APPENDIX B

REPORT OF THE COMMITTEE ON LAW AND LEGISLATION*

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I. Introduction

This year marks the third year of distribution to Academy members of the *Report of the Committee on Labor Arbitration and the Law of Collective Bargaining Agreements* prepared by the Labor and Employment Law Section of the American Bar Association. It marks the second year of experimentation with new formats for the report of the Academy's Committee on Law and Legislation. Last year's report discussed nine decisions of the courts and the National Labor Relations Board that the committee deemed worthy of special comment. This year's report continues with the same approach. We have selected 16 cases from the courts and the Labor Board that we consider significant for the development of the law of labor arbitration.

This new format allows us to be selective, for we continue to rely upon the ABA Report for a comprehensive overview of general developments in arbitration law. Our selections in this report focus on significant decisions in two related areas: (1) cases within the common law line of Section 301[1] arbitration decisions, which stem from *Lincoln Mills*[2] and the *Steelworkers Trilogy*,[3] and (2) cases which continue to define the relationship between the NLRB and arbitration.

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[1]61 Stat. 156, 29 U.S.C. §185 (1976).

[2]*Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 40 LRRM 2113 (1957).

[3]*United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

The committee is still experimenting. The format followed in the preparation of the instant report drew heavily upon the participation of almost every member of the committee, for which the chairperson is indeed grateful. The report also benefited from the assistance of 11 law students from Southern Methodist University whose contribution is gratefully acknowledged.[4] Notwithstanding such wide participation, we do not believe that we have yet achieved a unified process that will provide a definitive model for the future work of this committee. We therefore recommend further experimentation, but along similar lines. We do urge that every member who agrees to serve on this committee understand that he or she will be expected to make an important contribution by way of thought, analysis, and writing. We hope that a tradition of active membership participation will become firmly established for the future of this committee.

II. The Developing Common Law of Labor Arbitration Under Section 301

A. Substantive Arbitrability

One of the key principles of the *Trilogy* doctrine is that the question of substantive arbitrability is a matter for judicial determination. Thus, whether the parties have agreed to arbitrate a particular dispute—which usually involves determination of whether the collective agreement requires arbitration of the grievance—is to be determined by the court. As to such judicial determination, there is no requirement of deference to the arbitrator's interpretation, for the arbitrator's authority depends wholly upon the parties' having submitted the dispute to arbitration. This principle avoids a binding bootstrap decision by the arbitrator as to the scope of his or her own jurisdiction. Two appellate decisions of the past year provide reinforcement and refinement to the role of the courts in determining arbitrability: *Mobil Oil Corp.* v. *Local 8-766, OCAW*[5] and *Piggly Wiggly Operators Whse., Inc.* v. *Piggly Wiggly Operators' Warehouse Indep. Truck Drivers, Local No. 1.*[6]

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[4]Bruce Berger, Patricia Brandt, Alan Busch, Dan Dargene, Patrick DeMuynck, Sanford Denison, Robert Godfrey, Peter Riley, Eric Ryan, Steven Taylor, and Mark Williams.

[5]*Mobil Oil Corp.* v. *Local 8-766, Oil, Chemical and Atomic Workers International Union*, 600 F.2d 322, 101 LRRM 2721 (1st Cir. 1979).

[6]*Piggly Wiggly Operators' Warehouse, Inc.* v. *Piggly Wiggly Operators' Warehouse Independent Truck Drivers, Local No. 1*, 611 F.2d 580, 103 LRRM 2646 (5th Cir. 1980).

While the Supreme Court has insisted that the question of substantive arbitrability be decided by the courts, it nevertheless limited the judicial role in determining arbitrability by requiring a presumption favoring arbitrability. As the Court specified in *Warrior & Gulf*,[7] a dispute is deemed arbitrable "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." And "[i]n the absence of any express provision excluding a particular grievance from arbitration . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail. . . ."[8]

In the *Mobil* case, the Court of Appeals for the First Circuit applied both of the foregoing *Warrior & Gulf* requirements. Mobil had unilaterally decided to subcontract all delivery of fuel oil and gasoline from its Bangor plant, and as a result four truck drivers were terminated. Although there was no provision in the agreement specifically dealing with subcontracting, the agreement contained a recognition clause and provisions for seniority, wages, and classifications. The arbitration clause limited arbitration to the "express terms" of the agreement.

A grievance was filed and the matter proceeded to arbitration. The arbitrator found the dispute arbitrable and held the employer in violation of the agreement. When the employer refused to honor the award, the matter proceeded to federal district court, where the arbitrator's award was upheld on the merits.

On appeal to the First Circuit, the employer contended (1) the district court failed to make an independent determination of arbitrability, and (2) the arbitration clause was limited to disputes over "express provisions" and because there was no mention of subcontracting in the agreement, the dispute was not arbitrable. The union responded that the subcontracting violated the recognition clause and the seniority, wage, and classification provisions; accordingly, "express terms" of the agreement were in issue.

The circuit court agreed that the district court failed to make an independent determination of arbitrability and that such a determination was required. However, the court declined to remand the case, holding that the issue was a "question of law"

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[7]363 U.S. at 582–583.
[8]*Id.*, at 584.

and the factual record was complete. The court then addressed the issue of arbitrability. Basically agreeing with the union's contention that the dispute concerned "express provisions" of the agreement, it applied the familiar definition of arbitrability contained in *Warrior & Gulf:*

> "[A] dispute is arbitrable unless it can be said 'with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute' and unless there is an 'express provision excluding a particular grievance from arbitration.' "[9]

Since the arbitration clause did not expressly exclude subcontracting from arbitration, the dispute was deemed arbitrable.

Lastly, the court rejected an offer of extrinsic evidence of prior bargaining that the employer alleged would establish that subcontracting was excluded from arbitration. Although it noted a split among the circuits concerning the use of bargaining history to determine arbitrability, it held such history to be irrelevant, relying on *Warrior & Gulf* and its reaffirmation in *Nolde Bros.* v. *Local 358, Bakery Workers:*[10]

> ". . . The lower courts in Warrior & Gulf found compelling the fact that the union had been unable to insert a provision limiting subcontracting in its collective bargaining agreement. The Supreme Court, in reversing the finding of nonarbitrability, did not mention this prior bargaining history.
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> "Most recently, in *Nolde* . . . the Supreme Court reiterated the continued vitality of the Steelworkers Trilogy [and observed that] 'It is . . . noteworthy that the parties drafted their broad arbitration clause against a backdrop of well-established federal labor policy favoring arbitration.' "[11]

Accordingly, the First Circuit determined that the arbitrator had substantive jurisdiction to render an award on the subcontracting issue, and the order of the district court was affirmed.

In the *Piggly Wiggly* case, the Fifth Circuit recognized that the agreement to arbitrate a dispute may be dependent on the ad hoc submission agreement as well as upon the arbitration clause in the collective bargaining agreement. The arbitration concerned a driver named Strickland who was discharged because he had been declared uninsurable by the employer's insurance carrier. The employer relied upon Section Z, Article 21, of the

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[9] *Id.*, at 582–583, 585.
[10] 430 U.S. 243, 94 LRRM 2753 (1977).
[11] *Id.*, at 254.

collective bargaining agreement, which read: "Any driver who becomes uninsurable by any of the Company's insurance carriers will be subject to immediate discharge." The union, however, questioned the validity of that clause. It responded to the discharge by filing the following grievance on behalf of Mr. Strickland:

> "Purported Section (z) of Article 21 of the contract is not a valid term of the contract. Second, my driving record is a direct and inevitable consequence of company policies and cannot be used to penalize me. Third, any violations prior to the effective date of this contract cannot be used to my disadvantage pursuant to an understanding and agreement between the parties to the contract. Further, I deny that I am uninsurable as alleged in the company's letter."

