CHAPTER III

THE NATIONAL LABOR POLICY, THE NLRB, AND ARBITRATION

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We have recently had numerous articles discussing our topic for this evening. There have been meetings of NLRB personnel and various groups of arbitrators to explore the respective roles of arbitration and the Board within our system of industrial jurisprudence. Against this background of fruitful exploration, you can be sure that my presence here is not based on a belief that I can offer fresh insights. For those of you who had the good fortune to hear my friend Arnold Ordman, the distinguished General Counsel of the NLRB, address the Academy last year and who possibly had observed that Mr. Ordman defined the Board policy on arbitration by citing three cases in which I dissented, three in which I signed separate concurring opinions, and six in which I did not participate, be assured that my presence is not prompted by the Academy's grant of, or my request for, equal time.

On a more serious note, I did accept your invitation primarily because the opportunity to visit with old friends, while having occasion to exchange views with practitioners in the field, is always therapeutic for those of us exposed to "Potomac Fever" in dosages exceeding desirable levels.

In my remarks I cannot supply definitive answers, but I do propose to review some fundamental aspects of the problems, to explore my own views and reactions from my limited participation in the process, and to invite suggestions from your accumulated wisdom.

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Dual System of Remedies

A keynote of our times is the velocity of evolution whether in the field of theology, biology, medicine, or labor relations. A short time ago, in the period preceding *Smith* v. *Evening News*[1] and *Carey* v. *Westinghouse*,[2] there were marked differences of opinion as to whether the doctrine of preemption[3] should preclude arbitrators from resolving contract claims also constituting unfair labor practices. More recently, the Supreme Court in *Acme*[4] and *C & C Plywood*[5] considered the other side of the coin and held that the Board was not required to defer to the courts or arbitration even though the findings of an unfair labor practice involved some interpretation of a collective bargaining agreement. By virtue of these decisions it is now clear that (1) the availability of arbitration does not preclude Board exercise of jurisdiction over unfair labor practices, (2) the availability of a Board remedy does not bar arbitration, and (3) the Board has discretion to refuse to exercise its jurisdiction when in its judgment federal policy would best be served by leaving the parties to contract remedies. Now that the Court has ended this segment of the debate, we are confronted with a national labor policy which contemplates a dual system of remedies, with concurrent or overlapping jurisdiction. Having reached this point in development, the labor relations community, like those in other fields of human endeavor, must find solutions for new problems which emerge. Unlike the problems of the past, however, some of these are not susceptible to court resolution. The task at hand represents a challenge to Board members and arbitrators to exercise their common jurisdiction in a manner which will best serve the national policy.

I recognize, of course, that of the hundreds of thousands of grievances annually disposed of at the various stages of private settlement machinery, only a small percentage are also subject to the remedial processes of the Board. But it should not be surprising that these are the ones with which I am concerned. While philosophically I am a relativist, my tenure in Washington has brought a lively appreciation of the moralistic cliché or the trite

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[1] 371 U.S. 195, 51 LRRM 2646 (1962).
[2] 375 U.S. 261, 55 LRRM 2042 (1964).
[3] *San Diego Building Trades* v. *Garmon*, 359 U.S. 236, 245, 43 LRRM 2838 (1959).
[4] *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 64 LRRM 2069 (1967).
[5] *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421, 64 LRRM 2065 (1967).

truism. For example, I would describe my reaction to our overlapping jurisdiction as being foursquare in support of responsibility, democracy, and the general welfare. Just in case that doesn't impress you sufficiently, I will try, with some humility, to illustrate my interpretation of those precepts.

NLRB's Approach

Although I sometimes disagree with my colleagues at the Board in individual cases, the Board's record does evidence a desire to accommodate and encourage resort to arbitration. We must be mindful, however, that we are concerned with dual remedial processes, which, while interwoven into a single national labor policy, emerge from different sources, with distinct functions and objectives.

