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

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* 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,

> in this country depends to a large extent upon such co-operation. Let us work toward its achievement.[66]

There has been little across-the-table discussion.

Dialogue with the courts, except across the bar of courtrooms, is not consistent with judicial administrative propriety.[67] But arbitrators could, and did, with propriety, propose a dialogue with the NLRB—General Counsel, with the hope that each might better understand the role of the other.

Perhaps arbitrators suffer from mental and emotional insecurity, for courts and the Board, as creatures of statute, have power not granted to the arbitrator, who, as servant of disputing parties, acts only by consent; his award can be enforced only if a court so decrees; and it can be sidestepped, ignored, or reversed by the NLRB. In the words of the House Conference Report on the Taft-Hartley Act:

> . . . By retaining the language which provides the Board's powers under Section 10 shall not be affected by other means of adjustment, the conference agreement makes clear that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies.[68]

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National Academy of Arbitrators (Washington: BNA Incorporated, 1963), p. 175. See also, McCulloch, "The Arbitration Issue in NLRB Decision," 19 *Arb. J.* 134 (1964); Brown, "A Hospitable Reception for Arbitration at the Labor Board," an address before the Eastern Conference of Teamsters Lawyers Meeting, June 30, 1964; Smith & Jones, "The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators, and Parties," 52 *Va. L. Rev.* 831 (1966). A bibliography prepared by E. A. Jones, Jr., and distributed to participants in the regional meetings, is attached hereto.

[66] Ordman, "Arbitration and the NLRB—A Happy Marriage?," an address before the Midwest Seminar on Advanced Arbitration, University of Chicago Center for Continuing Education, June 5, 1964.

[67] This does not mean that judges and arbitrators confine themselves to the courtroom. Judge Paul R. Hays of the Second Circuit had some unkind things to say about arbitrators in "The Future of Labor Arbitration," 74 *Yale L. J.* 1019 (1965), and arbitrators have not remained silent. Former arbitrator Hays was, I think, securely replanted on the bench, from which he had plucked himself, by Saul Wallen in "Arbitrators and Judges—Dispelling the Hays' Haze," *Labor Law Developments,* Proceedings of The Southwestern Legal Foundation's Twelfth Institute of Labor Law, (Washington: BNA Incorporated, 1966), p. 159.

[68] House Conference Report No. 510, 80th Congress, 1st Session, p. 52; "Legislative History of Labor-Management Relations Act, 1947," p. 556; *National Labor Relations Board* v. *Wagner Iron Works,* 220 F.2d 126, 137, 35 LRRM 2588 (7th Cir., 1955); *cert. denied,* 350 U.S. 981, 76 S.Ct. 466 (1956), 37 LRRM 2639; *Local 743, International Association of Machinists* v. *United Aircraft Corporation,* 337 F.2d 5, 57 LRRM 2245 (2nd Cir., 1964); *National Labor Relations Board* v. *International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, CIO, Local 291,* 194 F.2d 698, 702, 29 LRRM 2433 (7th Cir., 1952).

While the report did not mention arbitrators, recognition that the "right to resort to the Board for relief against unfair labor practices cannot be foreclosed by private contract" is illustrated by *Local 743, International Association of Machinists* v. *United Aircraft Corporation,*[69] where the court cited numerous cases so holding, and said of Section 10:

> This express statutory mandate, in turn, reflects the theory enunciated by the Supreme Court in *National Licorice Co.* v. *NLRB*: "The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices." 309 U.S. at 364, 6 LRRM 674. This public interest in preventing unfair labor practices cannot be entirely foreclosed by a purely private arrangement, no matter how attractive the arrangement may appear to be to the individual participants. Moreover, as the court below pointed out, "The Board was designed to prevent any unfair economic pressure of expedient arrangements condoning unfair labor practices." 220 F. Supp. at 24. The aim of the act to give special protection to the economically vulnerable would be defeated if contracts entered into because of that very vulnerability were enough to preclude enforcement of the act. (p. 8)

The court said of the line of cases which

> . . . ordains an extreme laissez-faire policy on the part of the courts in reviewing arbitration awards, lest they discourage resort to private methods of settling labor disputes [and] warn courts to abstain from meddling with arbitration awards . . . are inapplicable to the Board which, unlike the courts, is charged with vindicating a body of public rights set forth in the National Labor Relations Act. (p. 10)

But we are not without friends. The Supreme Court has spoken well of arbitrators and invested them with a role (subject to court or NLRB review) which many were surprised to find they had.[70] And courts, where a contractual issue appears to be of importance, have favored decision by an arbitrator rather than by the NLRB, even though a statutory issue is present in the dispute.[71]

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[69] *Supra,* note 68.

[70] *United Steelworkers of America* v. *Warrior & Gulf Navigation Company,* 363 U.S. 574, 80 S.Ct. 1347 (1960), 46 LRRM 2416; *United Steelworkers of America* v. *American Manufacturing Company,* 363 U.S. 564, 80 S.Ct. 1343 (1960), 46 LRRM 2414; and *United Steelworkers of America* v. *Enterprise Wheel & Car Corporation,* 363 U.S. 593, 80 S.Ct. 1358 (1960), 46 LRRM 2423.

[71] *Trailways of New England, Inc.* v. *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America,* 343 F.2d 815, 58 LRRM 2848 (1st Cir., 1965), *cert. denied,* 382 U.S. 879 (1965), 60 LRRM 2255; *United Electrical, Radio and Machine Workers of America* v. *Worthington Corporation,* 236 F.2d 364, 38 LRRM

While all three decision makers—arbitrators, NLRB and its General Counsel, and the courts—function in the industrial scene, it seems apparent that the penumbras surrounding the ring in which each performs will not be eliminated during the lifetime of arbitrators who learned their skills in the National War Labor Board fraternity. But efforts to define the arena in which each serves will serve a useful purpose for the customers of the three entities.

As has been pointed out frequently, the roles of arbitrators, who interpret contracts, and the NLRB, which interprets a statute, in theory are mutually exclusive.[72] But experience has established that the statement is, at best, an expression of hope; and "disputes are often difficult to classify" and in some controversies a "blurred line . . . often exists." [73]

Congress, under Section 10 (a) of the Wagner Act, vested the NLRB with power to "prevent any person from engaging in any unfair labor practice" and decreed that:

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2507 (1st Cir., 1956); *Acme Industrial Company* v. *National Labor Relations Board,* 351 F.2d 258, 60 LRRM 2220 (7th Cir., 1965). This latter case, and *National Labor Relations Board* v. *C & C Plywood Corporation,* 351 F.2d 224, 60 LRRM 2137 (9th Cir., 1965), have been reversed by the Supreme Court of the United States in *National Labor Relations Board* v. *C & C Plywood Corporation,* 385 U.S. 421, 87 S.Ct. 559 (1967), 64 LRRM 2065, and *National Labor Relations Board* v. *Acme Industrial Company,* 385 U.S. 432, 87 S.Ct. 565 (1967), 64 LRRM 2069. *Sinclair Refining Company* v. *National Labor Relations Board,* 306 F.2d 567, 50 LRRM 2830 (5th Cir., 1962), and *Square D Company* v. *National Labor Relations Board,* 332 F.2d 360, 56 LRRM 2147 (9th Cir., 1964), have probably lost much of their impact by reason of the Supreme Court decisions in *C & C Plywood Corporation* and *Acme Industrial Company.*

[72] *Carey* v. *Westinghouse Electric Corporation,* 375 U.S. 261, 84 S.Ct. 401 (1964), 55 LRRM 2042; *McAmis* v. *Panhandle Eastern Pipeline Co.,* 273 S.W.2d 789 (Mo. App., 1954); Moss, "Arbitration and the NLRB's Jurisdiction," *Proceedings of New York University 17th Annual Conference on Labor,* (Washington: BNA Incorporated, 1954), pp. 65, 67. This includes the role of courts where there is no arbitration provision in the contract. *Smith* v. *Evening News Association,* 371 U.S. 195, 83 S.Ct. 267 (1962), 51 LRRM 2646; *Charles Dowd Box Co., Inc.* v. *Courtney,* 368 U.S. 502, 82 S.Ct. 519 (1962), 49 LRRM 2619. And under *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Flour Co.,* 369 U.S. 95, 82 S.Ct. 571 (1962), 49 LRRM 2717, the courts (in this instance a state court) are not ousted of jurisdiction for breach of contract, even though a contract may provide for compulsory arbitration. Note, however, the difference in the language of the Wagner Act and Taft-Hartley Act discussed below.

[73] *Carey* v. *Westinghouse, supra,* note 72, at 268, 269. For the denouement of this case see *Westinghouse Electric Corporation,* 162 NLRB No. 81, 64 LRRM 1082 (1967).

> This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.[74]

As arbitrators at the time the Wagner Act was enacted were not well known, and generally were unloved, it seems unlikely that congressmen were imbued with any idea that arbitration would fill an important role in the settlement of contract disputes.

A review of the legislative history discloses that the principal congressional concern was to give the soon-to-be established NLRB complete power *vis-a-vis* the codes that had been adopted and were enforced by industries pursuant to the National Industrial Recovery Act.[75]

By the time Taft-Hartley was enacted, however, Congress was familiar with arbitration, which had become an accepted means of settling labor disputes under the terms of collective bargaining agreements. Recognition of arbitration as an approved means of settling disputes is found in Section 203 (d):

> 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.[76]

In addition, the provision that the NLRB's power "shall be exclusive" and the reference to "codes" were omitted from the 1947 statute, which reads:

> This power shall not be affected by any other means of adjustment

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74 49 Stat. at Large 453.