After preliminary steps had been exhausted, the parties selected an arbitrator and submitted the grievance to him without entering into a separate submission agreement. The Court of Appeals, in an opinion written by Judge Alvin Rubin, noted that "[a]t no time did the employer contend that the grievance or any part of it was not a proper subject for arbitration."[12]

After the evidentiary hearing, the arbitrator concluded that the discharge was improper, based on the determination that Article 21(Z) was not a part of the contract because the clause in question had never been submitted to the union and the union had not consented to it.

The employer countered that the contract was clear and that the arbitrator exceeded his authority by modifying or rewriting it contrary to a provision which stated that the arbitrator "shall have no authority to change, amend, add to, subtract from, modify or amend any of the terms or provisions of this Agreement." The employer thus viewed the issue as whether the arbitration award drew its essence from the agreement under *Enterprise Wheel* standards. However, the court viewed the issue as one of substantive arbitrability—a *Warrior & Gulf* question.

The court pointed out that the scope of an arbitrator's authority is not always controlled by the collective agreement alone, that before arbitration could proceed it is necessary for the parties to "supplement the agreement to arbitrate by defining

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[12]611 F.2d at 582.

the issue . . . and by explicitly giving him authority to act."[13] Judge Rubin stated further:

> ". . . If the parties enter into a submission agreement this later contract is the substitution for legal pleadings; it joins the issue between the parties and empowers the arbitrator to decide it. . . . The arbitrator's jurisdiction is not limited to the issues that the parties could have been compelled to submit; the parties may agree on this method of resolving disputes that they were not compelled to submit to arbitration.
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> "The parties may act formally and enter into a written submission agreement or they may merely ask the arbitrator to decide the written grievance as it has been posed in their conciliation efforts. *When they do so, they have in effect empowered him to decide the issues stated in the grievance. The grievance itself becomes the submission agreement and defines the limits of the arbitrator's authority.* Arbitration is a matter of contract . . . but the initial contract to arbitrate may be modified by the submission agreement or grievance."[14]

Inasmuch as neither party had questioned the arbitrability of the dispute as stated in the grievance, the court held that the entire grievance, including the validity of Section Z, Article 21, was presented to the arbitrator without reservation. The court said that: "On whatever basis it rests, waiver, estoppel or new contract, the result is that the grievance submitted to the arbiter defines his authority without regard to whether the parties had a prior legal obligation to submit the dispute."[15]

Although the employer did not contend that the court should inquire into the basis of the arbitrator's determination, the court noted that "the contract itself forbids [it] to do so, making this award final."[16] Judge Jones dissented on the ground that the terms of the contract were unambiguous, that the union had knowingly written them into the contract, and that they could not be written out of the contract by the arbitrator.[17]

The *Piggly Wiggly* decision stands as a warning to the parties that where there is no separate submission agreement and when one party disagrees with the statement of the issue contained in the grievance, it is incumbent on that party to put its objection before the arbitrator lest he waive his position and discover

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[13] *Id.*, at 583.
[14] *Id.*, at 584. Emphasis added.
[15] *Id.*, at 584.
[16] *Id.*, at 585.
[17] *Id.*, at 585.

when it is too late that he has broadened the scope of arbitrability under the agreement.

B. Scope of Judicial Review of Arbitration Awards

1. *Review of Contract Interpretation.* The extent of the authority which the *Enterprise Wheel* decision vested in the arbitrator to interpret provisions of an agreement submitted for determination was tested in two circuit decisions here cited.

In *Acme Markets* v. *Bakery & Confectionary Workers,*[18] the Court of Appeals for the Third Circuit upheld an arbitrator's award which concluded that certain store closings were strategic, "i.e., designed to gain some advantage or avoid some disadvantage in [current] contract negotiations" and therefore constituted "lockouts" within the meaning of the collective bargaining agreement. The closing in question was part of a multi-employer response to a whipsaw strike of another union. Setting aside a district court decision that had vacated the award, the court of appeals, relying on a prior unreported decision involving a related situation, held that:

> "[the arbitrator's determination] that the . . . shutdowns constituted illegal lockouts within the no strike-no lockout provision of the . . . contract was not unreasonable and drew its essence from the collective bargaining agreement. . . . The arbitrator's determination . . . is not irrational."[19]

In *Teamsters Local 878* v. *Coca Cola Bottling Co.,*[20] the Eighth Circuit rendered an important decision regarding an arbitrator's authority to construe a typical "just cause" for discharge clause. The grievant had been discharged for dishonesty under such a clause without having been afforded an opportunity to tell his side of the story prior to termination. The arbitrator stated in his award that the weight of the evidence indicated that the grievant had been dishonest in that he had told his clerk-checker that he was short a case of soft drink instead of telling him that he had broken the case. Accordingly, the arbitrator concluded "that the termination . . . was for just cause *provided* due process was followed in handling the discharge."[21] How-

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[18] *Acme Markets* v. *Local 6, Bakery & Confectionary Workers International Union,* 613 F.2d 485, 103 LRRM 2394 (3d Cir. 1980).
[19] *Id.,* at 486–487.
[20] 613 F.2d 716, 103 LRRM 2380 (8th Cir. 1979).
[21] *Id.,* at 717.

ever, because of the employer's failure to give the grievant an opportunity to present his side of the case, there was a lack of procedural fairness which caused the dismissal to fall short of the just-cause standard.

The employer characterized the arbitrator's due-process requirement as "an unauthorized attempt to inflict his own brand of industrial justice onto the parties."[22] The court disagreed, noting that "arbitrators have long been applying notions of 'industrial due process' to 'just cause' discharge cases."[23] Judge Heany, writing for the majority, stated that while the court's "interpretation of 'just cause' may differ from that of the arbitrator, . . . such disagreement is irrelevant" for it was not the court's function to review the merits.[24] Judge Henley dissented.[25]

In *Operating Engineers Local 670* v. *Kerr-McGee Refining Co.*,[26] the Fourth Circuit affirmed the vacation of an arbitrator's award where the arbitrator had set aside a discharge because of the employer's failure to submit sufficient evidence on all of the stated grounds for discharge (excessive absenteeism), although the other ground (false statements to obtain sick leave benefits) had been proved. The collective agreement provided: "Any . . . false statements made to obtain benefits [for sick leave] will be cause for discharge."

The court of appeals held that it was clear that in requiring that all charges levied against the employee must be proved in order to sustain the discharge, the arbitrator ignored the express terms of the agreement and thereby "violated the essence of the agreement."[27]

While the district court in the *Kerr-McGee* case noted that it had the benefit of unambiguous contractual language against which to reverse the arbitrator's award, such was not the case in the Sixth Circuit decision in *General Drivers Local 89* v. *Hays and Nicoulin, Inc.*[28] In that per curiam opinion, the court of appeals and the lower court seem to have substituted their judgment for that of the arbitrator as to the interpretation of ambiguous terms of an agreement. The company had dismissed the grievant be-

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[22]*Id.*, at 719.
[23]*Ibid.*
[24]*Id.*, at 720.
[25]*Id.*, at 721.
[26]618 F.2d 657, 103 LRRM 2988 (10th Cir. 1980).
[27]*Id.*, at 660.
[28]594 F.2d 1093, 100 LRRM 2998 (6th Cir. 1979).

cause his bad health had rendered him unfit for his job. The arbitrator, however, concluded on the basis of expert testimony that the employee was not unfit. The arbitrator based his decision on a provision in the collective agreement which stated:

> "The *qualified* employee with the greater seniority and *ability* to perform the work remaining to be done shall be the last employee laid off . . . and the first to be recalled provided he has the ability to perform available work. *Ability shall be determined by the contractor in the first instance.*"[29]

The arbitrator determined on the basis of the emphasized portion of the foregoing that in later instances, such as grievance proceedings, the employer's determination of an employee's unfitness can be reviewed. The lower court, however, concluded that the proper contractual provision to apply was a managerial prerogative section which stated that: "The [Company] shall be the sole judge of the qualifications, capability, number, purpose and tenure of the employees." The court of appeals affirmed the lower court's summary-judgment determination that the latter clause indicated that the arbitrator could not contradict the company's determination that the employee was unfit. According to the court of appeals, the arbitrator viewed the company's action as a layoff without recall because of unfitness, whereas the appellate court said the record and the union's concession in oral argument indicated that the employee was discharged. Consequently, the arbitrator's construction of the contract was held not to draw its "essence from the collective bargaining agreement,"[30] citing *Enterprise Wheel.* But all the Sixth Circuit has done is to disagree with the arbitrator's interpretation of the contract. It certainly has not heeded the Supreme Court's admonition in *Enterprise* that it was not the function of the courts to apply "corrective principles of law to the interpretation of the collective bargaining agreement"[31] in order to determine whether the arbitrator's decision was based on the contract, for:

> ". . . The acceptance of this view would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract. This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's deci-

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[29] *Id.*, at 1094.
[30] *Ibid.* Emphasis added.
[31] 363 U.S. at 598.

