CHAPTER III

THE ARBITRATOR AND THE NLRB

I. ARBITRATION AND THE NLRB—A SECOND LOOK

ARNOLD ORDMAN*

In June 1964 I put the question whether there was or could be a happy marriage between the National Labor Relations Board and the arbitral process.[1] Since that time some of the obstacles to a successful union have been removed; others have merely been more sharply identified. Complete harmony is not yet assured, but now, as then, we can take comfort from the fact that there is a dedicated effort on both sides to make the marriage work.

Let us take a second look.

Long before the *Steelworkers* trilogy the National Labor Relations Board indicated its awareness of the importance of arbitration in the system of industrial self-government the Act was designed to promote.[2] After all, its first and second chairmen, J. Warren Madden and Harry A. Millis, had been distinguished arbitrators before the enactment of the Wagner Act. And Dr. William M. Leiserson came to the Board in 1939 with an outstanding record as one of America's foremost arbitrators.

In 1955 the Board in its landmark decision in *Spielberg Manufacturing Co.*[3] honored an arbitration award that denied reinstatement to certain individuals allegedly guilty of strike misconduct. The Board stated that it would honor an arbitration award where

* General Counsel, National Labor Relations Board, Washington, D. C.

1 "Arbitration and the NLRB—A Happy Marriage?" Address by writer before the Midwest Seminar on Advanced Arbitration, University of Chicago, Center for Continuing Education, Chicago, Illinois, June 5, 1964.

2 *Consolidated Aircraft Corp.*, 47 NLRB 694, 12 LRRM 44 (1943), enf'd as modified 141 F.2d 785, 14 LRRM 553 (9th Cir., 1944).

3 112 NLRB 1080, 36 LRRM 1152 (1955).

"the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." [4]

The Board thus recognized in situations where an arbitration award has been rendered the public interest in fostering private arbitration. The *Spielberg* safeguards were required to foreclose the possibility that the encouragement of private adjudication of disputes might be undertaken at the expense of the public rights the National Labor Relations Act is designed to guarantee.

There are differences between the private grievance-arbitration process formulated to enforce contractual rights and duties and the statutory administrative processes of the Board established to protect and enforce ". . . the rights of the public in connection with labor disputes affecting commerce." [5] The Board's power and duty to prevent unfair labor practices stems from Section 10 (a) of the National Labor Relations Act, which provides that the Board's power to remedy unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." These statutory provisions make it manifest that the Board is a public instrumentality enforcing "public rights." [6] The parties may not by private contract either circumvent or limit the Board's jurisdiction.[7] The Board "is not just an umpire to referee a game between an employer and a union." [8]

An arbitrator, on the other hand, is the creature and servant of the parties selected to determine disputes arising under the system of private law found in the collective bargaining contract and in the practices and customs which illuminate the nature and extent of the promises and arrangements evidenced by that contract. He has a limited charter "in a system of self-government created by

---

[4] *Id.* at p. 1082.
[5] Section 1 (b), Labor Management Relations Act.
[6] See *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 264, 266-268 (1940), 6 LRRM 669; *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 365 (1940), 6 LRRM 674; *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 264-265, 267-269 (1938), 3 LRRM 645.
[7] See *NLRB* v. *Walt Disney Productions*, 146 F.2d 44, 47-49, 15 LRRM 691 (9th Cir., 1944), *cert. denied*, 324 U.S. 877 (1945), 16 LRRM 918; *Lodge 743, Machinists* v. *United Aircraft Corp.*, 337 F.2d 5, 57 LRRM 2245 (2nd Cir., 1964), *cert. denied* 380 U.S. 908 (1965), 58 LRRM 2496.
[8] *Shoreline Enterprises* v. *NLRB*, 262 F.2d 933, 43 LRRM 2407 (5th Cir., 1959).

and confined to the parties." [9] The arbitrator, therefore, determines private rights and private duties stemming from a private contract.

The *Steelworkers* trilogy [10] emphasized the importance in the general statutory scheme of labor arbitration as a means for the promotion of industrial peace. The Board's hospitality to the arbitration process was manifested in *Spielberg,* and the Board subsequent to the trilogy further evidenced its recognition of arbitration as "an instrument of national labor policy for composing contractual differences" [11] discerned by the Supreme Court from the Court's reading of Sections 301 [12] and 203 (d) [13] of the Labor Management Relations Act.

The process of accommodation between the public interest in the voluntary resolution of disputes by the parties themselves as expressed in the trilogy and in Section 203 (d) and the public interest in protecting the rights of employees, employers, and unions under the Labor Management Relations Act was bound to reveal areas of compatibility but also areas of overlap and to some extent conflict.

The Supreme Court soon put to rest the notion that the preemption doctrine of such cases as *Garmon* [14] was relevant to a suit

---

9 Shulman: "Reason, Contract and Law in Labor Relations," 68 *Harv. L. Rev.* 999, 1016 (1955).

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

11 *International Harvester Co.,* 138 NLRB 923, 926, (1962), 51 LRRM 1155, *aff'd sub. nom. Ramsey* v. *NLRB,* 327 F.2d 784, 55 LRRM 2441 (7th Cir., 1964), *cert. denied,* 377 U.S. 1003 (1964), 56 LRRM 2544.