Where Award Has Been Rendered

Cases coming to the Board may be divided into those in which an award has already been rendered and those in which arbitration has not been invoked or no award has issued. Where an award covers the matters raised by an unfair labor practice complaint, the Board follows *Spielberg*[6] by confining itself to determination of whether the arbitration procedures were fair, the parties had agreed to be bound, and the results were not repugnant to the National Labor Relations Act.

I do not wish to belabor you by reciting the variant fact patterns in which an award was ignored by the Board because it was not issued either in a fair and regular proceeding or by an impartial panel. These cases are isolated, are generally decided on considerations of fair play, and present no real conflict between the two systems of adjustment.

On the other hand, the most difficult problem we encounter in applying *Spielberg* involves determination of whether an arbitrator has considered the unfair labor practice issue in making his decision under the contract. For example, suppose an employee is allegedly discharged for some violation of a company rule, such as smoking in a prohibited area. That employee had been active on behalf of a rival union disfavored by the employer. The case

[6] *Spielberg Mfg. Co.*, 112 NLRB 1080, 36 LRRM 1152 (1955).

is before the Board after an arbitrator has ruled that the discharge was for cause under the contract. But the evidence before us indicates that the company had condoned violations of its no-smoking rule in the past. In reviewing such an award, the Board may have no way of knowing whether the arbitrator considered the possibility that the no-smoking violation was a pretext seized upon by the employer to rid itself of an employee for his activity on behalf of a labor organization.

The pretext problem comes to us in three types of situations. The first is exemplified by the *Oscherwitz* case,[7] where the record before the Board included direct evidence that the arbitrator considered the statutory issue and the Board adopted his award even though it might have reached a different result. On the other hand, in *Monsanto Chemical*[8] the Board rejected an award validating a discharge and found the discharge to be in violation of the Act where the arbitrator had stated, "I have chosen to ignore for purposes of this decision the allegation that . . . union activities played a part in [the] discharge."

The usual case, however, is one in which the Board has difficulty in understanding just what the arbitrator has considered. In *Modern Motor Express, Inc.*,[9] I participated on a Board panel which adopted an arbitrator's award upholding the lawfulness of a discharge even though there was no direct evidence that the arbitration panel had considered the pretext issue. In that case, evidence that the dischargee had engaged in protected activity was introduced in the arbitration proceeding, and the dischargee had contended that his termination was for that reason. In *D. C. International*,[10] I participated on a panel which reached a different result. There we disregarded the award since no evidence had been presented to the arbitration panel suggesting that the employee's discharge was unlawfully motivated, nor had any contention been made to that effect. Thus, as there was no basis for the arbitration panel to explore and consider the validity of the discharge in the light of statutory considerations, we disregarded the award and found the discharge violative of the Act. It has been

[7] 130 NLRB 1070, 47 LRRM 1415 (1961).
[8] 130 NLRB 1097, 47 LRRM 1451 (1961).
[9] 149 NLRB 1507, 58 LRRM 1005 (1964).
[10] 162 NLRB No. 129, 64 LRRM 1177 (1967).

my view that an arbitrator must necessarily consider the pretext issue when resolving a grievance except in most unusual cases. I would be inclined to make such a presumption, but that is distinctly a minority view. The Board members have considered this problem at meetings with Bill Simkin, members of the Academy, the American Arbitration Association, and others, and we always raise the hypothetical question presented to you. These sophisticated gentlemen give qualified rather than dogmatic answers, and after the meetings the various Board members always disagree on what the answers were. Because I cannot predict the result that might be reached by the Board where the basis for an award is unclear, I think it would prove salutary for the arbitrator somehow to indicate that issues of interest to the Board have been canvassed in his deliberations. This may be accomplished through the submission agreement, statements in a transcript when available, or the award itself. We occasionally have an arbitrator willing to testify or submit affidavits to the Board on this issue, but not often.