> sion is final. . . . [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."[32]

2. *Review of Arbitrator's Findings of Facts.* Another Sixth Circuit decision involved the extent to which an arbitrator's findings of fact are subject to review under the *Enterprise* standard. Prior to 1973, the employer, in *Storer Broadcasting Co.* v. *AFTRA,*[33] had made voluntary contributions to a profit-sharing plan for the benefit of its employees. In 1973 it entered into a collective bargaining agreement with the union in which it was required to make contributions to the union's pension and welfare plan, and participation in the profit-sharing plan was discontinued. The 1973 collective agreement contained a provision stating that the union had "fully disclosed to its members the benefits being given up by its members in consideration for the Company's contribution to the AFTRA P & W fund and indicates that this arrangement is fully acceptable to the Union and its members."

In 1974, the trustee of the profit-sharing plan advised the employees covered by the collective agreement that they would receive the amounts that had "vested" in the profit-sharing plan up to that time. Seven out of the 20 employees involved, however, rejected checks for that amount and demanded to be paid the larger amounts which had been "credited" to their accounts in the plan. When this was refused, the union took the matter to arbitration.

The arbitrator construed the above contractual language to mean that the employer was bound to whatever reasonable interpretation the union had made and communicated to its members concerning their rights upon termination of their participation in the profit-sharing plan. He then made the factual finding that was the subject of the court action: that the union had represented to its members that they would receive the credited amount, not just the vested amount, and an award was entered in favor of the seven employees for the credited amount. The arbitrator's basis for this factual finding was that the union's version seemed

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[32] *Id.*, at 598–599.

[33] *Storer Broadcasting Co.* v. *American Federation of Television and Radio Artists*, 600 F.2d 45, 101 LRRM 2495 (6th Cir. 1979).

"more logical" than the company's version, and the union must have told the employees they would receive the credited amount, otherwise the seven employees would not have objected to receiving only the vested amount. However, there was no direct evidence in the record to support this finding.

The Sixth Circuit reversed the district court's decision upholding the award. Citing its 1979 *Detroit Coil*[34] decision, it noted two important exceptions to the general rule established in the *Steelworkers Trilogy* that the courts are required to refrain from reviewing the merits of an arbitrator's award:

> "First, 'the arbitrator is confined to the interpretation and application of the collective bargaining agreement, and although he may construe ambiguous contract language, he is without authority to disregard or modify plain and unambiguous provisions. . . .' Second, 'although a court is precluded from overturning an award for errors in the determination of factual issues, "[n]evertheless, if an examination of the record before the arbitrator reveals no support whatever for his determination, his award must be vacated." ' "[35]

The court found "absolutely no evidentiary support in the record before the arbitrator" for his factual finding. It noted that logic may be able to supplement evidence or help to draw inferences from evidence, but "it cannot substitute for evidence."[36]

The decision places another judicial gloss on the gloss which the court had cited as the second exception to the *Enterprise* standard. Here there was some evidence from which the arbitrator had drawn an inference. As the dissenting judge noted: "Admittedly, this evidence is of marginal weight; however, it is not totally specious. . . ."[37] The dissent further noted that the arbitrator was supplying "more than simple abstract logic,"[38] for his inference was supported by analogy to specific provisions contained in a previous plan which was discontinued by the 1973 collective bargaining agreement. It called for payment of "full credited amounts" to employees if the plan itself was dissolved or if a participating subsidiary of the company withdrew from the plan.

The *Storer* case is another in a line of recent Sixth Circuit

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[34]*Detroit Coil Co.* v. *International Association of Machinists*, 594 F.2d 575, 100 LRRM 3138 (6th Cir. 1979).
[35]Citing dictum in *N.F. and M. Corp.* v. *United States*, 524 F.2d 756, 760 (3d Cir. 1975).
[36]600 F.2d at 48.
[37]*Id.*, at 49.
[38]*Id.*, at 49.

decisions[39] that have chipped away at the basic premise of *Enterprise Wheel,* that ". . . [i]t is the arbitrator's construction which was bargained for, and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."[40]

C. Boys Markets[41] *Injunctions*

Steelworkers v. *Fort Pitt Steel Casting*[42] was a decision of the Third Circuit Court of Appeals upholding a *Boys Markets* status quo injunction against an action or threatened action involving a grievance subject to mandatory arbitration binding on both parties to a collective bargaining agreement. The union and the employer were parties to a three-year collective agreement, Section 9 of which prescribed a grievance procedure culminating in arbitration: "In the event the dispute shall not have been satisfactorily settled, the matter shall then be appealed to an umpire. . . . The decision of the umpire shall be final." The grievance procedure applied to any employee complaint, and stated that it "may be utilized by the Company in processing Company grievances."

Section 19, paragraph 140, of the agreement provided:

> "The parties agree that in the event of a labor dispute at the end of termination of this Agreement, the Company will continue hospitalization and insurance benefits. At the end of said dispute, the Company will be reimbursed for payments made on behalf of the employees in payment methods mutually agreed on by the parties."

The parties having failed to reach a new agreement by expiration of the old agreement on March 2, 1978, the union struck. But negotiations continued and the company continued making premium payments for hospitalization and insurance benefits. The union denied it was obligated to reimburse the company, claiming the local union, not the national union, was solely responsible for guaranteeing repayment and that such repayment was to be achieved by deductions from employee wages

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[39] *E.g.,* Detroit Coil, *supra* note 34; *Hays and Nicoulin, supra* note 28; and *Timken Co.* v. *Local 1123, Steelworkers,* 482 F.2d 1012, 83 LRRM 2814 (6th Cir. 1973).

[40] 363 U.S. at 599.

[41] *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770,* 398 U.S. 235, 74 LRRM 2257 (1970).

[42] 598 F.2d 1273, 101 LRRM 2406 (3d Cir. 1979).

when the strike ended. Construing the union stance as a breach of paragraph 140, the company threatened to discontinue premium payments toward the benefits unless the union by June 1, 1978, guaranteed in writing to provide repayment.

The union rejected the company's demand and petitioned the state court for injunctive relief to restrain the company threat. An injunction was granted, but the company removed the action to the United States district court where injunctive relief was again granted. The district court's preliminary injunction barred the company from ceasing timely payments of the premiums to keep the benefits in effect. The district court later entered an amended order maintaining in effect the preliminary injunction, denying the company's motion to dissolve the same, and directing the union to proceed to an expeditious arbitration should the company file a grievance regarding the union's alleged breach of paragraph 140.

The company complied with the injunction and resumed negotiations with the union. The company made two separate proposals modifying paragraph 140, both of which would have terminated the company's obligation to continue payments past the thirtieth day of a work stoppage. The union rejected both proposals. Concluding that the parties had reached an impasse on paragraph 140, the company unilaterally implemented its last offer which, since 30 days had elapsed, resulted in immediate termination of premium payments. The district court, on motion by the union, adjudicated the company in civil contempt, holding that because of the unique nature of paragraph 140, "the Company ha[d] in effect bargained away its right to institute a unilateral change in this clause, following an impasse."[43] The court further held that the plaintiffs had established an immediate and irreparable need for equitable intervention, that the plaintiffs had no adequate remedy at law, that the dispute involved an arbitrable issue under the collective bargaining agreement between the parties, and the union "must participate in an expedited grievance arbitration proceeding, if and when initiated by the company concerning . . . the interpretation and effect of Section 19 of the agreement."[44]

The strike and negotiations between the parties continued, but without an agreement being reached. On November 29,

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[43]452 F.Supp. 886, 887 (W.D.Pa. 1978).
[44]*Id.*, at 888.