12 Section 301 (a) provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to citizenship of the parties."

13 Section 203 (d) provides: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases."

14 *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959), 43 LRRM 2838.

for violation of a collective bargaining agreement.[15] And the Court also made it clear that the preemption doctrine does not bar a suit under Section 301 for breach of a collective bargaining agreement even though the identical conduct would also constitute a basis for an unfair labor practice proceeding.[16] If conflict should arise, however, the Court noted in *Carey* v. *Westinghouse,* the Board's authority is superior.[17]

The *Spielberg* standards are designed to balance these sometimes competing interests in a fashion compatible with the statutory objectives. There are now a substantial number of cases in which the rather generalized *Spielberg* standards have been applied.

Board Practice and Procedure Where Grievance-Arbitration Procedures Have Culminated in an Award

Arbitration Awards in Unfair Labor Practice Cases

The *Spielberg* doctrine has obvious application, of course, in situations in which the grievance-arbitration procedure has culminated in an award. The fairness and regularity requirement has not been met where the discharged employee did not receive adequate notice,[18] was denied counsel,[19] or refused to participate under circumstances showing union hostility toward him.[20] And when the arbitrator in adjudicating the alleged contract violation has not passed upon the unfair labor practice issue the Board under well-established policy will not honor the award.[21]

The composition of the tribunal must be such as will insure that the grievant will be afforded a fair and impartial hearing. Bi-

---

15 *Teamsters* v. *Lucas Flour Co.,* 369 U.S. 95 (1962), 49 LRRM 2717.
16 *Smith* v. *Evening News Association,* 371 U.S. 195 (1962), 51 LRRM 2646.
17 *Carey* v. *Westinghouse,* 375 U.S. 261 (1964), 55 LRRM 2042.
18 *Gateway Transportation Company,* 137 NLRB 1763, 50 LRRM 1495 (1962).
19 *Honolulu Star Bulletin,* 123 NLRB 395, 43 LRRM 1449 (1959).
20 In *International Harvester Company,* 138 NLRB 923, 51 LRRM 1155 (1962) *enf'd sub nom. Ramsey* v. *NLRB,* 327 F.2d, 55 LRRM 2441 (CA 7, 1964), where the grievant did not agree to be bound by the award, had no notice of the hearings and did not participate in them, the Board noting that the employee's interests were vigorously defended by the employer nevertheless honored an award requiring the employer to discharge the employee.
21 *Monsanto Chemical Co.,* 130 NLRB 1097, 47 LRRM 1451 (1961); *La Prensa, Inc.,* 131 NLRB 527, 48 LRRM 1076 (1961); *cf. Tex-Tan Welhausen Company,* 159 NLRB No. 141, 62 LRRM 1534 (1966).

partite committees as such are not foreclosed,[22] but where, as in a hiring-hall case or discharge case, the circumstances are such that submission to a bipartite committee composed of representatives of the contracting parties would constitute a reference of the grievance to a tribunal the members of which would be arrayed in common interest against the grievant, the necessary safeguards of fairness and regularity are absent.[23]

An interesting problem is presented where the Board's investigation results in the disclosure of important evidence that was not presented to the arbitrator in the hearing before him and, therefore, not considered by him in making his determination. Should the Board honor the award?

In *Precision Fittings, Inc.*,[24] on its face and upon the evidence before the arbitrator, the award seemed to meet *Spielberg* standards. Indeed, special counsel represented the dischargee.

At an arbitration hearing the dischargee, who had been active in conduct looking toward the decertification of the incumbent union, was said by the management witnesses to have been discharged for having falsified his employment application and for having failed to report for overtime work the preceding Saturday. In dealing with the evidence that the discharge took place only a few days after the employee had drawn up a second decertification petition, the arbitrator noted that this evidence was only circumstantial. As to an alleged disparateness in treatment between the dischargee and other employees for offenses charged, the arbitrator concluded that the evidence was insufficient to show such disparateness and that the dischargee had in fact been discharged for the reasons assigned by the employer.

At the hearing before the NLRB trial examiner, a former company vice-president who held that position at the time of the discharge testified and gave an entirely different version of the events

---

[22] *Denver-Chicago Trucking Company*, 132 NLRB 1416, 48 LRRM 1524 (1961); *Modern Motor Express, Inc.*, 149 NLRB 1507, 58 LRRM 1005 (1964).
[23] *Roadway Express, Inc.*, 145 NLRB 153, 54 LRRM 1419 (1963); *Youngstown Cartage Company*, 146 NLRB 305, 55 LRRM 1301 (1964); see *Lummus Company*, 142 NLRB 517, 53 LRRM 1072 (1963); see *Local 469, etc. (Associated Plumbing Contractors of Arizona)*, 149 NLRB 39, 45-46, 57 LRRM 1257 (1964).
[24] 141 NLRB 1034, 52 LRRM 1443 (1963).

relating to the discharge. According to his testimony, which was credited by the trial examiner, a pretext was sought by the management for discharging the grievant and found in the discovery that the dischargee had omitted mentioning a prior employment in his application for employment. The trial examiner and the Board held the discharge to be discriminatory and refused to honor the award because the proceeding was neither fair nor regular. The *Spielberg* standards were subverted. The employer's withholding from the arbitrator the one fact peculiarly within its knowledge which would have shown that the discharge was based on a pretext fraudulently concealed the facts. Such circumstances, it was held, nullify any justification for the Board's yielding its statutory power to a private instrumentality.