Where No Award Has Been Rendered

Where no award has been rendered, the Board has been less willing to withhold Board processes. In part, this is because speedy resolution of unfair labor practices is the essence of effective administration of the Act. Normally, the Board is not presented with a case until after a regional investigation of charges, the issuance of a complaint, and the issuance of a trial examiner's decision after a hearing. At this point the issues are ripe for a determination on a fully developed record. There is a reluctance to deny statutory rights under such circumstances.

One law review article analyzing some of the differences among Board members incorrectly reported that while I was willing to await an award after arbitration, I would not defer to potential arbitration. While I have stated the contrary in several decisions, I find it of passing interest that other articles have repeated the statement. I can understand why it is more interesting to read the articles than the decisions themselves.

Be that as it may, and with due deference to my colleagues, I think it desirable to defer to potential arbitration under exactly the same circumstances that I believe deference to completed

arbitration is justifiable. I believe in free collective bargaining and I believe that requiring the parties to adhere to their agreements promotes that process. Since one cannot tell whether a proceeding yet to be held will conform to the *Spielberg* standards, and because statutory rights are involved, I would hold the Board case in abeyance until the award had issued and then would review it only under the *Spielberg* doctrine. That is my endorsement of responsibility.

In *Elgin, Joliet and Eastern R. R. Co.* v. *Burley*,[11] the Supreme Court noted traditional differences between those contract disputes which involve claims of rights accrued in the past and those looking to the "acquisition of rights for the future." This forms an integral part of my approach to arbitration and the NLRB. The national labor policy establishes collective bargaining as the desirable method for resolving labor-management issues in our democratic society, and encouraging the practice and procedure of collective bargaining is one of the primary functions of the NLRA. Collective bargaining does not end with the execution of a contract. The Supreme Court has observed:

> It is of the essence of collective bargaining that it is a continuous process. Neither the conditions to which it addresses itself nor the benefits to be secured by it remains static.[12]

Thus, I do not view arbitration as a substitute for collective bargaining. Recently we have seen some public discussion of the possible use of arbitration of new contract terms in the steel industry and some interesting articles by Bernard Cushman covering wider use of such methods, but that is a different animal. While the future may bring interesting developments along this line, that is not the type of situation that comes to the NLRB. What we get are cases where a party claims that a general prerogative or arbitration clause of a contract justifies unilateral changes. I want to read the contract and review the history of negotiations to assure myself that the requested deferral to arbitration encompasses matters which have been subjected previously to collective bargaining. In my view, arbitration properly serves

[11] 325 U.S. 711, 16 LRRM 749 (1945).
[12] *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U.S. 521, 525, 24 LRRM 2173 (1949).

a judicial function to resolve differences about agreements previously reached, and not as a means for the "acquisition of future rights." In our present frame of reference, collective bargaining serves the legislative or agreement-making function, and that is a prime concern of the Board.

Whereas the trilogy teaches us, properly I think, that courts should refer questions to the arbitrator unless the contract clearly provides otherwise, I believe different standards are appropriate where the denial of statutory rights is involved. I believe that denial of access to the agency primarily responsible for enforcing the duty to bargain where the contract does not appear to regulate the specific subject matter of the dispute would increase industrial strife. Moreover, the attractiveness of arbitration clauses may be diminished if they are construed to imply a general waiver of statutory rights. A case in point is *Century Papers, Inc.*,[13] where I joined my colleagues in rejecting an employer's contention that a question of contract interpretation was involved which should be resolved through contractual grievance procedures. We found that the plain and unambiguous provisions of the agreement failed to justify the employer's unilateral grant of wage increases. In cases of this type, where in fact there is no ambiguity requiring the expertise of an arbitrator, the desirability of encouraging resort to arbitration must yield to the Board's duty to protect the bargaining process and the necessity for expeditious resolution of unfair labor practices.