75 The Senate Labor Committee stated that the suggested language "is intended to make it clear that although other agencies may be established by code, agreement or law to handle labor disputes, such other agencies can never divest the National Labor Relations Board of jurisdiction which it would otherwise have." Reference was made to a presidential suggestion that the old Board "should not take jurisdiction over [a case in the newspaper industry] since there had been provided by code a labor board supposedly competent to hear labor disputes in the newspaper industry." *Legislative History of National Labor Relations Act, 1935*, p. 1323. See also, pp. 1357, 1750, 2045. The lawyer who later was Chairman of the National War Labor Board, William H. Davis, prophesied, ". . . The words in the bill 'shall not be affected by any other means of adjustment or prevention that has been or may be established' and so forth are ambiguous in the extreme. In them might also be found a place of lodgement for seeds of trouble that would mar the performance of the proposed commission and lower its position in public esteem at the very outset." *Ibid*, p. 2097.

76 Voluntary arbitration is also mentioned in Section 201 (b), although in context it appears to refer to voluntary arbitration of terms of collective bargaining agreements.

or prevention that has been or may be established by agreement, law, or otherwise.[77]

The role of the courts may be like that of an arbitrator under contracts which do not include arbitration clauses,[78] or courts may determine whether an issue is arbitrable,[79] enforce an arbitration award,[80] or direct parties to arbitrate.[81]

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[77] Section 10 (a), National Labor Relations Act, 29 U.S.C. 160 (a). In *Haleston Drug Stores* v. *National Labor Relations Board,* 187 F.2d 418, 421, 27 LRRM 2401 (9th Cir., 1951), the court said: "By the express language of § 10 (a) the Board was and still is *empowered* [not directed] to prevent persons from engaging in unfair labor practices affecting commerce." (Emphasis in opinion)

[78] *Smith* v. *Evening News, op. cit.,* note 72; *Local 174, Teamsters* v. *Lucas, op. cit.,* note 72; *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO* v. *Hoosier Cardinal Corporation,* 383 U.S. 696, 86 S.Ct. 1007 (1966), 61 LRRM 2545 (while lost by the union because of the statute of limitations, appears to put to rest *Association of Westinghouse Salaried Employees* v. *Westinghouse Corporation,* 348 U.S. 437, 75 S.Ct. 489 (1955), 35 LRRM 2643, the court noting that in *Smith* v. *Evening News Association* "we rejected the view, once held for varying reasons by a majority of this court . . . 'that paragraph 301 did not give the . . . courts jurisdiction over a suit brought by a union to enforce employee rights . . . characterized . . . as . . . arising "from separate hiring contracts between the employer and each employee." '"); *Shaw Electric Co., Inc.,* v. *International Brotherhood of Electrical Workers, Local Union No. 98,* 418 Pa. 1, 208 A.2d 769 (1965) (apparently no arbitration clause).

[79] *Torrington Company* v. *Metal Products Workers Union, Local 1645, UAW-AFL/CIO,* 347 F.2d 93, 59 LRRM 2588 (1965), *cert. denied,* 382 U.S. 940, 86 S.Ct. 394 (1965), 60 LRRM 2512; *United Aircraft Corporation* v. *Lodge 971, International Association of Machinists,* 360 F.2d 150, 62 LRRM 2299 (5th Cir., 1966); *Strauss* v. *Silver Cup Bakers, Inc.,* 353 F.2d 555, 61 LRRM 2001 (2nd Cir., 1965); *Camden Industries Co.* v. *Carpenters Local Union No. 1688, United Brotherhood of Carpenters and Joiners of America,* 353 F.2d 178, 60 LRRM 2525 (1st Cir., 1965); *Timken Roller Bearing Co.* v. *National Labor Relations Board,* 325 F.2d 746, 54 LRRM 2785 (6th Cir., 1963).

[80] *Textile Workers Union of America* v. *Lincoln Mills of Alabama,* 353 U.S. 448, 77 S. Ct. 912 (1957), 40 LRRM 2113; *International Brotherhood of Packinghouse and Dairy Workers, Local No. 52* v. *Western Iowa Pork Company,* 247 F. Supp. 663, 62 LRRM 2800 (W.D. Iowa, 1965); *International Association of Machinists* v. *Cameron Iron Works,* 257 F.2d 467, 42 LRRM 2431 (5th Cir., 1958); *John Wiley & Sons, Inc.* v. *Livingston,* 376 U.S. 543, 84 S.Ct. 909 (1964), 55 LRRM 2769; *Trailways of New England, Inc.* v. *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America,* 343 F.2d 815, 58 LRRM 2848 (1st Cir., 1965); *Humble Oil & Refining Company* v. *Independent Industrial Workers' Union,* 337 F.2d 321, 57 LRRM 2112 (5th Cir., 1964); *Todd Shipyards Corporation* v. *Industrial Union of Marine & Shipbuilding Workers of America,* 232 F. Supp. 589, 56 LRRM 2784 (1965), *aff'd,* 344 F.2d 107, 58 LRRM 2826 (2nd Cir., 1965).

[81] *International Brotherhood of Packinghouse and Dairy Workers, Local No. 52* v. *Western Iowa Pork Company,* 247 F. Supp. 663, 62 LRRM 2800 (W.D. Iowa, 1965); *Metal Products Workers Union, Local 1645* v. *The Torrington Company,* 358 F.2d 103, 62 LRRM 2011 (2nd Cir., 1966); *General Drivers, Warehousemen & Helpers, Local Union No. 89* v. *Riss & Co.,* 372 U.S. 517, 83 S.Ct. 789 (1963), 52 LRRM 2623. (This case also held *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corporation* no longer authoritative as a precedent); *Monroe Sander Corporation* v. *Livingston,* 262 F. Supp. 129, 63 LRRM 2545 (S.D. N.Y., 1966); *Bancroft Hotel, Inc.* v. *Bartenders, Hotel and Restaurant Employees,* 63 LRRM 2535 (E.D. Mich., 1966).

## Supreme Court Decisions

The roles of arbitrators, of the NLRB, and of the courts have been the subject of recent decisions in *Acme Industrial Company* v. *National Labor Relations Board,*[82] and *National Labor Relations Board* v. *C. & C Plywood Corporation.*[83]

The two cases are concerned with Section 8 (a) (5) (collective bargaining) situations. *C & C Plywood* involved a collective bargaining contract which did not include an arbitration clause; the *Acme Industrial Company* contract provided arbitration as the terminal point in contract disputes. In *Acme Industrial,* the employer urged that the NLRB had no power to require him to furnish information to the union following the filing of 11 grievances charging the employer with breach of contract provisions relating to subcontracting and moving equipment from the plant.

The U.S. Supreme Court, noting that "the duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of the agreement" (p. 568), directed the court of appeals to enforce the Board's order, which required the employer to furnish the information sought by the union.

Mr. Justice Stewart viewed the decision in *Acme Industrial Company* [84] as ". . . not intruding upon the preserve of the arbitrator [but] in aid of the arbitral process." An employer's refusal to furnish information, Mr. Justice Stewart said, "would force the union to take a grievance all the way through to arbitration without providing the opportunity to evaluate the merits of the claim." The employer's action was "requiring [the union] to play a game of blind man's buff."

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[82] 351 F.2d 258, 60 LRRM 2220 (7th Cir., 1965), 385 U.S. 432, 87 S.Ct. 565 (1967), 64 LRRM 2069.

[83] 351 F.2d 224, 60 LRRM 2137 (9th Cir., 1965), 385 U.S. 421, 87 S.Ct. 559 (1967), 64 LRRM 2065.

[84] *National Labor Relations Board* v. *Acme Industrial Company,* 385 U.S. 432, 87 S.Ct. 565, 569 (1967), 64 LRRM 2069. The Court cited *Fafnir Bearing Company* v. *National Labor Relations Board,* 362 F.2d 716, 62 LRRM 2415 (2nd Cir., 1966), where the Court enforced a Board order which held an employer's refusal to permit a union to conduct a time study to determine whether it should seek arbitration of grievances concerning an employer's administration of an incentive plan was breach of Section 8 (a) (5). See also, *National Labor Relations Board* v. *Perkins Machine Company,* 326 F.2d 488, 55 LRRM 2204 (1st Cir., 1964).

It may be unfortunate that *Acme Industrial* arose in a situation where an employer took a particularly cavalier attitude with respect to information to be furnished to the union. When stewards requested information as to why machinery was being moved, the foreman, in each instance, simply stated that "he felt there had been no violation of the contract and that the employer did not feel compelled to give such information." [85]

A reading of the opinions suggests that a simple explanation by the foreman would have eliminated the union complaint, and a Supreme Court decision on this issue.

The *Acme Industrial* brief urged support of the finding of the examiner that "discovery and inspection in furtherance of [an] arbitration proceeding . . . is not . . . a proper function of an agency already overburdened by its caseload." It continued:

> We believe it cannot be a violation of 8 (a) (5) to refuse to give information which is neither presumptively nor *proven relevant* and we are certain that the record in this case shows neither presumptive nor proven relevance. (Emphasis supplied)

Although the brief urged that the NLRB should not interpret the contract, an element of interpretation was, it is clear, essential for NLRB determination of the case. For how is the Board to determine whether the information is relevant, without considering both the factual situation and the application of the facts to the contract? Indeed, the decision may result in a more effective use of the grievance procedure, and perhaps a decline in arbitrations, as recalcitrant employers are advised by their counsel that refusal to furnish information during the grievance process may result in a charge and complaint of breach of Section 8 (a) (5).

Any doubt there may have been as to NLRB's power to construe collective bargaining agreements, where necessary to determine whether an unfair labor practice has been committed, has been eliminated; and, indeed, the NLRB has done so in previous cases,[86] although it has, at times, urged that the dispute was "basically a disagreement over statutory rather than contractual

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[85] 58 LRRM 1277 (1965).

[86] *Woodlawn Farm Dairy Co., Division of Dolly Madison Foods, Inc.*, 162 NLRB No. 1, 63 LRRM 1495 (1966); *Leroy Machine Co., Inc.*, 147 NLRB 1431, 56 LRRM 1369 (1964); *Thor Power Tool Company*, 148 NLRB 1379, 57 LRRM 1161 (1964), *enf'd, National Labor Relations Board* v. *Thor Power Tool Company*, 351 F.2d

obligations," and that the issue of contract violation was a subsidiary one.