Repugnancy to the policies of the Act will, under *Spielberg* standards, if found in an award, result in the Board's refusal to honor it. A series of discharge cases illustrate this principle.

In *Virginia-Carolina Freight Lines, Inc.*,[25] the arbitrator upheld the discharge of an employee for seeking Board assistance in a dispute he had with the employer. The Board refused to honor the award.

Where the arbitrator's award results in a retroactive application of a union-security clause in violation of the Act, it is clear that the Board would refuse to honor such an award.[26]

And where an arbitration award upholds a discharge of employees for causing a work stoppage as a violation of a collective bargaining agreement, the Board will refuse to honor the award if the work stoppage is a protected activity because it was provoked by employer unfair labor practices.[27]

Arbitration Awards in Representation Cases

The Board has held that the *Spielberg* doctrine is applicable to representation disputes. In *Raley's, Inc.*,[28] an arbitrator had found

[25] 155 NLRB No. 52, 60 LRRM 1331 (1965).
[26] *Monsanto Chemical Co.*, 97 NLRB 517, 26 LRRM 1126 (1951) (pre-*Spielberg*).
[27] See *Ford Motor Company*, 131 NLRB 1462, 48 LRRM 1280 (1961), where a majority of the Board viewed the arbitrator's award as not ruling upon the unfair labor practice issue.
[28] 143 NLRB 256, 53 LRRM 1347 (1963).

that certain employees were covered by the contract between the parties to the arbitration proceeding. Subsequently, a petition was filed with the Board by a rival union seeking to represent the same employees that the arbitrator had ruled were covered by the contract. The Board, stating that it would apply *Spielberg* standards in representation proceedings as well as in unfair labor practice proceedings when an arbitral award is relied upon by one or more parties, held the contract to be a bar. The award was found consistent with Board principles, and petitioner's absence from the arbitration proceeding was deemed immaterial since the employer in the arbitration proceeding had vigorously contended that the contract did not cover the employees in dispute, a position identical with that urged by the petitioner in the representation proceeding.

The application of the rule in the *Raley's* case has been limited in several recent Board cases.[29] Of particular interest to this audience is the Board's decision in *Westinghouse Electric Corporation.*[30] That case is the aftermath of *Carey* v. *Westinghouse.*[31] In that case the IUE was certified as the representative of the production and maintenance employees. The contract contained an arbitration clause relating to unresolved disputes involving the "interpretation, application or claimed violation" of the contract. IUE grieved concerning the alleged performance by certain employees in the salaried and technical employees unit of production and maintenance work. The salaried unit was represented by another union, the Salaried Employees Association. Westinghouse refused to arbitrate, claiming the controversy was a representation matter within the exclusive jurisdiction of the Board. The state courts so held when IUE sued to compel arbitration. The Supreme Court reversed.

The Supreme Court held that, whether the dispute was regarded as a jurisdictional dispute or as a representation dispute, arbitration was not precluded between the contracting parties even though only one of the two unions would be a participant and bound by the result. Arbitration might, said the Court, have some

---

[29] *Hotel Employers Association of San Francisco,* 159 NLRB No. 15. 62 LRRM 1215 (1966); *Pullman Industries,* 159 NLRB No. 44, 62 LRRM 1273 (1966).
[30] 162 NLRB No. 81, 64 LRRM 1082 (1967).
[31] 375 U.S. 261 (1964), 55 LRRM 2042.

therapeutic value or, indeed, if the award should run against the participating union, end the controversy. The Court found, therefore, that arbitration could be ordered, stating, however, that "The superior authority" of the Board might "be invoked at any time." [32]

Subsequent to the decision in *Carey* v. *Westinghouse,* the arbitration was held between the IUE and Westinghouse. The Board had deferred action on motions for clarification of the certification of IUE and of the Salaried Employees Association filed after the issuance of the Supreme Court's decision by the employer pending the outcome of the arbitration between IUE and Westinghouse.[33]

The arbitrator found that the issue before him was a representation issue. He split the unit in the sense that he divided the employees whom the IUE claimed to represent into two groups based upon the wage level of the individual employees.

The Board also found that it was a representation issue because the IUE disputed the unit placement of the employees doing the work and complained of the failure to apply the IUE agreement to those employees. The IUE did not seek to replace employees represented by the SEA with its own members.

The Board first addressed itself to the question of the weight to be accorded to the arbitration award where all the parties were not before the arbitrator and two contracts were involved. The Board said that the *Hotel Employers Association of San Francisco* case [34] limited the scope of its decision in *Raley's* because in *Raley's* the contested question whether the contract included a specified group of employees was the sole issue presented to the Board. In *Raley's,* also, the Board had found the arbitrator's award to be consistent with Board principle. In *Hotel Employers Association,* however, the Board noted that the award in that case interpreting the contract did not resolve the ultimate issue concerning representation because the arbitrator did not consider the claim of a rival union to represent the employees in question. The Board concluded that in *Westinghouse,* as in *Hotel Employers,* the ultimate issue of representation could not be decided by the arbitrator's interpreting

---

[32] *Id.* at p. 272.
[33] The SEA also filed a petition seeking clarification of its certification.
[34] See footnote 29, *supra.*

the contract under which he was authorized to act but could be resolved only by utilization of Board criteria for making unit determinations. In such cases the arbitrator's award must "clearly reflect the use of and be consonant with Board standards." [35] Accordingly, the Board, while giving "some consideration to the award," applied its own criteria and made a different unit allocation.