I would reach a different result where interpretation of an ambiguous contract provision might justify an employer's unilateral action. In such a case the employer may merely be exercising an accrued right. If so, there is no bargaining interest to be protected by the Board, and I would defer to the expertise of an arbitrator by holding the case in abeyance for review of the award under *Spielberg*.[14] These are the principles I had in mind while partially dissenting in *LeRoy Machine Co., Inc.*[15] In that case the employer had taken unilateral action by establishing new rates of pay for new jobs and by requiring employees with bad absentee records

[13] 155 NLRB 358, 60 LRRM 1320 (1965).
[14] See my separate opinion in *Flintkote Company*, 149 NLRB 1561, 57 LRRM 1477 (1964); *Thor Power Tool Company*, 148 NLRB 1379, 57 LRRM 1161 (1964).
[15] 147 NLRB 1431, 56 LRRM 1369 (1964).

to submit to physical examinations. I joined the majority in finding an 8(a)(5) violation with respect to the establishment of rates for new jobs because there was no provision in the collective bargaining agreement supporting the employer's action in this regard. However, as the contract did include a provision permitting the company to "determine the qualifications of employees," the validity of the employer's action in requiring additional physical examinations depended upon an interpretation of this ambiguous provision. For this reason I would have deferred consideration of that phase of the unfair labor practice proceeding pending an arbitrator's decision.

In *Washington Hardware and Furniture Co.*,[16] the Board was confronted with an alleged 8(a)(5) violation based upon unilateral failure to grant Christmas bonuses that the employer had given in each of the 14 years preceding the union's certification. The employer at its first opportunity after execution of a bargaining agreement refused to pay the Christmas bonuses and did so without notice to or consultation with the union. The agreement included a standard arbitration clause and also provided that "employees receiving more than the minimum compensation or enjoying more favorable working conditions than provided for in this agreement shall not suffer by the reason of its signing or adoption." Because it is conceivable that this clause precluded the type of employer action in issue before the Board, here again I, contrary to a majority of the Board, would have preferred an arbitrator's interpretation of the contract. This type of dispute is grist for the mill of arbitration.

My dissenting opinion in *Univis, Inc.*[17] reveals an extension of these principles to an 8(a)(5) allegation based on an employer's refusal to furnish information. The record in that case established that in negotiations leading to the execution of a contract the parties had fully explored the information issue, with the employer giving examples of the type of data it would agree to furnish. The union thereafter accepted the contract, which specified the type of information to be provided. During the term of the agreement, when the employer denied the union's request for additional data, the union grieved but at the final step filed an un-

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[16] *Gravenslund Operating Company* d.b.a. *Washington Hardware and Furniture Co.*, 168 NLRB No. 72, 66 LRRM 1323 (1967).
[17] 169 NLRB No. 18, 67 LRRM 1090 (1968).

fair labor practice charge instead of seeking a final and binding determination under the agreed-upon dispute-settlement machinery. Here, again, the bargaining history and terms of the contract may have established that the union bargained away its right to the information sought. As the issue had been affirmatively regulated by the parties through the process of collective bargaining, I would leave the union to its contract remedies. This is my endorsement of do-it-yourself democracy.

Representation Cases

I have serious reservations about applying the same standards to representation cases. In the *Raley's* case,[18] which I did not sign, the Board announced that it would apply the same *Spielberg* principles to representation cases as unfair labor practice cases, and this was approved by the Supreme Court in *Carey* v. *Westinghouse*.[19] My colleagues at the Board in their treatment of a subsequent phase of the *Westinghouse* case [20] appear to share some of my misgivings, and I view their failure to adopt the arbitrator's award in that case as some modification of *Raley's*.

The doctrine of exclusive representation, adopted from our political traditions, and the role of the NLRB in determining units appropriate for collective bargaining have unique functions in the world of labor relations. Reviewing our history from the days of the National Labor Union and the Knights of Labor, when every depression destroyed the labor movement or switched it into some utopian effort, helps bring this matter into focus. Gompers and associates, with the appeal of craft units, brought the movement through its first depression. Yet 1920 to 1929 was the first time in history when trade-union membership declined on the upswing of the business cycle. While a lot of factors influenced those post-war years, Harry Millis thought that the inability of craft unions to cope successfully with the fastest growing part of the economy, the mass-production industries, was significant.

