employees of Raytheon Manufacturing Company. Local 1836 of the Machinists was the certified representative of certain types of machinists, tool makers and tool grinders. The Machinists filed a grievance claiming that Raytheon had assigned certain work encompassed within its collective-bargaining agreement with the Machinists to employees outside that bargaining unit when members of the unit were ready, willing and able to perform the work. After various negotiations, the Machinists requested arbitration of the dispute which was refused by Raytheon. Thereafter suit was filed under Section 301. The IBEW, as representative of the employees who were assigned the work, intervened in the suit.

The District Court [29] found that: (1) the NLRB does not have exclusive jurisdiction over controversies between labor organizations relating to work assignments; (2) the grievance filed by the IAM is an arbitrable one; and (3) since the agreement between the Machinists and Raytheon did not contemplate the intervention of a third party in any arbitration that might be had under their collective bargaining agreement, a district court could not while fashioning new remedies under *Lincoln Mills* thereby create new rights in *third* parties who are strangers to the agreement.

[29] 49 LRRM 2552.

The Court of Appeals for the First Circuit reversed,[30] finding that the dispute involved the scope of a Board certification, a matter exclusively within the jurisdiction of the Board, since an award by an arbitrator, if erroneous, would invade the IBEW certification. Referring to Section 10 (k) of the Act, the Court also noted that "jurisdictional disputes between unions are precisely the Board's province." It therefore dismissed the complaint. The Court of Appeals made one other point worthy of note here. Commenting on the possibility of arbitration with both the Machinists and Electricians and noting the Electricians' interest in the matter, it stated:

> We consider first the IBEW's claim. Concededly, even if it has an agreement to arbitrate, it is not an agreement to arbitrate with IAM. During oral argument we asked IAM how, nevertheless, it could be injured by tripartite arbitration. Counsel admitted he could think of no harm, but insisted that arbitration is purely a matter of contract and that it has a contractual right to arbitrate with Raytheon alone. In view of the factual situation this obviously would not make arbitration a true instrument for industrial peace.[31]

The above quotation from the Court's opinion clearly poses the dilemma of the Board when faced with an arbitration award in a jurisdictional dispute situation. Arbitration, as both courts noted, is a contractual means of solving a dispute between groups which have a contractual relationship. It is a voluntary, private system in which a noncontracting party has neither rights nor remedies. How then can arbitration in a jurisdictional dispute situation protect the rights of all parties in interest?

Yet the rights of the contracting parties to a court remedy under Section 301 are fairly clear, and we may hope if pre-emption is once more denied, that the court or the arbitrator may be sufficiently inventive to discover a form of remedy that may take appropriate account of the competing union's claims. What the Board would do if an 8 (b) (4) (D) and 10 (k) case were later brought before it, based on the same facts, I shall not be brash enough to predict. Perhaps the Supreme Court will give some indication as to its thoughts on the matter, unless the rumored

[30] 50 LRRM 2337.
[31] *Id.* at page 2337.

settlement removes the case from its ken. We can only wait and see.

Some Problems Ahead

Finally, the three areas I have discussed surely do not exhaust the kinds of cases or questions that may arise. Subcontracting issues, like those which were raised in *Warrior* and *Gulf,* may be another fruitful source of overlap or conflict between arbitration and the Board.

The legal problems that loom ahead also seem endless. If the contract clearly says the grievance-arbitration procedure is the exclusive means of settlement, is the Board's jurisdiction ousted despite Section 10 (a) ? Can the statutory rights be waived by the parties? When, if ever, is the individual union member or employee bound by such a waiver?

If the collective bargaining contract arbitration clause is narrowly confined to interpretations of the contract, can the arbitrator even consider the impact of the statute?

Shall the Board apply different criteria to grievance-arbitration awards when the employer and union are aligned on the same side against the individual employee—or when the form of the adjustment machinery at the last step is a bi-partisan board with no "neutral" participation? [32]

I am afraid that in talking to you today I have done little to answer any questions you may have concerning the Board's attitude toward arbitration in specific situations. However, the statute under which we operate at one and the same time indicates that adjustment by the parties of their disputes is desirable and that the Board must protect the rights of the public in connection with labor disputes. It was impossible for Congress to predict where these policies might conflict. Congress therefore established the Board to attempt to balance these ends on a case-by-case basis. We are attempting to fulfill that function.

By way of postscript and petition, I would merely add that our task of determining appropriate Board action where there has

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[32] See how the court resolved such a problem in *Union News Co.* v. *Hildreth,* 295 F.2d 658, 48 LRRM 3084 (6th Cir. 1961) ; and compare *Denver-Chicago Trucking Co., supra,* footnote 16.

been a prior arbitration award will be greatly eased if on the face of the award it is clear

(a) what the scope of the arbitrator's authority and the issues before him were;

(b) that due process for all parties, particularly aggrieved individuals, has been observed, and

(c) that where Section 7 rights are or may be be invoked, the arbitrator has considered such rights and has taken or offered parties the opportunity to present relevant evidence thereon.

I could also wish that this Academy would detail a small representative group of its members to explore with the Board administratively the foregoing and other critical areas of possible conflict and cooperation. We welcome your continuing counsel and criticism, in any case, as together we seek to make more effective the collective-bargaining process which is so central to the success of our economy.