Would the Board have reached a different result if SEA had been a party to the arbitration proceeding? If it is assumed that the same award would have issued, the award would still not have been consonant with Board standards and therefore would not have been honored by the Board.

If this analysis is correct, the pivotal issue here is less the participation of an interested party than it is the failure to apply established Board criteria.[36]

This brief review of the application of *Spielberg* standards in post-award cases by the Board should not be regarded as indicating that the process of accommodation between the arbitration process and the Board processes is malfunctioning. These cases illustrate situations in which *Spielberg* standards were not met. That is only a part of the picture. There are, of course, other cases in which the Board has honored awards.[37] And there are still other cases that never reach the stage of issuance of complaint because the regional office involved has stayed action on an unfair labor practice charge awaiting the outcome of an arbitration proceeding and has thereafter honored the award after review in the light of the *Spielberg* standards.

Board Practice and Procedure Where Contract Grievance-Arbitration Provisions Exist but Have Not Been Used or Completed

While the Board will exercise its discretion based upon the circumstances of a particular case, the exhaustion of contract reme-

---

[35] See fn. 30, *supra* at p. 1083.
[36] Compare *International Harvester, supra,* n. 20.
[37] *I. Oscherwitz & Sons,* 130 NLRB 1078, 47 LRRM 1415 (1961); *Goodyear Tire & Rubber Co.,* 147 NLRB 1233, 56 LRRM 1401 (1964); *International Shoe Company,* 151 NLRB 693, 58 LRRM 1483 (1965).

dies is not normally required by the Board in discharge or other cases that involve statutory questions.[38]

Where, however, the arbitration stage has been reached and arbitration is imminent, the Board will normally refrain from determining the unfair labor practice issue pending rendition of the arbitration award.[39] In *Dubo,* although a trial examiner had issued his initial decision, the Board deferred consideration of the discriminatory-discharge issues in view of the issuance of a federal-court order requiring the respondent employer to arbitrate the discharges under the collective bargaining contract.

In practice, the regional offices, when a charge is pending and the grievance-arbitration procedure is being actively pursued, will defer action on the charge pending the completion of the grievance-arbitration procedure and will encourage active resort to the grievance-arbitration procedure if it appears that there is a substantial likelihood that the utilization of the procedure will set the dispute at rest.

At this point it may be helpful to examine Board cases in situations where the grievance-arbitration procedure has not been resorted to, or the grievance procedure was initiated but broken off.

First, let us examine an illustrative discharge case. In *Thor Power Tool Company,*[40] the Board found that the dischargee had been discharged in violation of the Act for participation in the grievance procedure. The Board noted that neither the company nor the union had sought to invoke arbitration, that the grievance procedure had been stopped at the stage prior to arbitration, and that the charging employee did not have the right under the contract to require further action under the grievance procedure.

The unilateral-action area has been the subject of a number of important Board cases in which a defense to a refusal to bargain was predicated upon a failure to resort to the arbitration process.

---

[38] *Cloverleaf Division of Adams Dairy,* 147 NLRB 1410, 56 LRRM 1321 (1964); *Smith Cabinet Mfg.,* 147 NLRB 1506, 56 LRRM 1418 (1964); *Aerodex, Inc.,* 149 NLRB 192, 57 LRRM 1216 (1964).

[39] *Dubo Mfg. Co.,* 142 NLRB 431, 53 LRRM 1070 (1963).

[40] 148 NLRB 1379, 57 LRRM 1161 (1964), *enf'd* 351 F.2d 584, 60 LRRM 2237 (CA 7, 1965).

The Board has repeatedly held that it is not precluded from resolving an unfair labor practice issue merely because as an incident to such a resolution the Board may be required to construe the scope of a contract which an arbitrator is also empowered to construe.[41]

The *C & C Plywood Corporation* case,[42] recently affirmed by the Supreme Court,[43] is of interest in this area. The contract set forth a wage scale and also provided that the employer reserved the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude, or the like. Shortly after the contract was executed, the employer posted a notice that a premium-pay schedule would be instituted for members of a glue-spreader crew who would receive increased pay over and above the contractually specified rates whenever the crew as a whole met certain production standards within a two-week period. The employer placed this pay schedule in effect without prior notice to or bargaining with the union. Upon complaint by the union the employer refused to rescind the incentive-pay plan, although he offered to discuss it. There was no arbitration clause in the contract. The union filed unfair labor practice charges with the Board alleging a violation of the employer's bargaining obligation, and a complaint was issued. The Board rejected the employer's contention that it lacked jurisdiction to adjudicate the unfair labor practice issue because the company's contention that its unilateral action was authorized by the "premium pay" provision of the contract raised a question of contract interpretation. The Board found that the premium-pay clause was intended to authorize individual merit increases and not to give the employer the right unilaterally to raise wages of entire crews if they met certain production standards. The Board found a violation of Section 8 (a) (5) and issued a remedial order.