In one case,[87] the NLRB held that "a reasonable interpretation of the contract does not provide a lawful basis for the employee's suspension." In answer to the employer's contention that the matter involved contract interpretation, and that acceptance of jurisdiction by the NLRB would frustrate the congressional policy enunciated in Section 203 (d), the opinion said that "the Board has never shunned jurisdiction merely because a party had the contractual right to go to arbitration but has not exercised the option." The Board has also held that "it will not require an individual employee to resort to the grievance procedure of a contract as a condition to obtaining relief under the Act"; [88] and if the *Spielberg* criteria are not complied with, the Board will, in any event, accept and decide a case involving either discharge or other statutory issue, even though the contract includes an arbitration provision.[89] On the other hand, in *Flintkote Company* [90] the Board dismissed a charge, as there was a matter of contract interpretation involved and the employer was willing to proceed to arbitration.

NLRB members are not in accord as to the emphasis which

584, 60 LRRM 2237 (7th Cir., 1965); *Aetna Bearing Company,* 152 NLRB 845, 59 LRRM 1268 (1965) ("A responsible interpretation of the contract does not provide a lawful basis for the employee's suspension"); *Smith Cabinet Manufacturing Company, Inc.,* 147 NLRB 1506, 56 LRRM 1418 (1964) ((8) (b) (5) charge alleging employer required to bargain on reinstitution of 2nd shift); *Montgomery Ward & Co.,* 162 NLRB No. 38, 64 LRRM 1052, 1954 (1966) (The NLRB said that employer's offense was not confined to "mere breach of contract," but "in context with other of its actions [employer] was endeavoring to undermine the union's status as bargaining representative"); *National Labor Relations Board* v. *Perkins Machine Company,* 326 F.2d 488, 55 LRRM 2204 (1st Cir., 1964).

87 *Aetna Bearing Company,* 152 NLRB 845, 59 LRRM 1268 (1965).

88 *Combustion Engineering Co.,* 86 NLRB 1264, 25 LRRM 1054, 1056 (1949); *Local Union 469, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S.A. (Associated Plumbing, Heating & Piping Contractors of Arizona),* 149 NLRB 39, 57 LRRM 1257 (1964). (However, in this case, the complaint was dismissed on the merits. This is another case where the NLRB was required to consider the contract language in order to reach decision on the case); *Todd Shipyards Corp.,* 98 NLRB 814, 29 LRRM 1422 (1952); *Pontiac Motors Division, General Motors Corporation,* 132 NLRB 413, 48 LRRM 1368 (1961).

89 *Cloverleaf Division of Adams Dairy Co.,* 147 NLRB 1410, 56 LRRM 1321 (1964) (union failed to resort to arbitration concerning transfer of consumer marketing accounts from driver-salesmen to independent contractor); *Aerodex, Inc.,* 149 NLRB 192, 57 LRRM 1261 (1964) (employee discharged for distributing literature which Board held he had privilege to distribute).

90 149 NLRB 1561, 57 LRRM 1477 (1964).

should be given to an arbitration clause in a contract. Member Brown, as distinguished from his present colleagues, has urged withholding of action. His colleagues seem more inclined to proceed in cases where arbitration is provided in the contract but an award has not been issued. In *Adams Dairy Company*,[91] Member Brown said:

> Since we cannot predict whether a yet to be held arbitration proceeding will comply with *Spielberg* standards, we should withhold our action pending the arbitrator's award.

The NLRB, in my opinion, did not overstep the bounds of administrative propriety when it required *C & C Plywood* and *Acme Industrial* to furnish the requested information to their employees' representative.

No reference was made by Mr. Justice Stewart to the *Acme Industrial* argument that Illinois, where the grievance arose, had adopted the Uniform Arbitration Act in 1961, which includes a provision (Chapter 10, Smith-Hurd, Ill.Annot.Stat., para. 107) vesting arbitrators with power to authorize depositions and to issue subpoenas for the attendance of witnesses and the production of books, records and documents. But this procedure is effective only *after* a dispute has been submitted to arbitration. The nonjudicial pre-arbitration discovery procedure now required by *Acme Industrial* may render unnecessary the use of an arbitration clause of a contract.

Perhaps one other comment on these two recent cases should be made. Although the principle of the *Steelworkers* trilogy is that courts do not weigh the merits of a grievance if there is a reasonable basis for holding the issue arbitrable, *C & C Plywood* and *Acme Industrial* vest in the NLRB a contract interpretation power that the trial courts are directed by the Supreme Court to avoid. And this seems essential in the labor relations arena. If a court interprets a contract, it *substitutes* itself for the arbitrator, the decision-making official selected by many parties to interpret their agreement. The NLRB, on the other hand, has a *statutory* function to perform. Interpretation of a contract may be essential in the exercise of this duty.

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[91] 147 NLRB 1410, 56 LRRM 1321 (1964).

## Areas of Concern

The several areas of concern to the General Counsel, to the NLRB, and to arbitrators are: (1) discharge cases under Section 8, particularly 8 (a) (1) and (3) and 8 (b) (2); (2) representation cases, particularly Sections 7, 8 (a) (1), and 8 (b) (1); (3) jurisdictional disputes, particularly Section 8 (b) (4) (D); and (4) collective bargaining under Sections 8 (a) (5) and 8 (b) (3), cases that usually involve unilateral action by employers in the establishment of working conditions, subcontracting, plant removal, and other action that is subject to collective bargaining.[92]

Another means of division of cases as between NLRB and arbitrators is: (1) the award has already been issued; (2) the collective contract includes an arbitration clause but no arbitration has been instituted; or (3) arbitration and an unfair labor practice charge are filed at the same time, or the charge is filed while an arbitration case is pending, but not determined. Also a possibility, but less common, is a situation in which the charge is filed first and then a party seeks arbitration, either while a charge is pending before the NLRB or has already been decided. Thus, timing of the filing of either charge or grievance may be important.[93]

The first government official to look over an arbitrator's shoulder is the regional director, who has power to issue a complaint if, in his opinion, an unfair labor practice may have been

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[92] It is in 8 (a) (5) cases where the issue of *Acme Industrial Company* and *C & C Plywood Corporation* is clearly posed under difficult circumstances. *Acme Industrial Company* and *C & C Plywood Corporation* apparently overrule *Square D Corporation* v. *National Labor Relations Board,* 332 F.2d 360, 56 LRRM 2147 (9th Cir., 1964), where the court held that the Board has no jurisdiction to judge an unfair labor practice where "the existence of an unfair labor practice . . . is dependent upon a resolution of a preliminary dispute involving *only* the interpretation of the contract." (Emphasis in the original) The Ninth Circuit held that the NLRB was actually construing a collective bargaining agreement "in order to find an unfair labor practice." This, in the Ninth Circuit's opinion, the National Labor Relations Board did not have power to do. In *Timken Roller Bearing Company* v. *National Labor Relations Board,* 325 F.2d 746, 750, 54 LRRM 2785 (6th Cir., 1963), the court held that a union's right to relevant wage information "includes the processing of grievances under the bargaining agreement and the union's bona fide actions in administering the bargaining agreement during the period of its existence."

[93] *In re Buchholz,* 15 N.Y.2d 181, 205 N.E.2d 282, 58 LRRM 2462 (1965); *Kentile, Inc.* v. *Local 457, United Rubber, Cork, Linoleum & Plastics Workers of America,* 228 F. Supp. 541, 55 LRRM 3011 (E.D. N.Y., 1964); *Hortex Manufacturing Company,* 147 NLRB 1151, 56 LRRM 1374 (1964), *enf'd, Amalgamated Clothing Workers of America* v. *National Labor Relations Board,* 343 F.2d 329, 58 LRRM 2429 (D.D.C., 1965).

committed, although ultimate decisional control is vested in the NLRB. The General Counsel, and his representative, stated at the regional meetings held in New York, Chicago, and Los Angeles that it is his policy to convince the parties to use arbitration, rather than the processes of the Board, in those instances where a contract includes an arbitration clause. One NLRB official said, "We want arbitrators' help but we want the final word."

A consistent viewpoint was expressed in the NLRB brief filed in *Acme Industrial*:

> We take no issue in this case with the strong policy relied on by the courts of appeal, favoring the arbitral solution of labor disputes when the applicable collective bargaining agreement provides for such arbitration. . . . (p. 16)

Thus, the General Counsel, in the first instance, and the NLRB, generally after the fact, determine when proper administration of the NLRA requires the parties to submit an issue to arbitration rather than to the NLRB.

Where is the dividing line—or the area wherein either or both these participants may function?

The NLRB's *Acme Industrial* brief overstates the necessities of the case—as litigants' briefs often do:

> . . . even where an arbitrator is able to, and does, pass on an information request, he must determine it under the particular requirements of the contract and *therefore may not be free to take into account the relevant statutory considerations.* (p. 25) (Emphasis supplied)

The brief *suggests,* but does not actively urge, that arbitrators are confined to the four walls of the contract. A footnote cited several arbitrators' opinions that hold, like some arbitrators at the regional meetings, that arbitrators may not, or should not, be concerned with statutory issues.[94] This concept was unnecessary for decision by the Court in *Acme Industrial,* and the Court did not adopt it.

*We disagree vigorously with both the rationale and conclusion of those who advocate it.* There is a responsibility of arbitrators,

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[94] *Bethlehem Steel Company,* 31 LA 423 (Arthur Stark, 1958); *Natvar Corporation,* 24 LA 753 (Jules J. Justin, 1955) (The opinion does not disclose that violation of the NLRA was alleged as a possible issue); *Spartan Mills,* 27 LA 256 (J. Fred Holly, 1956); *Borg-Warner Corporation,* 9 LA 901 (Joseph D. Lohman, 1948).

corollary to that of the General Counsel and the NLRB, to decide, where relevant, a statutory issue, in order that the NLRB, consistent with its announced policy, may avoid a decision on the merits, and the statutory policy of determining issues through arbitration may be fulfilled.

Arbitrators and the Board or its General Counsel meet most frequently in discipline and discharge cases. The law relating to their respective roles in this type of dispute has been enunciated rather clearly.