1978, the company announced it was totally closing the plant, effective the following day. The district court denied the company's motion to vacate the injunction. It relied on *Nolde Bros.* v. *Local 358 Bakery Workers,*[45] holding that whether the obligations of the company under paragraph 140 were terminated upon shutdown of the plant was an arbitrable issue, and until that issue was resolved the company had no grounds to justify vacating the injunction.

The Court of Appeals for the Third Circuit affirmed the district court in its holding that it had authority to grant the preliminary injunction under the *Boys Markets* exception to the Norris-LaGuardia Act,[46] and it sustained the civil contempt order issued against the company. However, it remanded to the district court the question of permanent termination of company operations following the adjudication of contempt, holding that if the district court finds the company had permanently terminated all operations of the plant, then the injunction prohibiting the ceasing by the company of payments to maintain hospitalization and insurance must be dissolved.

In arriving at its decision, the appellate court considered three elements: (1) whether the underlying dispute is subject to mandatory arbitration; (2) whether the employer, rather than seeking arbitration of its grievance, is interfering with and frustrating the arbitral process which the parties had chosen; and (3) whether an injunction would be appropriate under ordinary principles of equity.

The court rejected the company's claims that arbitration was not mandatory. The company interpreted the grievance procedure under the agreement as providing for a permissive rather than mandatory obligation on the company to use the arbitration procedures and that it had the right to terminate the premium payments as an exercise of its management rights. The company's view, rejected by the circuit court, was that the union was required to initiate the grievance procedure on its claim that the company violated paragraph 140 by terminating the premium payments. Since the union did not do so, it was the company's view that it had not interfered with the arbitral process. The court held that the language of the grievance procedure employed permissive language in reference to both the union's

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[45] *Supra* note 10.
[46] 47 Stat. 70 (1932), 29 U.S.C. §§101–115 (1964).

and the company's use of that procedure; therefore, the district court had not committed error in finding that arbitration was mandatory for the company.

The circuit court also agreed with the district court's determination that the payment of monies does not automatically preclude a finding of irreparable injury. It held that proper discretion was exercised and that the injunction was appropriate under equitable principles. It rejected the company's contention that under the implementation of its final offer, the employees were not irreparably injured since they would remain covered for 30 days after premium payments were terminated and would have the option to convert their individual policies thereafter. The court found that there was nothing in the record that suggested that the strike would end within 30 days and held that the absence of earnings during the strike promised a significant risk that the employees would not be in a position to pay for the benefits and would be irreparably injured with their loss.

In dealing with the company's contention that it was entitled to dissolution of the injunction on the basis of its right to implement its last offer after an impasse in collective bargaining, the court acknowledged that unilateral changes following an impasse did not violate the Labor Management Relations Act, but held that the provisions of paragraph 140 of Section 19 of the agreement did not lapse by its terms until the end of a labor dispute and that the company had already struck a bargain with the union on this issue and was therefore precluded by the agreement from altering the substance of that bargain without union approval. The circuit court also held that the district court was justified in entering a civil contempt order.

The rationale of the *Fort Pitt Steel Casting* decisions, at both the district and appeal court levels, reflects a deep commitment to the declared federal labor policy of protecting the integrity of the arbitral process under collective bargaining agreements.

III. Relationship Between the NLRB and Arbitration

A. The Spielberg Progeny

One of the areas of Board law capable of making the hearts of most arbitrators skip a beat is that of the *Spielberg* line of cases. The National Labor Relations Board has long held that it will

defer to an arbitration award where the following three requirements are satisfied: (1) the proceedings appear to have been fair and regular, (2) all parties have agreed to be bound, and (3) the decision of the arbitrator is not clearly repugnant to the purposes and policies of the National Labor Relations Act.[47]

Five important *Spielberg* cases are here reviewed: *Union Fork and Hoe Company,*[48] *Pacific Southwest Airlines, Inc.,*[49] *Cook Paint & Varnish Co.,*[50] *Suburban Motor Freight, Inc.,*[51] and *Servair, Inc.* v. *NLRB.*[52]

The arbitrator in *Fork and Hoe* found that union steward Robert Terry McKinney was discharged for just cause. On his way to so finding, the arbitrator set forth the following standard, by which he tested the alleged misconduct in the processing of a grievance:

> "The grievant, as a Union steward, is held to a higher degree of proper conduct within the plant, because the other employees look up to the steward, and should the steward treat management in a disrespectful manner, as was true in this situation, such disrespectful conduct, or insubordination, is much more visible when a Union steward becomes engaged in such conduct, because the eyes of the entire department are on the steward. It is hoped that the grievant finds employment elsewhere and should the grievant become an official in another bargaining unit, that the grievant will learn by this experience and thereby be a better Union official, and more carefully process a claim made by another employee in the bargaining unit. . . ."[53]

In reacting to the finding of the arbitrator as quoted above, the Board commented that the arbitrator "apparently failed to consider well-established Board law that a steward is protected by the Act when fulfilling his role in processing a grievance, just as any other employee is protected by the Act when presenting a grievance to an employer."[54]

Further, the Board described its own standard for measuring the conduct of stewards as follows:

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[47] *Spielberg Mfg. Co.,* 112 NLRB 1080, 36 LRRM 1152 (1955).
[48] 241 NLRB No. 140, 101 LRRM 1014 (1979).
[49] 242 NLRB No. 151, 101 LRRM 1366 (1979).
[50] 246 NLRB No. 104, 102 LRRM 1680 (1979).
[51] 247 NLRB No. 2, 103 LRRM 1113 (1980).
[52] 607 F.2d 258, 102 LRRM 2705 (9th Cir. 1979).
[53] 101 LRRM at 1015.
[54] *Id.,* at 1015.

> "Thus, as was stated in *Clara Barton*,[55] a steward is protected by the Act 'even if he exceeds the bounds of contract language, unless the excess is extraordinary, obnoxious, wholly unjustified, and departs from the *res gestae* of the grievance procedure.' The appropriate Board standard for measuring the conduct of an employee engaged in protected concerted activities was summarized in *Prescott Industrial Products Company*, as follows: 'The Board has long held that there is a line beyond which employees may not go with impunity while engaging in protected activities and that if employees exceed this line the activity loses its protection. That line is drawn between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such character as to render the employee unfit for further service.' "[56]

The Board held that because the arbitrator's standard of conduct for stewards while engaged in protected activities directly conflicts with "well-established Board precedent,"[57] his decision was clearly repugnant to the Act and deferral was refused. The Board reasoned that this policy of not deferring to arbitration awards where the punishment of overzealous stewards is at issue "insures that the grievance and arbitration machinery is used effectively in the manner in which it was intended."[58]

In *Pacific Southwest Airlines (PSA)*, the complaint to the Board alleged that the employer had violated Section 8(a)(3) of the Act by discharging two employees, Ingalls and Sharpe, and had violated Section 8(a)(1) by refusing to permit a union steward to be present during a telephone interview with the two employees.

Ingalls and Sharpe were among the witnesses to an on-the-job drinking incident that ended in the discharge of two other employees. On August 23, 1977, the day before the scheduled arbitration hearing on the drinking incident discharges, the employer's attorney attempted to interview Ingalls and Sharpe to prepare for that hearing. After considerable discussion, including phone calls to the union office and approval from the union steward, Ingalls said he was instructed not to answer the questions. Then both Ingalls and Sharpe refused to answer questions and were suspended. On the following day PSA refused to per-

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[55]*Clara Barton Terrace Convalescent Center, a Division of National Health Enterprises-Delfern, Inc.*, 225 NLRB 1023, 1034, 92 LRRM 1621 (1976).