The Ninth Circuit denied enforcement of the Board's order. The court held that the Board has no power to interpret a collec-

---

41 *Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410, 56 LRRM 1321 (1964); *Smith Cabinet Manufacturing Company, Inc.*, 147 NLRB 1506, 56 LRRM 1418 (1964); *Huttig Sash & Door Company, Inc.*, 154 NLRB No. 67, 60 LRRM 1035 (1965); *Century Papers, Inc.*, 155 NLRB No. 40, 60 LRRM 1320 (1965); *C & S Industries*, 158 NLRB No. 43, 62 LRRM 1043 (1966).

42 148 NLRB 414, 57 LRRM 1015 (1964).

43 385 U.S. 421 (1967), 64 LRRM 2065.

tive bargaining agreement. When the employer claims that his unilateral action is privileged by the agreement, the court said, the Board loses its jurisdiction to determine whether an unfair labor practice has been committed until the contract issue has first been resolved by the courts or, where the contract contains an arbitration provision, by the arbitrator.

The Supreme Court rejected the employer's contention that, since the contract contained a provision arguably allowing the employer to act unilaterally, the Board was powerless to construe the contract to determine whether the provision did authorize the employer's action because that question must be determined by a court under Section 301. The contract here did not provide for arbitration. Consequently, there was no possible conflict with the trilogy. Here the Board limited itself to enforcing "a statutory right which Congress considered necessary to allow labor and management to get on with the process of reaching fair terms and conditions of employment. . . ." The Board only construed the contract to the extent necessary to determine whether the union had waived such statutory safeguards. In necessarily construing the contract to decide the unfair labor practice, the Board did not exceed its jurisdiction.

The Court also upheld the Board's conclusion that the contract did not give the employer a unilateral right to institute the premium-pay plan. The Court found that the Board's reliance upon its experience and "the Act's clear emphasis upon the protection of free collective bargaining" was not misplaced.

C & C Plywood seems to me to affirm the Board's *power* to interpret a contract when a contractual provision is urged as a defense to a charge of unfair labor practices. While that case did not deal with arbitration, the same result seems compelled by the logic of the decision when read together with the *Acme Industrial Co.*[44] case which I shall discuss in connection with the duty to furnish information. The exercise of the Board's *discretion* to defer or not to defer to arbitration in a particular case was not directly before the Court in *C & C Plywood.*

The Board has, of course, discretion to defer or not to defer to

---

[44] 385 U.S. 432 (1967), 64 LRRM 2069.

arbitration. Where a contract issue is raised as a defense to a refusal-to-bargain charge involving unilateral action, the Board ordinarily will not refrain from determining the contract issue insofar as it relates to the unfair labor practice charge if it concludes (1) that the contract issue is insubstantial or (2) that it involves a matter central to the system of collective bargaining established by the Act and requiring the application of the principles developed under the Act and not merely traditional principles of contract interpretation.[45]

Where, however, the defense for unilateral action raises a substantial contract-interpretation question, the circumstances indicate that the challenged conduct is not subversive of basic principles essential to collective bargaining, and arbitration is likely to determine both the contract dispute and the unfair labor practice issue, the Board has indicated that it will defer to arbitration.[46]

Arbitration and the Duty to Bargain in the Furnishing-of-Information Cases

It has been settled for some time that the duty to furnish relevant information is a necessary corollary of the duty to bargain collectively.[47] This principle has been applied in many cases with regard to the furnishing of information relating to the administration of existing agreements.[48]

Where the agreement contained an arbitration provision, however, the courts had been in conflict as to the existence of a duty to bargain prior to the exhaustion of the contract arbitration procedure insofar as the furnishing of information was concerned.[49]

---

[45] *Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410, 56 LRRM 1321 (1964); *Smith Cabinet Manufacturing Company, Inc.*, 147 NLRB 1506, 56 LRRM 1418 (1964); *Huttig Sash & Door Company, Inc.*, 154 NLRB No. 67, 60 LRRM 1035 (1965); *Century Papers, Inc.*, 155 NLRB No. 40, 60 LRRM 1320 (1965); *C & S Industries*, 158 NLRB No. 43, 62 LRRM 1043 (1966).

[46] *The Flintkote Company*, 149 NLRB 1561, 57 LRRM 1477 (1964); *The Crescent Bed Company, Inc.*, 157 NLRB No. 22, p. 4, 61 LRRM 1334 (1966).

[47] *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956), 38 LRRM 2042.

[48] *NLRB* v. *Woolworth Co.*, 352 U.S. 938 (1956), 39 LRRM 2151; *NLRB* v. *Item Company*, 220 F.2d 956, 35 LRRM 2709 (CA 5, 1955), *cert. denied*, 350 U.S. 836 (1955), 36 LRRM 2716; *J. I. Case Co.* v. *NLRB*, 253 F.2d 149, 41 LRRM 2679 (CA 7, 1958); *NLRB* v. *Whitin Machine Works*, 217 F.2d 593, 35 LRRM 2215 (CA 4, 1954), *cert. denied*, 349 U.S. 905 (1955), 35 LRRM 2730; *Boston-Herald-Traveler Corp.* v. *NLRB*, 223 F.2d 58, 36 LRRM 2220 (CA 1, 1955).