*Spielberg Doctrine*

After some wandering in the wilderness,[95] the NLRB announced the *Spielberg* doctrine, a principle from which it has not departed in discipline and discharge cases in spite of some "flexibility" in other areas.[96] An unfair labor practice charge was filed following an arbitration award rendered as part of a strike settlement. The NLRB agreed with its trial examiner that "the Board is not bound, as a matter of law, by an arbitration award [as] 'private parties cannot restrict the jurisdiction of the Board.'" But the NLRB refused to decide the case on the merits because "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."

The test is due process. Under the NLRB ruling, proceedings must be fair and regular,[97] there must be adequate notice and representation,[98] and the arbitrator must have passed on the issue of the alleged unfair labor practice.[99] All parties must agree to be bound by the arbitrator's award; [100] and such agreement may elimi-

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95 *Joseph H. Klotz,* 13 NLRB 746, 4 LRRM 344 (1939), *suppl'd,* 29 NLRB 14, 7 LRRM 247 (1941); *Rieke Metal Products Corporation,* 40 NLRB 867, 10 LRRM 82 (1942); *Timken Roller Bearing Co.,* 70 NLRB 500, 18 LRRM 1370 (1946); *enf. denied* on other grounds, 161 F.2d 949, 20 LRRM 2204 (6th Cir., 1947); *Crown-Zellerbach Corporation,* 95 NLRB 753, 28 LRRM 1357 (1951); *United Telephone Company of the West,* 112 NLRB 779, 36 LRRM 1097 (1955).

96 *Spielberg Manufacturing Co.,* 112 NLRB 1080, 36 LRRM 1152 (1955).

97 *Denver-Chicago Trucking Co.,* 132 NLRB 1416, 48 LRRM 1524 (1961).

98 *Hamilton-Scheu & Walsh Shoe Co.,* 80 NLRB 1496, 23 LRRM 1263 (1948); *Gateway Transportation Co.,* 137 NLRB 1763, 50 LRRM 1495 (1962).

99 *I. Oscherwitz & Sons,* 130 NLRB 1078, 47 LRRM 1415 (1961).

100 *Local 18, Operating Engineers (Building Trades Employers' Association),* 145 NLRB 1492, 55 LRRM 1188 (1964).

nate NLRB proceedings, even though decision is by a committee composed of an equal number of employer and union representatives.[101] But there is a point beyond which the NLRB will not go. An ambiguous award will not be recognized.[102] If an arbitrator's award is "repugnant" to the NLRA, the award will not be enforced.[103] This simply says that arbitrators, like other decision-makers, may sometimes be wrong.

The NLRB is concerned, as it should be, with the rights of individuals. An employee who (a) advises his union that he intends to resort to the National Labor Relations Board, (b) tells an arbitrator that he will seek legal recourse other than arbitration, or (c) says he will not agree to be bound by the decision of a joint labor-management committee, is not barred from seeking his remedy under the NLRA.[104]

The furthest the NLRB seems to have gone in the exercise of its discretion, and with some inconsistency, is in *International Harvester Company*.[105] The Board accepted an arbitrator's award (which decided a legal issue) as "not palpably wrong" and concluded that "[t]o require more of the Board would mean substituting the Board's judgment for that of the arbitrator, thereby

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101 *Modern Motor Express, Inc.*, 149 NLRB 1507, 58 LRRM 1005 (1964); *Humphrey* v. *Moore*, 375 U.S. 335, 84 S.Ct. 363, 55 LRRM 2031, *reh. denied*, 376 U.S. 935, 84 S.Ct. 697 (1964).

102 *Dubo Manufacturing Corporation*, 148 NLRB 1114, 57 LRRM 1111 (1964).

103 *International Union, United Automobile, Aircraft & Agricultural Implement Workers of America (CIO), Local 291 and Wisconsin Axle Division, The Timken Detroit Axle Co.*, 92 NLRB 968, 27 LRRM 1188 (1950) (arbitrator ordered discharge of employees under union security clause which NLRB held contrary to NLRA); *Hershey Chocolate Corporation*, 129 NLRB 1052, 47 LRRM 1130 (1960), *enf. denied* on other grounds, 297 F.2d 286, 49 LRRM 2173 (3rd Cir., 1961) (employees required to belong to two unions at one time); *Monsanto Chemical Co.*, 97 NLRB 517, 29 LRRM 1126 (1951) (employees' failure to pay dues for period prior to effective date of contract); *Virginia-Carolina Freight Lines, Inc.*, 155 NLRB No. 52, 60 LRRM 1331 (1965) (employee discharged for threatening to seek and seeking NLRB assistance in a controversy with his employer). If an award is contrary to state policy, the federal courts will not interfere. *Black* v. *Cutter Laboratories*, 351 U.S. 292, 76 S.Ct. 824 (1956), 38 LRRM 2160, *reh. denied*, 352 U.S. 859, 77 S.Ct. 21 (1956).

104 *Wertheimer Stores Corporation*, 107 NLRB 1434, 33 LRRM 1398 (1954); *Hershey Chocolate Corporation*, 129 NLRB 1052, 47 LRRM 1130 (1960), *enf. denied* on other grounds, 297 F.2d 286, 49 LRRM 2173 (3rd Cir., 1961); *Plumbers & Pipefitters Union*, 149 NLRB 39, 57 LRRM 1257 (1964).

105 138 NLRB 923, 51 LRRM 1155 (1962), *aff'd*, *Ramsey* v. *National Labor Relations Board*, 327 F.2d 784, 55 LRRM 2441 (7th Cir., 1964), *cert, denied*, 377 U.S. 1003, 84 S.Ct. 1938 (1964), 56 LRRM 2544. See *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 84 S.Ct. 909 (1964), 55 LRRM 2767.

defeating the purposes of the Act and the common goal of national labor policy concerning the final adjustments of disputes, 'as part and parcel of the collective bargaining process.' " An employee charged that his employer and his union had breached Sections 8 (a) (1), 8 (a) (3), 8 (b) (1) (A), and 8 (b) (2). He had not agreed to be bound by the award, had no notice of the hearing, and did not participate in it. The NLRB held, however, that his rights had been vigorously defended by the employer; hence there was no denial of due process.

Perhaps the case may be distinguished from the typical case of "just cause," as it involved a discharge under Indiana's now-repealed right-to-work law. The contract had been entered into prior to the enactment of the law in 1957; hence the union security provision remained applicable. An arbitrator held that the employer had breached the contract by not discharging the employee. He was, with union consent, reemployed on the date the contract expired (the union security clause no longer being effective), but with reduced seniority. The reduction in seniority resulted in a layoff which promoted the filing of the charge. The issue was essentially legal, and the employer was interested in sustaining the legal principle for which the employee contended. Thus, the employee's failure to receive notice and lack of participation did not prejudice him, as it would in the typical contract dispute involving discipline or discharge for insubordination, incompetence, absenteeism, fighting, or other incident that occurs in the plant.

The Court of Appeals for the Seventh Circuit confirmed the discretion vested in the NLRB to accept or reject an arbitrator's award:

> . . . the Board has the discretion to defer to the decision of an arbitrator. [The court's] function in reviewing such cases is to determine whether the Board abused its discretion in so deferring. (pp. 787-788)

The court quoted approvingly the NLRB opinion that it

> . . . should give hospitable acceptance to the arbitral process as "part and parcel of the collective bargaining process itself," and voluntarily withhold its undoubted authority to adjudicate alleged unfair labor practice charges involving the same subject matter, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the

> award was clearly repugnant to the purposes and policies of the Act. (p. 788)

The court noted that "[it] appears that the company fully and adequately defended petitioner's position at the hearing." Although Judge Hastings said that "[there] is no statutory or constitutional right of an employee to be present at an arbitration hearing," a blind following of this dictum may collide with *Spielberg*.

There is serious question whether an arbitrator affords a discharged grievant the opportunity of defense to which he is entitled unless the arbitrator makes certain that the grievant has an opportunity to be present at the hearing. Indeed, there are situations in which the arbitrator should insist to the point of communicating personally with a grievant. A grievant's absence may be a basis for refusal by the NLRB to "defer" to an arbitrator's award.[106] An arbitrator in most cases knows from the evidence and method of presentation whether the union representatives are, in fact, doing a sincere job of handling their constituent's grievance before the arbitrator.[107]

*Interpretation of Law*

*Spielberg* requires due process in the procedural requirements of an arbitration; thus, it can be urged that it is inapplicable to decision on the merits of a discharge case. Should an arbitrator apply or interpret the law—statutory and/or common?

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[106] *Auburn Rubber Co., Inc.*, 156 NLRB No. 30, 61 LRRM 1033 (1965). In this case, the alleged discriminatees had "placed their cases in the hands of the General Counsel."

[107] There has been an ever increasing concern over the rights of individual employees who may be unpopular with both employer and union. Perhaps in the *Miranda Fuel Co.* case there is a seed which could grow into a method of protecting rights of individuals, although the Court of Appeals for the Second Circuit in three separate opinions refused to enforce the NLRB order. *National Labor Relations Board* v. *Miranda Fuel Co., Inc.*, 326 F.2d 172, 54 LRRM 2715 (1963). For a shocking abuse of the grievance procedure and the judicial process see *Hildreth* v. *Union News Company*, 295 F.2d 658, 48 LRRM 3084 (6th Cir., 1961), 315 F.2d 548, 52 LRRM 2827 (6th Cir., 1963), *cert. denied*, 375 U.S. 826, 84 S.Ct. 69 (1963), 54 LRRM 2312; *Simmons* v. *Union News Company*, 341 F.2d 531, 58 LRRM 2521 (6th Cir., 1965); *cert. denied*, 381 U.S. 884, 86 S.Ct. 165 (1965), 60 LRRM 2255. The dissent of Mr. Justice Black, in which Chief Justice Warren concurred, is "must" reading for all arbitrators. *Vaca v. Sipes*, 385 U.S. 895, 925, 87 S.Ct. 903 (1967), 64 LRRM 2369, will probably have a tendency to increase the discharge cases which unions process through the arbitration procedure. Determination of union good faith would, I submit, be more efficiently determined by NLRB, as was attempted in *Miranda Fuel*, and as Mr. Justice Fortas suggested in his concurring opinion.