[56]205 NLRB 51, 52, 83 LRRM 1500 (1973).

[57]101 LRRM at 1015.

[58]*Id.*, at 1015, quoting *Barton*, at 1029.

mit a union steward to be present during telephone interviews when Ingalls and Sharpe were again asked if they would answer the questions; both employees persisted in their refusal to answer. Later, with a union steward present, a PSA official gave Ingalls and Sharpe each an opportunity to change his mind; when they still refused to respond, he discharged them.

The arbitrator found that PSA acted within its rights in attempting to interview Ingalls and Sharpe, that both should have submitted to the interview, but that because they "got caught in the middle of a struggle between two organizations,"[59] their discharge would be converted to suspensions.

The Board found that the arbitration award was not repugnant to the purposes and policies of the Act and fully met *Spielberg* standards for deferral, for the arbitrator's findings supported his conclusions and demonstrated that he considered and rejected the contentions of the General Counsel. Those findings included: (1) Ingalls and Sharpe were witnesses to the drinking incident. (2) A party to an arbitration, as an almost routine practice, interviews his witnesses to prepare for the hearing and to assess the evidence in light of a possible settlement. (3) PSA had the right to expect good-faith cooperation from Ingalls and Sharpe and did not seek disclosure of what they would testify to at the hearing or details of the union's position. (4) PSA did not go beyond legitimate inquiry into job-related conduct. (5) The interviews were not coercive. (6) PSA did not wrongfully intrude upon or interfere with the grievance procedure.

Concerning the 8(a)(1) issue, the Board observed that although PSA's refusal to permit the presence of a steward during the telephone interviews was improper, the violation was not material. PSA had allowed a steward to be present in the office interview of August 23 and at the discharge interview the following day, though not for the telephone interviews of August 24, and had allowed periodic opportunities to bolster union representation by telephone calls to the union. And during the telephone interviews, all Ingalls and Sharpe did was repeat their mistaken insistence on what they said was their right not to respond, which they again repeated at the discharge interview before being discharged.

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[59] 101 LRRM at 1367.

The Board, therefore, dismissed the complaint in its entirety, deferred to the arbitrator's award concerning Section 8(a)(1) and 8(a)(3) allegations, and concluded as follows:

> "In consideration of all the circumstances, we find that the arbitration award with respect to the *Weingarten*[60] issue is not clearly repugnant to the Act. In doing so, we do not condone Respondent's refusal of union representation, and we neither approve the arbitrator's nor reject the Administrative Law Judge's analysis of *Weingarten.*[61] Instead we find that the arbitration award does not do substantial violence to the *Weingarten* principles or to the purposes and policies of the Act and is therefore not clearly repugnant under the *Spielberg* standards."[62]

The *Cook Paint & Varnish Co.* case also involved interrogation concerning a pending grievance. In anticipation of a scheduled arbitration, the employer's counsel sought to question two employees concerning an incident for which a grieving employee had been discharged. When the two refused to cooperate, the employer threatened to discipline them. The Board found the employer's conduct in violation of Section 8(a)(1). The Board stated that whether an employer may compel its employees to submit to questioning depends on how the "delicate" balance is struck between the employer's need to maintain orderly conduct and the employees' right to make common cause with their fellow employees. "Delicate" or not, the Board indicated that the balance should be struck in favor of the employer when interrogation occurs in the "investigatory" stage of inquiry, i.e., the stage preliminary to the making of a disciplinary decision. But where a disciplinary decision has already been made, as in the instant case, the employer is engaging in "discovery," and the balance must be struck in favor of the employees' interest, for there is no general right to pretrial discovery in arbitration.[63]

The Board distinguished *PSA,* noting that in that case the arbitrator had sought to accommodate the conflicting interests and had struck the balance in favor of the employer. While the Board may not have decided the case the same way as the arbitrator, that did not necessarily mean that the arbitrator's result was "clearly repugnant to the policies" of the Act.

Quarreling with the generality of the principal opinion's ap-

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[60]*NLRB* v. *J. Weingarten, Inc.,* 420 U.S. 251, 88 LRRM 2689 (1975).
[61]The Administrative Law Judge found a violation of §8(a)(1).
[62]101 LRRM at 1368.
[63]102 LRRM at 1681.

proach and claiming that it did not apply a balancing test, Member Truesdale concurred. To prove his point, he contrasted the facts of the present case with those of *PSA.* In the present case, the employer was seeking to discover the union's position prior to arbitration. In *PSA,* the employer was interrogating certain employees to see if they could be called as company witnesses and to consider the possibility of settlement depending upon their answers. These were "legitimate" employer interests which could outweigh the employees' interests even though interrogation occurred prior to arbitration and after the disciplinary decision that was to be the subject of arbitration had already been made. In the present case, however, the employer was seeking to learn the union's case; this disclosed an illegitimate purpose of seeking to undermine the union's case.[64]

In *Suburban Motor Freight,* the Board overruled its 1974 decision in *Electronic Reproduction Service Corp.*[65] and thereby reestablished another requirement for deferral to arbitration under the *Spielberg* doctrine. In *Suburban,* a truck driver who had been discharged for alleged violations of work rules was reinstated, but with a warning, by a Local Joint Grievance Committee. The complaint before the Board included an allegation that the disciplinary action had been imposed for discriminatory and antiunion purposes, an issue that had not been presented to the joint committee in those terms. The Board refused to defer, stating that it would no longer honor the results of an arbitration proceeding under the *Spielberg* doctrine unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator. It also ruled that the burden of proof, that the statutory issue of discrimination was litigated before the arbitrator, would be imposed on the party seeking deferral. The Board expressly overruled *Electronic Reproduction Service Corp.,* in which it had held that in the absence of unusual circumstances the Board would defer to arbitration awards dealing with discharge or discipline cases, even where there is no indication that the arbitrator had considered or had been presented with the unfair labor practice issue involved.

In a strong dissenting opinion, Member Penello argued that the Board was reverting to earlier doctrine which experience had shown resulted in a party's withholding evidence of dis-

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[64] *Id.,* at 1681–82.
[65] 213 NLRB 758, 87 LRRM 1211 (1974).

crimination during arbitration in order to preserve a second opportunity to try his case in an unfair labor practice proceeding. This had a deleterious effect on arbitration, said the dissent, and for this reason the Board had correctly concluded in *Electronic Reproduction* that it

> ". . . should give full effect to arbitration awards dealing with discipline or discharge cases, under *Spielberg,* except when unusual circumstances are shown which demonstrate that there were bona fide reasons, other than a mere desire on the part of one party to try the same set of facts before two forums, which caused the failure to introduce such evidence at the arbitration proceeding."[66]

Meanwhile, in reviewing a *Spielberg*-type case from the Board, the Ninth Circuit indicated its agreement with the approach espoused by Member Penello. In the *Servair, Inc.* v. *NLRB* case, 19 employees who had struck to protest the allegedly discriminatory discharge of a union activist were themselves discharged. Their discharges were upheld in arbitration, but the Board refused to defer to the arbitrator's decision on the ground that the contractual issue of "just cause" was closely intertwined with a charge of a Section 8(a)(2) violation (unlawful employer support of a rival union) which could not be delegated to an arbitrator. The Board applied two criteria which *Baynard* v. *NLRB*[67] had added to the *Spielberg* doctrine, namely, (1) the arbitrator must clearly have decided the issue that is later presented to the NLRB, and (2) the issue must be one that is within the competence of an arbitrator to decide.

The Ninth Circuit reversed, holding the Board to the original *Spielberg* doctrine as the court interpreted it. According to the court, this meant that deferral should be exercised where a contractual issue, which may also be stated as a statutory violation, is submitted to arbitration. The court noted that nearly every alleged violation by management of a collective bargaining contract could also be framed as an unfair labor practice, and to give a losing party at arbitration a "second bite" in cases where this is so would tend to undermine the system of voluntary arbitration.[68]

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[66]*Id.,* at 1216.
[67]505 F.2d 342, 87 LRRM 2001 (D.C.Cir. 1974).
[68]Case withdrawn from publication, rehearing pending.