[49] Compare *Fafnir Bearing Co.* v. NLRB, 362 F.2d 716, 62 LRRM 2415 (CA 2, 1966) with *Sinclair Refining Co.* v. *NLRB*, 306 F.2d 569, 50 LRRM 2830 (CA 5, 1962).

The recent Supreme Court decision in *NLRB* v. *Acme Industrial Company* [50] has resolved these conflicts and made it clear that the duty to furnish relevant information to the statutory bargaining representative during the term of the contract persists despite the existence of an arbitration procedure. *Acme* was a companion case to *C & C Plywood* and was handed down the same day.

The contract contained a provision whereby the employer agreed not to subcontract work normally performed by bargaining-unit employees if such subcontracting would cause the layoff of employees or prevent the recall of employees who would normally perform this work. The contract also provided that, in the event equipment was moved to another location of the company, employees working in the plant or in the department from which the equipment was removed who were subject to reduction in classification or layoff as a result might transfer to the new location with full rights and seniority. During the contract period, upon discovering that machinery was being moved from the plant, the union requested information as to the reason for the removal of the machinery and where it was being relocated. The company replied that there was no violation of the contract and that it therefore was not obliged to furnish the information.

Grievances were filed. The grievances alleged that the employer by removing the machinery and by subcontracting the work previously performed on the machines had violated the recognition, subcontracting, and work-transfer clauses of the contract. The union by letter requested information concerning the equipment removal, asserting that the information was essential for the servicing and administration of the contract. The employer replied by letter stating that it had no duty to furnish the information since there had been no layoffs or reductions in any classification within five days prior to the formal request for information. Five days was the time limitation established in the contract for filing grievances. The union then filed charges with the Board.

The Board held that the Act had been violated. It found that the information was relevant to the administration of the agreement; the statutory representative needed it in order to evaluate intelli-

[50] 385 U.S. 432 (1967), 64 LRRM 2069.

gently the grievances filed and to determine whether they were meritorious and whether to press for arbitration. The Board also found that there had been no waiver of any statutory right to such information and that the mere existence of a grievance machinery terminating in arbitration did not constitute a waiver of the union's statutory right to such information.

The Seventh Circuit reversed the Board and denied enforcement of its order. The court did not upset the Board's finding that the requested information was relevant to the union's performance of its function as statutory bargaining agent nor did it dispute the Board's conclusion that there had been no waiver of the statutory right to information. The court ruled, however, that the existence of the arbitration clause precluded the Board from exercising its ordinary unfair labor practice authority. It held that the factors bearing on a determination of the relevancy of the information requested were interrelated with the construction and application of the contract provisions, a matter exclusively reserved for the arbitrator. The court stated that Board intervention to determine relevancy thus violated the policy of the trilogy and the national policy embodied in Section 203 (d) of the Labor Management Relations Act.

The Supreme Court reversed the Seventh Circuit and affirmed the Board. The Court said that the only real issue in the case was whether the Board must await an arbitrator's determination of the relevancy of the requested information before it can enforce a union's statutory rights under Section 8 (a) (5). The Court held that the Board need not do so.

Mr. Justice Stewart, speaking for the Court, distinguished the trilogy as dealing with the relationship of courts to arbitrators when an award is under judicial review or the employer denies any duty to arbitrate under the agreement. The arbitrator's greater "institutional competency" was vital to those decisions. The relationship of the Board to arbitrators was said to be of "a quite different order."

In an assessment of the Board's power to deal with unfair labor practices, provisions of the NLRA which do not apply to courts under Section 301 must be considered. The duty to bargain under

Section 8 (a) (5) and the Board's power under Section 10 (a) to prevent unfair labor practices unaffected by any other means of adjustment or prevention preclude a view of the trilogy as requiring automatic deferral by the Board to the primary determination of an arbitrator.

In any event, the Board was not making a binding construction of the contract when it ordered the production of the requested information. It was only holding that the information was probably relevant and would be useful to the union in performing its statutory responsibilities. The Board did not decide the merits of the union's contractual claims.

The Board's action facilitated the arbitral process. The arbitration system cannot perform its function properly if it is to be swamped by the processing of all grievances to arbitration. The law does not require the union to go to arbitration to learn for the first time "that the machines had been relegated to the junkheap."

The Board's order was consistent with the national labor policy favoring arbitration and the express terms of the Act.

Contract Clauses Arguably Invalid Under the National Labor Relations Act

The Board frequently is called upon to determine the validity of contract clauses. The clause may be one that relates to union security and is challenged as violative of Section 8 (a) (3).[51] Or the clause may be one that allegedly confers superseniority in violation of the Act.[52] Or the clause may be one that is challenged as violative of Section 8 (e).[53] The Board's power to determine whether such contract clauses violate the Act is clear, and the Board need not refer the case to the grievance arbitration procedure under the contract.[54]

---

[51] See *NLRB* v. *General Motors Corp.*, 373 U.S. 734 (1963), 53 LRRM 2313.
[52] *Great Lakes Carbon Co.* v. *NLRB*, 360 F.2d 19, 62 LRRM 2088 (CA 4, 1966).
[53] See *Minnesota Milk Co.* v. *NLRB*, 314 F.2d 761, 52 LRRM 2589 (CA 8, 1963); *Meat Drivers Local Union 710* v. *NLRB*, 335 F.2d 709, 56 LRRM 2570 (CA D.C., 1964); *Truck Drivers Union Local 413* v. *NLRB*, 334 F.2d 539, 55 LRRM 2878 (CA D.C., 1964), *cert. denied*, 379 U.S. 916 (1964), 57 LRRM 2496.
[54] *Great Lakes Carbon Co.* v. *NLRB, supra; Woodlawn Farm Dairy Company*, 162 NLRB No. 1, 63 LRRM 1495 (1966).