There are distinguished arbitrators who advance the thesis that an arbitrator is responsible solely for determination of contract issues, and that all questions involving statutory violation should be deferred to the NLRB. Opinions that so hold are cited at footnote 95, although contract language is a factor in the decision in some of these cases.

I submit that, subject to the caveat expressed below, arbitrators *should* render decisions on the issues before them *based on both contract language and law.* Indeed, a separation of contract interpretation and statutory and/or common law is impossible in many arbitrations. This impossibility of separation has been well stated:

> In short, no regulation of unilateral action during the term of an agreement can escape the dilemma that, if the regulation be by the NLRB, it will involve that body in the administration of agreements, and that, if the regulation be by court or arbitrator, it will involve them in determining as a contractual question the discharge of what is also a statutory obligation. Adjudication by either overlaps the function of the other.[108]

Arbitrators, as well as judges, are subject to and bound by law, whether it be the Fourteenth Amendment to the Constitution of the United States or a city ordinance. All contracts are subject to statute and common law; and each contract includes all applicable law. The law is part of the "essence [of the] collective bargaining agreement" to which Mr. Justice Douglas has referred (footnote 70).

An award that does not consider the law may result in error. Consider obvious examples. Should an arbitrator enforce a contract that provides for payment of wages lower than those established in the Fair Labor Standards Act or, if applicable, a state minimum wage law? Or is he performing his function if he overlooks limitations on hours for women and minors, or maximum loads that women may carry in industrial employment? I think not.

A recent case that can be cited by both proponents and opponents of the thesis advocated here is *International Union, United*

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[108] Dunau, "Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems," 57 *Col. L. Rev.* 52, 79 (1957).

*Automobile, Aerospace & Agricultural Implement Workers of America* v. *W. M. Chace Company,*[109] in which a district court refused to require an employer to comply with an arbitrator's award because compliance would have required the employer to commit a misdemeanor. A statute [110] provides that: "No female shall be assigned any task disproportionate to her strength." The union, the prevailing party, sought judgment on the pleadings.

The court, in denying the motion and dismissing the petition, observed:

> First, the arbitrator was not commissioned to construe law *qua* law. The extent of his authority was to determine the meaning of the agreement. His jurisdiction to interpret the law was limited to rendering a legal construction only insofar as the agreement incorporated the law by reference. He was authorized to construe the law as though it were nothing more than a provision of the contract. In *Enterprise Wheel,* the Supreme Court, referring to the ambiguous arbitration opinion before it, observed . . . :
>
> "It may be read as based solely upon the arbitrator's view of the requirements of enacted legislation, *which would mean that he exceeded the scope of the submission.*" (Emphasis supplied by district court)
>
> Second, the arbitrator's opinion does not clearly show exactly under what conditions he felt that female employees could do certain jobs without causing respondent to violate M.S.A. § 28.824. . . .
>
> Had the arbitrator's award expressly directed respondent not only to reinstate the women but also to take whatever steps were necessary to arrange workloads so that no woman would have to do "disproportionate" work, it may well be that the award would be summarily enforceable. But this is not the case. The award actually made only directs reinstatement. (pp. 2100-2101)

Rather than determining that the arbitrator is not concerned with the law, the opinion really holds that the arbitrator did not give the law sufficient consideration. Had he discussed the law in his opinion and applied it, it seems likely that either (1) the arbitrator would have denied the grievance; or (2) the opinion and award would have been sufficient basis for enforcement. This decision argues that an arbitrator should consider the law more

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[109] 262 F. Supp. 114, 64 LRRM 2098 (E.D. Mich., 1966).
[110] Mich. Stat. Ann. 28.824.

fully, not that he should shove the law to one side as not within his jurisdiction. One cannot disagree with the judge's comment that the arbitrator's jurisdiction is limited to "rendering a legal construction only insofar as the agreement incorporated the law by reference"—*because every agreement incorporates all applicable law.*

Indeed, an arbitrator who decides a dispute without consideration of legal issues disserves his management-union clients, and acts inconsistently with the decisions of both the NLRB and the courts that sanction arbitral decisions.[111]

The omission in the 1947 statute of the words "shall be exclusive," together with the addition of Section 203 (d), suggests that the determination of legal questions is not excluded from the arbitrator's role, although one may urge that Congress did not consider the arbitration process, as the House Conference Report (footnote 68) referred only to the Board and the courts.

Consider other examples. Many contracts include language prohibiting discrimination for union activity or because of race, religion, or national origin; other contracts are silent on these subjects. Suppose a union or an employee grieves over a discharge allegedly for insubordination or incompetence, but which the union or employee contends was for discrimination under Section 8 (a) (3) of the National Labor Relations Act. Is the arbitrator, if the evidence discloses discrimination, to dismiss the grievance because the contract is silent and require the grieving party to file a charge with the NLRB? This would result in a procedure contrary to the recognition and encouragement of the settlement of disputes by arbitration as enunciated by the Supreme Court in the *Steelworkers* trilogy and other cases; by the National Labor Relations Board in formal opinions; and, by members of the Board in the public forum.

The concept would have another unfortunate effect. Management lawyers often have urged that inclusion in collective bar-

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111 The sentence and footnote in the *Acme Industrial* NLRB brief which suggests that an arbitrator may be without power to determine statutory issues sounds like an afterthought; does not portray the arbitral process correctly, for arbitrators, with NLRB and court approval, do render decisions on legal issues. In *International Harvester,* for example (footnote 105), the arbitrator was faced with a legal issue, which both the NLRB and the court of appeals affirmed.

gaining agreements of provisions enjoining discrimination because of union activity or race, religion, or national origin are unnecessary because this area is regulated by statute. If arbitrators confine themselves to the contract, unions will urge—and rightly—the inclusion in collective bargaining agreements of all statutory provisions that might affect their constituents.

Dr. George Taylor, in an address before a meeting of commissioners of the Federal Mediation and Conciliation Service on January 9, 1967, suggested a "Taylor Prize" for employers and unions who reduce the length of their collective bargaining agreements 10 percent over the previous year. The concept that arbitrators are not concerned with the law of the land would tend to increase the length of collective bargaining agreements.

The issue of civil rights is of increasing importance. Recently, the Acting General Counsel for the Equal Employment Opportunity Commission announced the EEOC position that neither contract, grievance-arbitration procedures, nor the exclusive jurisdiction of the National Labor Relations Board over unfair labor practices may serve as a defense to federal-court action for violations of Title VII of the Civil Rights Act of 1964, and that an employee's privilege to invoke Title VII may not be defeated by contract. In his address, he stated that the EEOC and NLRB jurisdictions are concurrent when both statutes apply.[112]

Arbitrators should no more close their eyes to issues under federal or state civil rights or fair employment practices statutes than they should to breaches of the National Labor Relations Act.

Should an arbitrator in Michigan brush aside as inapplicable the statutory provision which declares that: "The opportunity to obtain employment without discrimination because of race, color, religion, national origin, or ancestry is hereby recognized and declared to be a civil right"? [113]

A case in point is *Hotel Employers Association,*[114] in which a hotel association made a special arrangement with a civil rights group and agreed to arbitrate civil rights disputes with this group.

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[112] 63 LRR 300 (1966).
[113] Mich. Stat. Ann. 17.458 (1).
[114] 47 LA 873 (Robert E. Burns, 1967).

The union, which was the collective bargaining representative for the members of the association, protested the agreement with the civil rights group and filed a grievance. The arbitrator, *construing the National Labor Relations Act,* found that the agreement with the civil rights group was "a collective bargaining agreement in everything but name," and held that the union's protest against the arrangements made between the association and the civil rights group had merit. This case could not have been decided had the arbitrator confined himself to the language of the collective bargaining agreement.

That an arbitrator should consider the statute is consistent with the *Spielberg* doctrine. *Unless an arbitrator has passed upon the statutory issue, his award will not be honored.*[115] And the arbitrator should not confine statutory interpretation to those situations in which the collective bargaining contract, as is sometimes the case, parrots the statute. In keeping with the concept that arbitrators' awards will be honored if due process is recognized, as the *Spielberg* doctrine holds, and if the settlement of disputes through a private, rather than a public, agency is to be encouraged, arbitrators should not hesitate in their application of the applicable statute.

Perhaps one caveat should be noted. If an employer and a union advise an arbitrator that they have chosen him to determine an issue under the collective bargaining agreement and that actual or potential statutory questions are to be presented to the NLRB and should be disregarded by him, the arbitrator, who has been retained by the parties, must comply or withdraw from the case. Withdrawal might be the wiser course, allowing the parties to pursue their remedy before the NLRB, thus avoiding two hearings and two decisions.[116]

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[115] *I. Oscherwitz & Sons,* 130 NLRB 1078, 47 LRRM 1415 (1961); *Monsanto Chemical Co.,* 130 NLRB 1097, 47 LRRM 1451 (1961); *Raytheon Co.,* 140 NLRB 883, 52 LRRM 1129 (1963).

[116] A charge filed with the Board may, of course, be cheaper than arbitration, as the taxpayer pays for the investigation and, if a complaint is issued, for the cost of the hearing. But what if the six-month statute of limitations under NLRA has run? This is a reason for filing a "holding" charge with the NLRB if it appears that the statute of limitations may expire before arbitral decision is rendered. It also makes sense under the view expressed by Board Member Gerald A. Brown and General Counsel Ordman that the NLRB delay decision until the arbitrator has had an opportunity to render his award.

Some arbitrators have found such limitation in contract language. Thus, in *Spartan Mills and United Textile Workers of America,*[117] one of the cases cited in the NLRB's *Acme Industrial* brief, the arbitrator considered himself limited to the contract by the language:

> The arbiters' authorities shall be limited to matters involving the application of the terms of this agreement and must be settled within the terms of this contract. The arbiters may not modify, amend, or add to the terms of this agreement.