The standards for Board determination of units is to assure to employees the fullest freedom in exercising the rights guaranteed by the Act. In this world of the Twentieth Century, public-

[18] *Raley's, Inc.*, 143 NLRB 256, 53 LRRM 1347 (1963).
[19] Note 2 above.
[20] 162 NLRB No. 81, 64 LRRM 1082 (1967).

interest considerations in the determination of the boundaries of the bargaining unit preclude, in my view, surrender of this function to private parties. Building-block theories for encouragement of collective bargaining, the interrelation of market factors and size of the unit, self-determination and craft severance, freedom of choice and stability—these are matters which seem to me to require broader consideration than is possible under a private agreement. This is my endorsement of the general welfare.

This is not to say that the Board election procedures should completely ignore the availability of arbitration. In *Pacific Tile and Porcelain Company*,[21] we deferred ruling on challenges to the voting eligibility of two individuals whose discharges were the subject of pending grievance action. In that case the status of these individuals on the eligibility and election dates depended upon the outcome of their grievances. This is an example of a situation in which an arbitrator's determination presents no conflict with the Board's role in representation cases.

Views of Arbitrators

I said earlier that solutions for these problems required our joint effort. I know the NLRB has tried to accommodate these two phases of our national labor policy. Generally speaking, the Board has applied *Spielberg* in a manner satisfactory to protect rights guaranteed by the Act while giving hospitable acceptance to the results of arbitration. Although I have occasionally parted company with my colleagues in cases where I would refrain from exercising jurisdiction, it is my judgment that these differences at the Board level could be reduced were my colleagues satisfied that arbitrators are responsive to the special rights and duties protected by the Act. Just when I thought I was making progress in convincing other Board members that any arbitrator worth his salt would consider statutory issues, we had a meeting with some Academy members in New York. According to the informal minutes of that meeting as prepared by an Academy member, "the consensus of the arbitrators present seemed to be that the arbitrator should confine himself primarily to the contract and leave statutory issues to the NLRB." I attended similar meetings in Los Angeles a year ago last October and found similar differences of

[21] 137 NLRB 1358, 50 LRRM 1394 (1962).

opinion although a majority reached a different conclusion. While some believe the complainant should always have both forums, others think parties should be limited to the one of their choice.

The reasons for not considering statutory questions as expressed by arbitrators who embrace this view are worthy of consideration. Many freely confess a lack of expertise in Board law and are hesitant to assume a role somewhat akin to that of a Board trial examiner. And with increasing costs and backlog, they argue somewhat persuasively that the introduction of an issue alien to those covered by the contract will detract from the advantages of speed and flexibility inherent in arbitration. Theoretically, their position finds further justification since the arbitrator, being a creature of agreement, can determine only the issues submitted by mutual assent of the parties.

I do suggest that it is desirable to try to synthesize the two processes in improving our system of industrial jurisprudence. An award is an integral part of the code of conduct governing the plant community, and, as such, its viability and immunity from challenge should be guaranteed to the same extent as any term or condition of employment. The Board, however, has indicated plainly that it will disregard any award emanating from a proceeding in which statutory issues have been ignored.

From the standpoint of my agency's responsibility, effective arbitration means a diminution of a constantly swelling caseload. Furthermore, I think it compatible with democratic principles to minimize governmental intrusion where it appears that private parties are capable and willing to regulate their affairs in a manner consistent with the general welfare. In sum, I am guided by a general view that a long-range public interest is served by expanding and strengthening the role of private adjustment machinery in order to decrease the government's role in labor relations.

The world turns, and as a perennial optimist I am sure that progress is inevitable. While we may not have complete agreement on some of these items, education is still possible in both directions. I would also remind you that I have endorsed responsibility, democracy, and the general welfare, and I hope we can all agree on these.