Accommodation Problems Arising From Conflicting Views Among Arbitrators

Consideration as to when, if ever, the Board should refer or defer to resolution by private arbitration questions concerning the statutory validity of contract clauses suggests an inquiry into the practices and attitudes of arbitrators faced with unfair labor practice issues.

There is considerable disagreement among arbitrators as to whether they should determine or, for that matter, are empowered to determine unfair labor practice issues in cases before them. Many arbitrators take the view that they should limit themselves to the question as to whether the contract has been violated.

Arbitrator Seitz believes that:

> If arbitration begins to do the business of the NLRB and the courts, interpreting legislation, effecting national rather than private goals as a kind of subordinate tribunal of the Board, that voluntarism which is the base of its broad acceptance could be eroded and its essential objectives changed. Arbitration can be weakened by freighting it with public law questions which in our system should be decided by the courts and administrative agencies. Arbitration should not be an initial alternative to Board adjudication. It has been (and should be) a separate system of judication respecting *private* rights and duties resulting in final decisions—not decisions on *public* matters reviewable by the Board and deferred to if not repugnant to the Labor Act.[55]

Under such a view the fact that an award would require an employer or a union to commit an unfair labor practice presumably would not be a matter to be considered by the arbitrator.

In *Rowland Tompkins & Sons*,[56] for example, a contract clause between the employer and the union provided, in substance, that the employees could not be required to install prefabricated piping that did not bear the union label. The union claimed that the employer's insistence on the installing of prefabricated piping not bearing the union label constituted a violation of the agreement. The arbitrator found that the contract had been violated by the

---

[55] Vol. 88 *Monthly Labor Review*, at p. 764 (1965).

[56] 35 LA 154 (1960).

company's insistence on requiring the pipefitting employees to handle, distribute, or install the prefabricated equipment. The arbitrator also stated that it might well be that the union might be engaged in an unfair labor practice under Section 8 (b) (4) (B) in refusing to handle the prefabricated assemblies, but found that the issue had not been submitted to him and that he was not authorized to decide it. The arbitrator further stated that it might also follow that the contract clause in question was violative of Section 8 (e), hence unenforceable and invalid. He ruled, however, that he was limited to the construction of the collective bargaining agreement and that he had no authority to determine whether any clause therein was illegal.

On the other hand, some arbitrators take the view that the requirements of the National Labor Relations Act must be considered by the arbitrator.[57]

In *S. S. White Dental Mfg. Company,*[58] an arbitrator enforced a union security clause that had been challenged by the employer as unlawful. The arbitrator said that if the clause were patently illegal he might refuse to enforce it.

In view of the contrariety of views among arbitrators as to the deference to be given by them to the provisions of the National Labor Relations Act, the Board may well be hesitant to defer to arbitrators in the area of the determination of the legality of contract clauses.

In evaluating contractual provisions urged as a defense to unfair labor practice charges involving unilateral action, many arbitrators differ from the Board in their approach.

The Board's evaluation of the circumstances in which the claim of privileged unilateral action is made usually involves considerations other than the interpretation of a single specific contract provision. Frequently, the claim of privilege is predicated, at least in part, on the presence of a generalized management prerogative clause, the absence of any express contractual prohibition

---

[57] *Sorg Printing Co.,* 38 LA 1162 (1962); *International Harvester Co.,* 22 LA 583 (1954); Smith and Jones, "The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law," 63 *Mich. L. Rev.* 751, 804.

[58] 26 LA 428 (1956).

of the particular action taken, or the union's failure to obtain a specific prohibition during negotiations. The Board has developed statutory principles for evaluating these general circumstances. For example, the Board with court approval has held that a waiver of statutory rights must be clear and unmistakable; waiver will not be found merely because a contract is silent on a subject protected by the Act, or because the contract contains a general management prerogative clause, or because the union in contract negotiations failed to obtain contractual protection for its statutory rights.[59]

Many arbitrators, since they are concerned solely with whether there has been a breach of contract, consider it improper for arbitrators to apply the statutory principles developed by the Board or to apply them differently than the Board does. Some arbitrators apply the so-called "residual rights" theory where management takes unilateral action, holding that management is free to act unless the collective bargaining agreement expressly prohibits the challenged conduct.[60] In the *Finkbeiner* case [61] the employer had transferred work from one plant to another without bargaining with the union, contending that this action was permitted by the management rights clause of the contract. The arbitrator held that in the absence of express contractual language prohibiting the transfer of work, the management rights clause must be construed to authorize the unilateral conduct. He recognized that the employer's action did concern a mandatory subject of bargaining under the National Labor Relations Act, but ruled that he was not empowered to decide the unfair labor practice issue in construing the contract.