The first sentence may confine the arbitrator to the terms of the contract. The "standard" language contained in the second sentence should not be construed as limiting legal consideration, as all contracts are made within, not outside, the law. Arbitrators who do not recognize this have not fulfilled their proper function.

In the words of one arbitrator:

> . . . [a]ll agreements are made subject to the applicable provisions of Federal or State laws, and the parties must be presumed to have intended an agreement which is not in violation of any law. . . . *I am bound by the Agreement and the provisions of the applicable Federal laws in determining the particular grievance involved.* (Emphasis supplied) [118]

This philosophy is consistent with Section 203 (d). It is inconceivable that Congress intended that a method of final adjustment, agreed upon by the parties, should not be subject to applicable federal and state law. For arbitrators to "duck" the legal question is inconsistent with the deference paid to arbitrators' decisions by the NLRB. The NLRB has reason for showing "deference" *only* if there is a statutory issue in the case *and the arbitrator decides it.* Indeed, if there is no statutory issue involved, the NLRB has no business in the case at all!

It is not the position of this paper that the arbitrator has a power superior to the Board. It is rather that arbitrators should not avoid a decision on the merits solely because a statutory or common-law question is involved.

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[117] 27 LA 256, 258 (J. Fred Holly, 1956). See also, *Eaton Manufacturing Company,* 47 LA 1045 (Samuel S. Kates, 1966).

[118] *Hancock Steel Company, Inc.,* 23 LA 44, 47-48 (Hyman Parker, 1954).

*Cases in Point*

Space permits citation of only a few cases of arbitrators who have, fortunately, recognized that they have a responsibility under statute as well as under contract. These are cases in point:

*Pennsylvania Electric Company.*[119] In this case the arbitrator construed "time worked" within the meaning of the Fair Labor Standards Act, notwithstanding the employer's contention that the contract should be interpreted without regard to the statute and statutory issues left for resolution in another forum, since meaning and application of contract terms involved are ultimately controlled by the Fair Labor Standards Act.[120]

*Coakley Brothers Company.*[121] Here the contract was held valid, notwithstanding a connection by the employer that he was coerced into signing it by the unfair labor practice of a threat to picket a partially constructed building at which the employer had a moving job.

*National Steel and Shipbuilding Company.*[122] In this instance the arbitrator determined a work-jurisdiction dispute and held that, as an arbitrator, he was not automatically preempted by Section 10 (k) of the National Labor Relations Act.[123]

*Houdaille Industries, Inc.*[124] This case, like *National Steel and Shipbuilding,* involved a jurisdictional dispute, which the arbitrator held was not beyond his jurisdiction, although he recognized that the NLRB was not divested of jurisdiction and "if a Board decision should be contrary to the arbitrator's award, the Board decision prevails."

*Safety Electrical Equipment Corporation* v. *Local 299, United*

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119 47 LA 526 (Emanuel S. Stein, 1967).
120 FLSA provides for enforcement through the Department of Labor or by private suit of the aggrieved employee.
121 47 LA 356 (Arvid Anderson, 1966).
122 40 LA 625 (Edgar A. Jones, 1963).
123 For discussion of this and similar cases see: Jones, "An Arbitral Answer to a Judicial Dilemma: The Carey Decision and Trilateral Arbitration of Jurisdictional Disputes," 11 *UCLA L. Rev.* 327 (1964); Bernstein, "Nudging and Shoving All Parties to a Jurisdictional Dispute into Arbitration: The Dubious Procedure of National Steel," 78 *Harv. L. Rev.* 784 (1965); Jones, "On Nudging & Shoving the National Steel Arbitration into a Dubious Procedure," 79 *Harv. L. Rev.* 327 (1965).
124 35 LA 455 (Milton H. Schmidt, 1960).

*Electrical, Radio and Machine Workers of America.*[125] This award which interpreted Connecticut's Workmen's Compensation Law, was enforced by a court, which noted that: "No claim is made the award was procured by partiality or corruption on the part of the arbitrator." The court cited *United Steelworkers* v. *Enterprise Wheel & Car Corporation* (footnote 70), and noted that it would not refuse to enforce an arbitrator's award, "especially where, as here, a review of the arbitrator's opinion reveals no 'manifest disregard' of the law." Obviously, consideration of the law was necessary.

*Hawthorn-Mellody, Inc.*[126] In this case, in applying the principle of accretion, the arbitrator said:

> It is wholly unreasonable to interpret a clause in [the collective bargaining agreement] without reference to the other legal obligations and restrictions created by [the National Labor Relations Act and related legislation]. This is particularly pertinent in the case like the present, where the issue raised by the Union involves consideration of representation problems normally under the jurisdiction of the Labor Board.

*General American Transportation Corporation.*[127] Here the arbitrator determined whether employees were supervisors as defined by the National Labor Relations Act. He stated that had the question been "one of determining the scope of the bargaining unit, he would have granted the union's motion to defer the matter to NLRB. But, the scope of the bargaining unit having already been determined," the question "boils down to whether [the employees involved] are excluded from the bargaining unit." [128] This case illustrates an arbitrator's exercising jurisdiction in much the same manner as does the General Counsel of the NLRB.

*Buckstaff Company.*[129] In this discharge case, the arbitrator held that if an employer were to be required to discharge employees,

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125 62 LRRM 2786 (Conn., 1966).
126 42 LA 1296, 1299 (Jacob D. Hyman, 1964).
127 42 LA 1308 (Murray M. Rohman, 1964).
128 The arbitrator cited *Carey* v. *Westinghouse Electric Corporation,* 375 U.S. 261, 84 S.Ct. 401 (1964), 55 LRRM 2042, and noted that the Supreme Court saw no barrier to the use of the arbitration procedure in a work assignment or representation dispute, recognizing that "[t]he superior authority of the Board may be invoked at any time."
129 40 LA 833 (George H. Young, 1963).

both union and employer would be guilty of violating the National Labor Relations Act, and "he cannot bring himself to render an opinion and award, which, if carried out, would result in both parties to the arbitration being guilty of unlawful conduct." Although the arbitrator denied that he was "construing or interpreting the National Labor Relations Act in concluding that the discharge of these employees would be a violation of the Act," it is clear that he *applied* the statute. Evidently, this arbitrator felt the law so clear that he did not need to construe or interpret.

*Sivyer Steel Casting Company.*[130] In this case the union contended that the company, which had closed its plant and moved its operations to a newly purchased plant, was required under *Zdanok* v. *Glidden Co.*[131] to recognize seniority of employees. The arbitrator, disagreeing with *Glidden,* held on the basis of *Town & Country Manufacturing Company, Inc.*[132] and *Fibreboard Paper Products Corporation* [133] (neither of which had then been decided by the courts of appeal) that the company had fulfilled its statutory duty to bargain on the effect of the move on the employees and had made commitments to the employees. The arbitrator directed compliance with the agreement reached. When the employer refused to comply, the union sought enforcement. The employer contended that the arbitrator had decided the case under a second agreement, under which he was not empowered to act. The U.S. District Court for the Northern District of Illinois, agreeing with the employer, held in an unreported case that "the arbitrator exceeded the authority granted by the collective bargaining agreement between the parties and also the issue submitted to him for determination." [134]

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130 39 LA 449 (Robert G. Howlett, 1962).

131 288 F.2d 99, 47 LRRM 2865 (2nd Cir., 1961).

132 136 NLRB 1022, 49 LRRM 1918 (1962).

133 130 NLRB 1558, 47 LRRM 1547 (1961).

134 Let this be a warning to unions! The arbitrator was, *and is,* of the opinion that the employer had a continuing duty to bargain; that the parties had bargained; that the NLRB, had the case been submitted to it, would have required the employer, under Section 8(a)(5), to fulfill the agreement reached through collective bargaining. By the time the arbitrator decided the case, the six-month statute of limitations had run. See also *Lockheed Aircraft Corporation,* 27 LA 517 (Thomas L. Purdom, 1956); An action at law was also a possibility. See *Rheem Manufacturing Co.,* 32 LA 147 (Paul Prasow, 1959); and *Mode O'Day Corporation,* 1 LA 490 (George Cheney, 1946).

*Arbiter's Duty to "Probe"*

Questions are raised as to whether an arbitrator should "probe" to determine whether a statutory issue is involved. If he is to be useful in reducing the NLRB caseload, he should, particularly in discharge cases, inquire as to the possibility of Section 8 (a) and 8 (b) violations, the latter if there is any suggestion of collusion between the parties.[135] Unless he does so, neither the General Counsel nor the Board will "defer" to the arbitrator's decision; and, if the statute has run, the arbitrator's failure to act may result in an injustice to an employee.

It was made clear in the regional meetings that if arbitrators are to be helpful to the NLRB in the overlapping jurisdiction under discussion, they should make it clear in their opinions that a statutory issue is involved, discuss the issue, decide it, and give the *rationale* for the decision. The arbitrator who does not follow this practice, or who sidesteps the issue completely, will never reach *Spielberg,* for the Board will be required to assume jurisdiction and decide the case. About the only thing the arbitrator has done in these circumstances is to collect his fee!

There are, of course, cases in which an arbitrator is unable to determine that an issue of discrimination, or other statutory question, is present. These may ultimately end up in the lap of the Board; but, I reiterate, the six-month statute of limitations and the tendency of some employers and unions to delay completion of cases in the grievance procedure argues persuasively for full treatment by the arbitrator.

When an arbitrator meets one of those cases which might better be determined by the NLRB or EEOC (or some other agency), he may determine that the General Counsel or the Commission, with its power of investigation, is in a better position to secure evidence than is an under- or non-represented employee whose dispute has

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[135] *Local No. 824, United Brotherhood of Carpenters and Joiners of America* v. *Brunswick Corporation,* 227 F. Supp. 643, 55 LRRM 2779 (W.D. Mich., 1964), 342 F.2d 792, 58 LRRM 2718 (6th Cir., 1965). In this case, Arbitrator Pearce Davis held that the dispute was arbitrable and that the employee, whose union had at first refused to support him, was entitled to reinstatement.

been submitted to arbitration.[136] He should so advise the parties and withdraw. (See also discussion in text at footnote 116.)