B. Arbitrability and NLRB Jurisdiction

In *Crescent City IAM Lodge 37* v. *Boland Marine & Mfg. Co., Inc.*,[69] the Fifth Circuit Court of Appeals held that the refusal of an NLRB regional director to issue a complaint was not a bar to arbitration of the same dispute under a collective bargaining agreement. The collective agreement contained a union-steward superseniority clause concerning overtime work assignments as well as layoff and recall. Klein, the grievant, was an outside machinist for the company for 28 years as well as an outside steward for the union for three and one-half years. The company transferred Klein to a position as inside machinist. The union, on Klein's behalf, filed a grievance, and an arbitration hearing was conducted. The arbitrator issued an award, but the union asserted that Klein's claim for overtime based on the steward's preference clause had not been disposed of. In a supplemental opinion, the arbitrator stated that the record provided insufficient evidence to rule on the overtime claim, but that the right to assert such claim "is preserved and is maintained without prejudice."[70]

Thereafter, the union again sought to arbitrate the preference overtime claim, but the company refused; whereupon the union filed an unfair labor practice charge under Section 8(a)(5) alleging the same facts which it originally sought to arbitrate. The NLRB regional director refused to issue a complaint, stating that the company's refusal to honor the steward-preference clause was lawful. The regional director based his determination on a Board decision holding that steward superseniority clauses are presumptively invalid on their face to layoff and recall, and also that the burden of rebutting that presumption is on the party asserting the clause's legality.[71]

The union filed suit in federal district court seeking an order to compel the company to arbitrate the issue.[72] The district judge granted the company's motion to dismiss on the grounds

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[69]591 F.2d 1184, 100 LRRM 3121 (5th Cir. 1979).

[70]*Id.*, at 1185.

[71]*Dairylea Cooperative, Inc.*, 219 NLRB 656, 89 LRRM 1737 (1974). The Board's rationale was that the granting of preferences to union stewards is justified only when it relates to recall or layoffs. In these instances the preference operates to facilitate the maintenance and administration of the collective bargaining agreement. Preferences regarding other aspects (overtime, choice of scheduling, etc.) of the agreement serve no such purpose.

[72]Jurisdiction was based on §301(a) of the Labor Management Relations Act, 29 U.S.C. §185 (1976).

that, according to the Board, the steward-preference clause was no longer enforceable. The union appealed, urging that the refusal by the NLRB to issue a complaint could not operate as a bar to arbitration.

The court of appeals reversed and remanded the case to the district court, with directions to compel arbitration of the grievance. First, the court distinguished the case from those in which an arbitrator's decision had been made and is found by the court to be in conflict with a Board's decision.[73] Next, citing the *Steelworkers Trilogy,* the court enunciated the appropriate guidelines to be applied in making a judicial determination of substantive arbitrability: (1) arbitration should be encouraged; (2) arbitrability depends on the collective bargaining agreement; (3) broad arbitration clauses manifest a real intention to utilize the process; and (4) exclusions must be clear and explicit. Stressing that the question of substantive contractual arbitrability is one for the courts, the court limited its role to deciding "whether the agreement on its face makes the claim asserted arbitrable." Accordingly, the court refused to project what the outcome of the arbitration of Klein's grievance might be and concluded that the broad arbitration clause in the agreement was dispositive.

In concluding that the petition for arbitration must be granted, the court also noted two Second Circuit decisions[74] which had rejected the argument that the refusal of the regional director to issue a complaint is a bar to arbitration. Those cases rejected the argument on three grounds: First, the failure to issue a complaint does not foreclose the possibility that the union may have rights and remedies under the collective bargaining agreement. Second, it is conceivable that the arbitrator could fashion a remedy under the contract that would not conflict with Board policy or the regional director's decision. Finally, the regional director's refusal to issue a complaint is not a binding determination of the dispute which precludes the union from arbitrating the issue. As a postscript, the court emphasized that its order merely compelled arbitration, as op-

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[73]It has generally been held that courts will not enforce an arbitration award that forces a party to the hearing to commit an unfair labor practice. *See Botany Indus. Inc.* v. *New York Joint Bd., Amalgamated Clothing Workers,* 375 F.Supp. 485, 86 LRRM 2046 (S.D.N.Y. 1974).

[74]*International Union of Electrical, Radio, and Machine Workers, AFL-CIO* v. *General Electric Co.,* 407 F.2d 253, 70 LRRM 2082 (2d Cir. 1968); *Luckenbach Overseas Corp.* v. *Curran,* 398 F.2d 403, 68 LRRM 3040 (2d Cir. 1968).

posed to placing "advance Court imprimatur on the award"; possible clashes between arbitral and Board determinations must await enforcement.[75]

The decision is consistent with prior case law addressing the question of whether the regional director's refusal to issue an unfair labor practice complaint operates as a bar to arbitration. The issue is deserving of analysis at two separate levels: (1) the legal effect of the NLRB's refusal to issue a complaint (i.e., res judicata or collateral estoppel), and (2) the conflict resulting from an arbitrator's ruling on the contract and the Board's interpretation of federal labor law.

It is well established that an NLRB refusal to issue a complaint has no res judicata or collateral estoppel effect.[76] Several reasons have been advanced for that proposition. First, "the Board uses different criteria in determining whether to issue a complaint from those which courts employ in adjudicating a controversy."[77] Second, any proceeding or decision by the regional director or General Counsel is administrative, and not adversarial.[78] Consequently, any application of res judicata or collateral estoppel would deny a party of his right to be heard.[79] Finally, the decision not to issue a complaint is not a final order (or final judgment on the merits) and thus can have no res judicata or collateral estoppel effect.[80]

The more significant aspect of the instant case is the conflict that may result between the Board (which interprets the federal statute) and the arbitrator (who interprets the collective bargaining agreement). If the court orders arbitration and the arbitrator enforces the steward-preference clause as it is written, then arguably the company is being compelled to commit an

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[75] *United States Gypsum Co.* v. *United Steelworkers of America,* 384 F.2d 38, 66 LRRM 2232 (5th Cir. 1968).

[76] *Pressette* v. *Int'l Talc Co., Inc.,* 527 F.2d 211, 215, 91 LRRM 2077 (2d Cir. 1975); *Smith* v. *Local 25, Sheet Metal Workers Int'l Assn.,* 500 F.2d 741, 747–748, 87 LRRM 2211 (5th Cir. 1974); *Peltzman* v. *Central Gulf Lines,* 497 F.2d 332, 334, 86 LRRM 2554 (2d Cir. 1974); *Aircraft & Engine Maintenance Employees, Local 290* v. *E.I. Schilling Co.,* 340 F.2d 286, 289, 58 LRRM 2169 (5th Cir. 1965), *cert. denied,* 382 U.S. 972, 61 LRRM 2147 (1966); *Local No. 1434, Int'l Brotherhood of Electrical Workers, AFL-CIO* v. *E.I. duPont Nemours & Co.,* 350 F.Supp 462, 465, 81 LRRM 2678 (E.D.Va. 1972).

[77] *Smith* v. *Local No. 25, supra* note 76, at 748. *See also Vaca* v. *Sipes,* 386 U.S. 171, 64 LRRM 2369 (1967), where in a footnote the court stated, "[t]he public interest in effectuating the policies of the federal labor law, not the wrong done to the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies."

[78] *Smith* v. *Local No. 25, supra* note 76, at 748; *IBEW* v. *duPont, supra* note 76, at 465.

[79] *Aircraft & Engine Maintenance Workers* v. *E.I. Schilling, supra* note 76, at 289.

[80] *Peltzman* v. *Central Gulf Lines, supra* note 76, at 334.

unfair labor practice.[81] If such an award were deemed to be in conflict with Board policy,[82] the company could file an unfair labor practice charge and obtain an NLRB ruling on the issue.