In *Mallinckrodt Chemical Works,*[62] a practice had existed for 20 years under which employees who were required to wear special

---

[59] See, *e.g., NLRB* v. *Perkins Machine Co.,* 326 F.2d 488, 55 LRRM 2204 (CA 1, 1964); *Timken Roller Bearing Co.* v. *NLRB,* 325 F.2d 746, 751, 54 LRRM 2785 (CA 6, 1963), *cert. denied,* 376 U.S. 971 (1964), 55 LRRM 2878; *NLRB* v. *Item Co.,* 220 F.2d 956, 958-959, 35 LRRM 2709 (CA 5, 1955), *cert. denied,* 350 U.S. 836 (1955), 36 LRRM 2716; *NLRB* v. *Yawman & Erbe Mfg. Co.,* 187 F.2d 947, 949, 27 LRRM 2524 (CA 2, 1951); *Fafnir Bearing Co.* v. *NLRB,* 362 F.2d 716, 62 LRRM 2415 (CA 2, 1966).

[60] Elkouri, *How Arbitration Works* (Washington: BNA Incorporated, 1960), pp. 287-288; *C. Finkbeiner, Inc.,* 44 LA 1109 (1965); *Bethlehem Steel Company,* 30 LA 678 (1958); *Celanese Corp. of America,* 33 LA 925 (1959).

[61] Footnote 60, *supra.*

[62] 38 LA 267 (1961).

clothing reported 15 minutes prior to the start of the normal workday to change to special clothing. This resulted in an eight-hour-and-15-minute work day with pay for the 15 minutes at the overtime rate. The employer without notice to the union and for economic reasons eliminated the 15 minutes' overtime and required the change of clothing to be done within the normal eight-hour work day. The affected employees filed a grievance seeking restoration of the status quo and compensation for pay lost as a result of the change.

The arbitrator stated that the past practice might have become a term or condition of employment within the meaning of the National Labor Relations Act but held that the determination of such a matter must be made by the National Labor Relations Board. He recognized that such a determination might be found by the Board to result in a refusal to bargain in violation of the Act and that the Board might restore the *status quo ante* until such time as the employer fulfilled the duty to bargain. The arbitrator held, however, that he was not empowered to compel the employer to adhere to past practice in the absence of some term in the agreement that required adherence to the former hours of work. Stating that it would be improper for him to find that the practice had become a statutory term or condition of employment or that the employer had refused to bargain about a change therein, the arbitrator denied the grievance.

The view that the contract is the exclusive statement of the bargaining agent's rights and privileges is inconsistent with *Fibreboard*.[63] In addition, a doctrine which is bottomed upon the theory that management has all "residual rights" is also in conflict with the Board-developed and court-approved principle that a statutory waiver must be express and clear. In short, in a unilateral-action case, a reference to an arbitrator for a decision of the contract question may well either be a futile gesture or lead to a result in conflict with the policies of the Act. Under such circumstances, is there justification for the Board to delay enforcement of the public command to bargain collectively until an arbitration is had?

---

[63] *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964), 57 LRRM 2609, holding that the Act, in certain circumstances, requires bargaining about subcontracting apart from any contractual requirement.

We at the Board are eager to encourage the use of voluntary arbitration by the parties to a collective bargaining agreement. Last year we participated in meetings in Chicago, New York, and Los Angeles with members of the Academy during the course of which we explored our mutual problems. The exercise of Board discretion to defer to arbitration must be determined on a case-by-case basis. We have been and will continue to extend hospitality to the arbitration process without abdicating our statutory responsibilities. We are grateful for your assistance in that important effort.

II. THE ARBITRATOR, THE NLRB, AND THE COURTS

ROBERT G. HOWLETT*

"The Arbitrator, the NLRB, and the Courts" was conceived by arbitrators, and born at regional meetings where arbitrators and representatives of the National Labor Relations Board and its General Counsel discussed their roles in the administration of employer-employee relations in disputes where an act or omission may be both breach of contract and breach of statute.[64]

Heretofore, discussion of the respective functions of arbitrators, the NLRB, and the General Counsel, and potential and actual conflict between these private and public actors in the labor relations arena has been confined primarily to addresses at meetings sponsored by universities and professional organizations, many of which have found their way into the law reviews.[65] General Counsel Arnold Ordman summarized:

> I look forward to a period of nuptial bliss and harmony between the grievance-arbitration process and the National Labor Relations Board. The good health and vitality of labor-management relations

---

* Member, National Academy of Arbitrators; Chairman, Michigan Labor Mediation Board.

64 General Counsel Arnold Ordman said in an address delivered on June 5, 1964 (see footnote 66): "I know we at the Agency would welcome further opportunity to meet with arbitrators and any others to explore the areas of difficulty so we might achieve better understanding."

65 The appearance of Board Chairman Frank W. McCulloch before the National Academy of Arbitrators in 1963 was impressive, and had great impact on the thinking in this area. McCulloch, "Arbitrator and/or the NLRB," *Labor Arbitration and Industrial Change,* Proceedings of the Sixteenth Annual Meeting,