*Representation Cases*

The Board has applied the *Spielberg* doctrine in representation cases where an award has already been rendered,[137] although either the selection of a bargaining agent or the determination of the constituency of a bargaining unit is less likely to be involved in contract interpretation than is discharge. Thus, in a case where there was an issue of clarifying the bargaining unit in a new pilot plant which an arbitrator held was covered by the contract as an accretion to an existing unit, the Board held the arbitration proceedings were fair and regular, all parties were before the arbitrator, and the decision was not contrary to the policies of the Act.[138]

That representation and unfair labor practice cases may become intermixed is illustrated by *Schreiber Trucking Company, Inc.*[139] This interstate trucking company operated two terminals in Pennsylvania. The International Association of Machinists was bargaining agent for the mechanics at one terminal, the Brotherhood of Teamsters at the second. When the employer built a new terminal, in which he combined his two operations, the Machinists invoked the arbitration clause to determine whether the contract "governed the new location." The arbitrator held that the contract covered the transfer of the employees represented by the Machinists to the new terminal. Out of this arose a dispute. When the Pittsburgh terminal opened, the employer terminated the Ma-

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136 What of the states, such as Michigan and Wisconsin, where charges are referred to trial examiners if they state a cause of action, and the burden is on the charging party to establish his case before the trial examiner? The Michigan Board, and I presume the Wisconsin Board, adopted this procedure in order that the state board might not be both prosecutor and judge, one of the principal charges levied against the NLRB prior to the establishment of the separate office of General Counsel in 1947. The Michigan Board has announced its policy that in those cases where an individual is not represented by counsel, the trial examiners will, within the bounds of propriety, make certain that all relevant testimony is brought to the attention of the trial examiner.

137 *Raley's, Inc.*, 143 NLRB 256, 53 LRRM 1347 (1963); *Hotel Employers Association of San Francisco*, 159 NLRB No. 15, 62 LRRM 1215 (1966); *Goodyear Tire & Rubber Co.*, 147 NLRB 1233, 56 LRRM 1401 (1964); *Pacific Tile & Porcelain Company*, 137 NLRB 1358, 50 LRRM 1394 (1962).

138 *Goodyear Tire & Rubber Co., supra*, note 137.

139 148 NLRB 697, 57 LRRM 1070 (1964).

chinists, recognized the Teamsters as the bargaining representatives at the new unit, and extended the Teamsters' union security contract to cover that unit before any employees were employed. The Machinists filed a charge under Sections 8 (a) (1), 8 (a) (2), and 8 (a) (3).

The Board noted that "the only issue litigated in the arbitration proceedings was whether the Machinists' contract required the employer to apply the contract to [the new terminal] and to transfer the Pittsburgh mechanics under the contract terms" and that "it has not been found that the Pittsburgh mechanics had a contractual right to be transferred to [the new terminal] under the terms of the Machinists' contract, or that the employer should have applied the terms of the Machinists' contract to the Pittsburgh mechanics who were rehired at [the new terminal]." The arbitrator did not have before him, and did not decide, the unfair labor practice issue of whether the Teamsters' contract lawfully could be applied to the new terminal; and the employer's treatment of the Pittsburgh mechanics was based on the application of the Teamsters' contract, which did not apply to the Machinists. The Board opined (quite correctly) that its findings, which required the employer to cease and desist from recognizing the Teamsters as representative of the mechanics unit at the new terminal until certified, were in no way inconsistent or in conflict with the award of the arbitrator.

This is an example of the necessity of an arbitrator's determining, if possible, all pertinent issues, although in this instance the arbitrator would have had to use an imaginative approach, as did the arbitrator in *National Steel and Shipbuilding Company* (footnote 122), in order to bring the Teamsters Union into the arbitration.

The Courts, as well at the NLRB, have recognized that representation cases may be determined by arbitration,[140] although representation and assignment of work issues are often difficult to distinguish. Where a General Motors umpire [141] "decided a dispute as to the assignment of work and not a representation

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[140] *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* v. *General Motors Corporation,* 59 LRRM 2411 (E.D., Mich., 1965).

[141] *General Motors Corporation,* NLRB No. 7-RC-2793, 56 LRRM 1332 (1964).

issue," the NLRB accepted a petition and determined the representation question. The Board noted that while

> . . . certain language in the Umpire's statement of the case and opinion speaks in terms of representation . . . [w]hen the opinion is read with care, as the Umpire admonishes, and particularly when it is observed that the language of the Umpire's decision (as distinguished from the opinion) refers *only* to the assignment of disputed work, as in fact did the UAW grievance, it is apparent to us that the Umpire has decided a dispute as to the assignment of work and not a representation issue.

In a footnote, the NLRB states that *Raley's* [142] is inapposite to the *General Motors* case, which suggests that if the umpire had been presented with a representation issue, and the *Spielberg* criteria had been present, the NLRB would have deferred to the arbitrator's award.

In *New Orleans Typographical Union No. 17, International Typographical Union, AFL-CIO (E. P. Rivas, Inc.) and Local 53, Amalgamated Lithographers of America,*[143] a case decided less than six weeks after *Carey* v. *Westinghouse Electrical Corporation* (footnote 72), the NLRB, over two dissents, declined to honor the arbitrator's award, which had been both ordered and enforced by court decree, assigning work to one of two unions, because the opinion and award interpreted the contract of only one of the unions involved.

The dissenting members construed the contract language and did not reach their conclusion solely in "deference" to the arbitrator's award. They commented:

> It seems to us that the language of the ITU contract and arbitration award clearly and strongly favor the position taken by the ITU on contract coverage.

Evidently, the three members of the majority, and perhaps the minority, were unimpressed with the philosophy of Mr. Justice Douglas in *Westinghouse Electric Corporation* (footnote 72), where he suggested that arbitration, "whether one involving work assigned or one concerning representation," has value, for "if . . . a work assignment dispute, arbitration conveniently fills a gap and

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142 *Op. cit.*, footnote 137.
143 147 NLRB 191, 56 LRRM 1169 (1964); *Local 18, Operating Engineers (Building Trades Employers' Association)*, 145 NLRB 1492, 55 LRRM 1188 (1964).

avoids the necessity of a strike to bring the matter to the Board [and] [i]f . . . a representation matter, resort to arbitration may have a persuasive, curative effect even though one union is not a party." [144]

*Carey* v. *Westinghouse Electric Corporation* (footnote 72) was decided in *Westinghouse Electric Corporation* (footnote 73) early in 1967 on remand, after the Supreme Court had urged the therapeutic effect of arbitration. Following the Supreme Court decision, Westinghouse filed two motions, one for clarification of the certification issued for each of the two disputing unions, and then filed a petition for an election among the employees in the two units. The Board deferred decision pending the arbitrator's award, which was ultimately issued in 1965, one of the unions not participating in the arbitration. The Board refused to defer to the arbitrator's award and decided the case on the merits. Like the arbitrator, it found no merit in the contention of the union that sought a finding that a jurisdictional dispute existed, but stated that the "dispute as to which labor organization is entitled to represent a particular group of employees involves a representation matter over which the Board has statutory authority" (p. 1083). The NLRB, in refusing to defer to the arbitrator's award, which had split a single bargaining unit into two units, cited *Raley's, Inc.* (footnote 137) and the limitation placed thereon by *Hotel Employers Association of San Francisco* (footnote 137). The Board said:

> Here, as in the *Hotel Employers Association* case, the ultimate issue of representation could not be decided by the Arbitrator on the basis of his interpreting the contract under which he was authorized to act, but could only be resolved by utilization of Board criteria for making unit determinations. *In such cases the arbitrator's award must clearly reflect the use of and be consonant with Board standards.* (Emphasis supplied)
>
> In this case apparently not all the evidence concerning all these standards was available to the Arbitrator for his consideration and appraisal, and his award reflects this deficiency. (p. 1083)

The Board went on to state that, although the arbitrator's decision considered the employees' skills:

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144 A possible distinction in *E. P. Rivas, Inc.*, is that one union had gone on a strike which was enjoined pursuant to Section 10 (1) of NLRA.

> . . . it does not treat with the following significant factors, among others: bargaining history; the integration of operations of P-20; the progression of the employees from the lower to higher grades in that department; and the possible adverse effects of splitting the department on the Employer and the employees in the departmental unit. Consquently, while we give some consideration to the award, we do not think it would effectuate statutory policy to defer to it entirely. (pp. 1083-84)

Another facet of the representation—assignment of work dispute area (with elements also of a jurisdictional dispute) arose in *International Brotherhood of Firemen & Oilers, AFL-CIO* v. *International Association of Machinists, AFL-CIO*,[145] where a court of appeals held that a district court has jurisdiction under Section 301 to enforce an arbitration award holding that the efforts of one certified union at a plant to obtain work claimed by another certified union is a violation of the AFL-CIO no-raiding agreement. The arbitrator, the court held, did not exceed the scope of his authority, and the district court did not abuse its discretion in enforcing the award, even though the NLRB had concurrent jurisdiction and was a superior authority. The court, citing *Carey* v. *Westinghouse Electric Corporation*,[146] noted some of the distinctions between cases involving work assignments and representation.

> If a work assignment dispute is involved, the Board has no power to resolve it under § 10 (k), 29 U.S.C.A., § 160 (k), absent a strike or a threat to strike by the union. However, if the controversy is representational, the union may seek relief from the Board by filing an unfair labor practice charge under § 8 (a)(5), 29 U.S.C.A. § 158 (a) (5) (refusal to bargain), or by petitioning the Board under § 9 (c) (1), 29 U.S.C.A., § 159 (c) (1), for a clarification of its certificate. (p. 178)

The Court cited *Textile Workers Union of America* v. *Lincoln Mills of Alabama*[147] as authority that the arbitration process should be encouraged "even though the superior authority of the Labor Board might be invoked at any time," and observed that "should a subsequent decision by the Board conflict with the ruling of the arbitrator, the Board's decision would control." The court concluded:

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145 338 F.2d 176, 57 LRRM 2459 (5th Cir., 1964).