The Supreme Court must have contemplated this problem when in *Smith* v. *Evening News*[83] and *Carey* v. *Westinghouse Electric Corp.*[84] it held that the Board's unfair labor practice and representation disputes jurisdiction, respectively, do not preempt arbitral jurisdiction. Thus, the issue becomes whether the courts in Section 301 suits should effectuate Board policies by (a) denying petitions for arbitration where there is a Board-contract conflict, or (b) granting the petitions and then denying enforcement of any award that is clearly in conflict with Board policy. Alternatively, the courts might choose not to effectuate the Board's policies at all. Thus far they have not chosen this alternative.[85] Instead, they have chosen alternative (b) above, enforcing petitions for arbitration where there is potential conflict[86] and then denying enforcement of awards which either do not comport with NLRB policy or compel the commission of unfair labor practices.[87]

There are several persuasive reasons for the courts' choice: (1) Courts are not supposed to pass on the merits of grievances in their determination of arbitrability.[88] (2) The arbitrator may incorporate the federal statutes and Board policies into the in-

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[81]In light of the Board's determination in *Dairylea, supra* note 71, enforcement of the provision would result in violations of §§8(a)(2) and 8(a)(3) of the Labor Management Relations Act (supporting a labor organization, and discrimination in regard to terms or conditions of employment to encourage membership in a labor organization).

[82]See *Dairylea, supra* note 71.

[83]371 U.S. 195, 51 LRRM 2646 (1962).

[84]375 U.S. 261, 55 LRRM 2042 (1964).

[85]*Supra* note 73.

[86]However, several courts have held that if the grievant is seeking to compel arbitration under a contract provision which the NLRB has already found to violate the Labor Management Relations Act, or is seeking to have the arbitrator compel conduct which the Board has held will violate the Labor Act, the court in the §301 action should sustain a defense to arbitration. *See Oil Workers* v. *Cities Service Oil Co.*, 277 F.Supp. 665 (N.D.Okla. 1967); *Smith Steel Workers* v. *A.O. Smith Corp.*, 421 F.2d 1 (7th Cir. 1969). In each case, however, the Board's ruling dealt specifically with the parties at bar. The courts did not rely on mere precedent.

[87]*Carey* v. *Westinghouse Electric Corp., supra* note 84: "Should the Board disagree with the arbiter . . . the Board's ruling would, of course, take precedence." *Id.*, at 272, *and see* note 76 *supra* and accompanying text for decisions dealing with petitions for arbitration. See *Botany Indus., supra* note 73, where enforcement of an arbitral award was denied on the grounds that it compelled a violation of §8(e) of the Labor Management Relations Act. *See also Luckenbach Overseas Corp.* v. *Curran, supra* note 74 (conflicting award subject to review and correction in courts). *But see* discussion of *General Warehousemen, Teamsters Local 767* v. *Standard Brands, Inc.*, 579 F.2d 1282, 99 LRRM 2377 (5th Cir. 1977) in the 1979 Report of this committee, pp. 265–267, 1979 NAA Proceedings.

[88]*See Steelworkers Trilogy, supra* note 3.

terpretation of the contract and no conflict will result.[89] (3) The arbitrator may fashion a remedy not inconsistent with Board policies.[90] (4) The Board might alter its policies during the time it takes to complete the arbitration and enforce the award. (5) In the event an award does issue which is inconsistent with the Board's policy, the matter could be determined by the Board in an unfair labor practice proceeding, and the Board's decision would take precedence over any conflicting arbitration award.[91]

C. Work-Assignment Disputes

UMW Local 1269 (Ritchey Trucking, Inc.)[92] involved a Section 10(k) work-assignment dispute between two locals of the UMW. A full panel of the NLRB, with one member dissenting, quashed the notice of hearing on the ground that the parties had agreed upon a method for voluntary adjustment of the dispute. The Board relied on the existence of a provision for arbitration in the collective bargaining agreement between an employers' association and the international body of the union which by its terms bound all affected employers and local unions, although it was conceded that the agreement did not provide capability for an employer to initiate arbitration or for all the affected parties to participate in the same arbitral proceeding. In so holding, the Board noted that "in deciding whether the Board lacks jurisdiction to proceed with an 8(b)(4)(D) complaint, we focus our inquiry on the existence, not the substance, of an agreed-upon method for the voluntary adjustment of the work dispute."[93]

In a strong dissenting opinion, Member Jenkins took the position that an arbitral decision based on a hearing at which only one of the competing unions and one of the members of the employers' association are heard "falls short of the statutorily specified 'agreed-upon method' of adjudicating disputes."[94]

It is clear from the legislative history that Section 10(k) was designed to provide, both to the public and to neutral employers, relief from the disruptive effects of jurisdictional work stoppages. The statutory provision was enacted to give to the Board primary authority to settle such disputes on the merits on the

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[89]*See* F. Elkouri and E.A. Elkouri, How Arbitration Works (2d ed. 1973) 328–338.
[90]*Supra* note 87.
[91]*See* notes 86 and 87, *supra.*
[92]241 NLRB No. 16, 100 LRRM 1496 (1979).
[93]*Id.*, at 1498.
[94]*Id.*, at 1498.

same basis as would an impartial arbitrator. But the Board is authorized to make a Section 10(k) determination on the merits only after first establishing that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties do not have an agreed-upon method for the voluntary settlement of the dispute. This latter determination reflects the policy of Congress in favor of voluntary dispute resolution.

Although the Board early on was reluctant to decide Section 10(k) disputes on the theory that such a course of action would clash with congressional policy in favor of voluntary dispute resolution, the Supreme Court held that the Board was indeed required to gear itself toward effectuating such dispute settlements. In *NLRB* v. *Radio Engineers Union (CBS),*[95] the Court stated that under Section 10(k) "it is the Board's responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then to award such tasks in accordance with its decision."[96]

Following this mandate, the Board had consistently followed a pattern of considering the parties' agreed-upon method to be insufficient where the employer, as a necessary party, was excluded from the voluntary arbitration process. This stance was seriously challenged only once, by the District of Columbia Court of Appeals in *Plasterers Local 79* v. *NLRB.*[97] That appellate decision was reversed in *NLRB* v. *Plasterers Local 79,*[98] where the Supreme Court agreed with the Board that it was not required to defer its jurisdiction to a process of voluntary dispute settlement which does not include all the parties. In rejecting the D.C. court's argument that the unions were effectively the only real parties to the dispute, the Court noted that the Board since 1947 has accorded necessary party status to employers.

With reference to the policy considerations of *CBS, supra,* the Court noted:

> "Although this Court has frequently approved an expansive role for private arbitration in the settlement of labor disputes, this enforcement of arbitration agreements and settlements has been predicated on the view that the parties have voluntarily bound themselves to such a mechanism at the bargaining table. . . . Section 10(k) contemplates only a voluntary agreement as a bar to a Board decision."[99]

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[95]364 U.S. 573, 47 LRRM 2332 (1961).
[96]*Id.*, at 586.
[97]449 F.2d 174, 74 LRRM 2575 (D.C. Cir. 1970).
[98]404 U.S. 116, 78 LRRM 2897 (1971).
[99]78 LRRM at 2903.

In three previous 10(k) determinations construing the same collective bargaining agreement between the Bituminous Coal Operators Association (BCOA) and the UMW, the Board had consistently found that the method of dispute settlement was sufficient to bind the employers' association members and voluntary signatories. See *United Mine Workers Local 1979 (Consolidated Coal Company),*[100] *United Mine Workers Local 1368 (Bethlehem Mines Corporation),*[101] and *United Mine Workers Local 1600.*[102] In *Consolidated Coal* and *Bethlehem Mines,* a panel of Murphy, Fanning, and Penello interpreted the arbitration clause in response to an employer contention that because the provision was for two-party dispute resolution, it could not suffice for an agreed-upon method relative to excluded parties:

> "However, the term 'employer,' as used in the agreement, refers to all coal operators who are signatories to the agreement and the term 'union' refers to all locals of the UMWA. . . . Thus we conclude that the only logical interpretation of the agreement allows the parties to participate in any arbitral proceeding directly affecting their interests."[103]

Thus, the Board's earlier acceptance of this method as sufficient for its deferral relied upon the assumption that all the parties would indeed have access to the arbitral process and would not be barred by a two-party procedure.

In *UMW Local 1600,* Member Murphy expressed some reservation with the Section 10(k) deferral practice of the Board. Footnote 6 noted:

> "While Member Murphy has heretofore adhered to the view that where an agreed-upon method exists the parties must resort to that procedure, she may deem it appropriate to reconsider her position in the event it appears from a series of cases that an existing method is ineffective or is not being used by the parties."[104]

Member Jenkins has consistently taken a strict scrutiny posture and would have the Board adhere to the mandate of the Supreme Court, as he sees it, of the Board's duty to protect the public and neutral employers from the disruption of jurisdictional disputes. To be consistent with that mandate, he would have the Board not defer to the "shadow" of an agreed-upon method which effectively excludes the employer from the arbi-

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[100] 227 NLRB 815, 94 LRRM 1689 (1977).
[101] 227 NLRB 819, 94 LRRM 1692 (1977).
[102] 230 NLRB 830, 95 LRRM 1405 (1977).
[103] 94 NLRB at 1692.
[104] 230 NLRB at n. 6.

tral process. See Jenkins's dissent in *Capitol Air Conditioning.*[105] In that same case Member Walther in dissent suggested that deferral be restricted to cases not only where there exists a method, but where the parties show an actual activation of the method that will resolve the dispute. Walther referred to frustration of congressional policy where the Board does not ensure that the dispute is actually resolved.

Based on its own precedents in considering whether an employer is considered a party to the private dispute-resolution process and the decision of the Supreme Court in *Plasterers Local 79,* the decision in *Ritchey Trucking* is surprising. The previous UMWA cases implied that if the contract did not allow for full participation of all affected parties, the Board would not defer. But when faced squarely with that question in *Ritchey,* the Board decided that the standard is simply the mere existence of an agreed-upon method of dispute resolution.

The Board distinguished *Plasterers Local 79* by noting that all the parties involved in that case were signatories to the agreement, but it ignored the rationale that the crucial question was whether the affected employer had an opportunity to participate in the arbitration proceedings. The Board noted further that the remaining employers can indeed be involved in the process by waiting until the union with which they have contracted decides to seek arbitration. In effect, the Board's decision places certain employers in the position of having to stand by until the disputing unions push the right buttons to bring the employers into the process.

The final decision reviewed in this report concerns the desirability of securing tripartite arbitration of jurisdictional disputes. Whether this end should be achieved at the expense of vacating the awards in two arbitration proceedings, each of which awarded the same work to a different union under different collective bargaining agreements, was the issue in *Louisiana-Pacific Corp.* v. *International Brotherhood of Electrical Workers, AFL-CIO, Local Union 2294.*[106] The court's answer to this narrow question was in the negative.

The company was a party to two collective agreements, with local unions of both the Association of Western Pulp and Paper Workers (Pulp Workers) and the International Brotherhood of

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[105]224 NLRB 985 (1976).
[106]600 F.2d 219, 102 LRRM 2070 (9th Cir. 1979).

Electrical Workers (IBEW), each of which represented different employees of the company in separate bargaining units. The company assigned certain maintenance work on a generator to employees represented by IBEW. The Pulp Workers, believing that this was work which should have been assigned to them, filed a grievance, processed it to arbitration under their collective bargaining agreement, and obtained an award holding that the work should have been assigned to the Pulp Workers and directing the company to pay the Pulp Worker employees for the hours of work lost. The company filed suit to vacate the award and to secure an order compelling tripartite arbitration. On summary judgment, the court confirmed the award and denied the request for tripartite arbitration. The IBEW took no part in these proceedings, and the company neither requested not sought to compel tripartite arbitration until after the arbitrator's award in the Pulp Workers' grievance.

After that award had been confirmed by the court, however, the IBEW, feeling that its right to the assignment of similar work in the future was being jeopardized, filed a grievance under its collective agreement. After processing it to arbitration, it obtained an award declaring that the work had been properly assigned by the company to IBEW employees. The company again filed suit to vacate and to obtain tripartite arbitration of the dispute. On summary judgment, this award was also confirmed, and the request for tripartite arbitration was likewise denied. The company appealed from the decisions of the district court's refusing to vacate the two respective awards, and the two cases were consolidated on appeal before the Ninth Circuit.

Actions to review or vacate arbitration awards are normally governed by the test established in *Steelworkers* v. *Enterprise Wheel and Car Corp.*[107] Under this test, the award can be set aside only if it fails to "draw its essence" from the agreement. Here, the company made no claim that the two awards failed to draw their essence from the agreement, or that the arbitrators were guilty of fraud or bias,[108] or even that the two arbitrators made the incorrect decision under either of the two agreements. Instead, the company contended that the inconsistency of the two awards was sufficient grounds to vacate.

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[107] *Supra* note 3.
[108] *See* 9 U.S.C. §10.

To support this proposition, the company cited *Transportation-Communication Employees Union* v. *Union Pacific Railroad Company,*[109] in which a jurisdictional dispute had been referred to the National Railway Adjustment Board for resolution pursuant to the Railway Labor Act. One of the unions involved, however, refused to take part in the proceedings and the other parties made no effort to compel its participation. The lower federal courts refused to enforce the ensuing Board award because of the absence of an indispensable party and the Supreme Court affirmed, holding that it was the Board's duty under the Act to settle the dispute between all the parties in one proceeding; therefore, the court ordered that the dispute be remanded to the Board for tripartite arbitration. The Ninth Circuit, in *Louisiana-Pacific,* however, distinguished *Transportation Union* on the ground that under the Railway Labor Act the Adjustment Board had exclusive jurisdiction to hear and determine the dispute; whereas, in the instant case, where the Railway Labor Act has no application, the arbitrator's authority is derived not from statute but solely from the parties' own respective collective bargaining agreements.

The deciding consideration for the court in refusing to vacate the two awards and to order tripartite arbitration was the company's failure to secure either a contractual or judicial solution to the dispute prior to the arbitration of the first grievance. The court cited *Carey* v. *Westinghouse Electric Corp.,*[110] which held that the courts may order bilateral arbitration of jurisdictional disputes even though the dispute might later come under the jurisdiction of the Board in an unfair labor practice proceeding. The court in *Carey* noted that only one union would be involved in the arbitration and that an award might not settle the controversy. The court, however, went on to say: "Yet the arbitration may as a practical matter end the controversy or put into movement forces that will resolve it."[111]

In the Ninth Circuit's view, since jurisdictional disputes arise frequently, and since after *Carey* the company should have been aware that it would be required to arbitrate such disputes with each of the disputing unions under their respective collective bargaining agreements, the company should have either (1)

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[109]385 U.S. 157 (1976).
[110]*Supra* note 84.
[111]*Id.,* at 265.

contracted with the unions involved for trilateral arbitration, or (2) secured a court order compelling trilateral arbitration under Section 301 of the LMRA prior to the arbitration of the Pulp Workers' grievance. As to the contractual solution, the court noted that in the construction industry, where such disputes are frequent, the unions and employer associations have established a "Plan for Settlement of Jurisdictional Disputes" which is commonly incorporated by reference into local collective agreements. As to the judicial solution, the court cited, without itself deciding the issue, the Second Circuit's opinion in *Columbia Broadcasting System, Inc.* v. *American Recording and Broadcasting Association,* [112] which held that tripartite arbitration of jurisdictional disputes can be ordered under Section 301 of the LMRA prior to the commencement of bipartite arbitration of the dispute under either of the unions' agreements. Because it chose not to take advantage of either the contractual or judicial remedies available to avoid its present predicament, the company, in the court's view, must now bear the consequences of its failure to act.

[112] 414 F.2d 1326, 72 LRRM 2140 (2d Cir. 1969).