146 *Op. cit.*, footnote 72.

147 353 U.S. 448, 77 S.Ct. 912, 40 LRRM 2113 (1957).

> . . . we hold first, that the District Court had jurisdiction; second, that the arbitrator in making his award acted within the scope of his authority; and third, that there was no abuse of discretion on the part of the District Court in entering the order complained of even under the circumstances that the Board had concurrent jurisdiction and was a superior authority in the premises. (p. 179)

A case at odds with *Firemen & Oilers* v. *Machinists* [148] is *Local 1505, International Brotherhood of Electrical Workers* v. *Lodge 1836, International Union of Machinists,*[149] a case decided a year and a half before the Supreme Court spoke in *Carey* v. *Westinghouse.* The Court of Appeals for the First Circuit looked with disfavor upon arbitration between an employer and one contending union, expressing the opinion, contrary to that of Mr. Justice Douglas in *Carey* v. *Westinghouse,* that:

> In view of the factual situation, this obviously would not make arbitration a true instrument of industrial peace. [NLRB had] exclusive jurisdiction to resolve the conflict between the parties . . . whose certificates have permitted these overlapping claims.

This philosophy is contrary to expressions of both the NLRB and other courts that arbitration should be encouraged, and where due process has been observed and the decision is not "too contrary" to the Board's construction of the contract, the arbitrator's award will be recognized.

*Jurisdictional Disputes*

The Board has, in many cases, recognized the *Spielberg* doctrine in disputes involving two or more unions claiming the same work. Thus, in *Electrical Workers Local 26, International Brotherhood of Electrical Workers, AFL-CIO, and McCloskey & Co.,*[150] the Board affirmed the award of the National Joint Board for the Settlement of Jurisdictional Disputes, noting that "[t]he work had been awarded to the Sheet Metal Workers by the Joint Board, and, like the Trial Examiner, we find that all parties were bound by that award." [151]

There are several cases wherein the Board has not recognized an

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148 *Op. cit.,* footnote 145.
149 304 F.2d 365, 50 LRRM 2337 (1st Cir., 1962).
150 147 NLRB 1498, 56 LRRM 1402 (1964).
151 See also, *Local 1, International Brotherhood of Electrical Workers, AFL-CIO (Sundermeyer Painting Co.),* 155 NLRB No. 97, 60 LRRM 1429 (1965).

award if either the employer or one or both unions refused to submit to the arbitral jurisdiction.[152] And the Board, following *Spielberg,* has refused to recognize an award where it disclosed no rational supporting basis.[153]

*Millwrights Local Union No. 1102, United Brotherhood of Carpenters & Joiners of America and Don Cartage Company,*[154] suggests that NLRB may have adopted a new standard for this construction industry plague. Two employers contended that the Carpenters' Union had induced and encouraged a work stoppage to force one of the employers and his customer to assign work to members of a Carpenters local rather than to members of an Iron Workers local. Following a hearing before a trial examiner, the Carpenters and a regional director executed a settlement agreement wherein the Carpenters agreed not to force the employer to assign the disputed work to their members. The NLRB issued a notice against the Iron Workers to show cause why it should not approve the settlement agreement. Both the Iron Workers and the employers argued that they had not approved the settlement agreement and urged that the NLRB should issue an award extending beyond the precise dispute which led to the filing of the charges. The NLRB, however, approved the settlement agreement.

In its opinion, the NLRB called attention to the newly consti-

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[152] A few of the cases where the Board has so held are: *Winslow Bros. & Smith Co.,* 90 NLRB 1379, 26 LRRM 1346 (1950); *Local Union No. 181, International Union of Operating Engineers, AFL-CIO (Service Electric Company),* 146 NLRB 483, 55 LRRM 1348 (1964); *Carpenters District Council of St. Louis,* 146 NLRB 989, 56 LRRM 1001 (1964); *International Association of Operating Engineers, Local 66 (Frank P. Badolato & Sons),* 135 NLRB 1392, 49 LRRM 1688 (1962); *Locals 138, 138A, 138B, 138C, and 138D, International Union of Operating Engineers, AFL-CIO (Cafasso Lathing and Plastering, Inc.),* 149 NLRB 156, 57 LRRM 1251 (1964); *Local 69, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO (Bellezza Company, Inc.),* 149 NLRB 599, 57 LRRM 1360 (1964); *Local 449, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (Joseph B. Fay Company),* 149 NLRB 759, 57 LRRM 1363 (1964); *Lathers Local Union No. 62, Wood, Wire & Metal Lathers International Union, AFL-CIO (Belou & Co. Acoustics, Inc.)* 150 NLRB 21, 58 LRRM 1038 (1964); *Omaha Carpenters District Council (Bel-Toe Foundation Co.),* 150 NLRB 991, 58 LRRM 1179 (1965); *Local 7, Plumbers & Pipefitters (James N. Maloy, Inc.),* 150 NLRB No. 50, 58 LRRM 1125 (1964); *Local 162, Sheet Metal Workers (Lusterlite Corp.),* 151 NLRB 195, 58 LRRM 1385 (1965).

[153] *Local 300, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (D'Annunzio Bros., Inc.),* 152 NLRB 707, 59 LRRM 1163 (1965).

[154] 154 NLRB No. 45, 59 LRRM 1772 (1965).

tuted (April 1, 1965) National Joint Board for the Settlement of Jurisdictional Disputes, which establishes new standards and new appeals procedures for the settlement of disputes in the construction industry. Both unions were bound by the agreement establishing the new Joint Board, but neither the employer nor the association to which it belonged had adhered to the new agreement. The NLRB expressed the oft-announced policy of showing "deference" to but not being bound by, the decision of the arbitrator:

> Nevertheless, we believe that the new Joint Board should be given the opportunity to resolve this dispute on a voluntary basis. It may be that after study of the new procedures of the Joint Board, the employers will find these more acceptable than the old and will agree to submit their dispute to the new Joint Board. Or, if they refuse to make this submission, they may find that an award of the Joint Board on submission by the two unions is acceptable as a resolution of the jurisdictional dispute. The Board, too, may profit from such an award if it is forced to make its own jurisdictional determination even if the Joint Board award is not dispositive of the jurisdictional dispute under Section 10 (k). One of the relevant factors in determining who is entitled to the work in dispute, the Board has said, is an award by a joint board in the same or related cases. An award by a joint board of standing and experience, following procedures of fairness and impartiality, cannot fail to be helpful to the Board in making a jurisdictional determination if it is ultimately required to do so. (p. 1774)

The Board noted that the long hearing had caused the expenditure of time and money, but said:

> . . . we believe that this exercise of our discretion in response to the establishment of the new Joint Board, will best effectuate the public policy to encourage voluntary settlements of jurisdictional disputes. If we were to make a determination which extended beyond the Ternstedt dispute, we would be undercutting the new Joint Board at the very beginning of its operations and lessening its chances of success. The Board, employers, unions, and the public all have something to be gained by the successful operation of a voluntary system for the settlement of jurisdictional disputes. The Board, unions, and employers generally will save many times over the money expended on the hearing in this case if the new Joint Board will satisfactorily resolve, and therefore make unnecessary the submission of, even a small proportion of the jurisdictional disputes cases that would otherwise come before the Board. (p. 1774)

This expression by the NLRB is sound and consistent with the *Spielberg* principles. It is another cogent argument that arbitrators

should accept the responsibility vested in them to determine not only the narrow issues of contract construction but also legal issues —with the broad brush placed in their hands by the *Steelworkers* trilogy.

But, unfortunately, this effort in industrial self-government was short-lived, for, on petition for review, the Court of Appeals for the District of Columbia reversed and remanded the case to the Board with the admonition:

> It was the duty of the Board, in the circumstances here shown, to decide the jurisdictional issue presented and fully developed in a hearing before it.[155]

A concurring judge noted that "the employers [in this case] have consistently refused to be bound by the procedures of the [new] Joint Board." Evidently these employers are not in accord with the plaint, so often heard from industry, that employers and unions should be allowed to work out their problems without government interference.

But in a Section 301 case,[156] where the parties had agreed to be bound under the "new plan for the National Joint Board for the Settlement of Jurisdictional Disputes," the court recognized a settlement. In this instance, "all of the parties in this case are affiliated with an organization that adopted and signed an agreement" in 1965 "[which] provides for arbitration of disputes over work assignments in the construction industry."

Also of interest is *Local 728, International Brotherhood of Electrical Workers (Ebasco Services, Inc.),*[157] in which the NLRB said it was unwise to fragmentize a dispute and accepted an adjustment decreed by the Joint Board between two unions, even though only part of the work was within the Joint Board's jurisdiction.[158] Query: Would the Court of Appeals for the District of Columbia have allowed this decision to stand under the doctrine expressed in *Quinn?* (footnote 155)

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155 *Quinn* v. *National Labor Relations Board,* 61 LRRM 2690 (D.C. Cir., 1966).
156 *Sheet Metal Workers International Union, AFL-CIO, Local Union 17* v. *Aetna Steel Products Corporation,* 246 F. Supp. 236, 60 LRRM 2273 (U.S.D.C., Mass., 1965).
157 153 NLRB No. 68, 59 LRRM 1535 (1965).
158 The Board confined its decision to "the peculiar facts which we deem controlling in the instant case," an approach which, particularly in the jurisdictional area, has been the NLRB practice.

The importance of an arbitrator's or a joint board's considering and determining the law, and probing for evidence that may bear thereon, is well illustrated by the recent case of *D. C. International, Inc.*,[159] in which the NLRB refused to defer to a joint committee's award upholding an employee's discharge because the employee's statutory rights had not been "litigated" in the committee proceedings. There was no "hint," the NLRB said, of the occurrences that might be in breach of statute.

*Refusal-to-Bargain Cases*

As discussed above under *Acme Industrial,* arbitrators may be involved in refusal-to-bargain (Section 8 (a) (5)) and perhaps even Section 8 (b) (3) cases—cases involving, for example, a refusal to furnish information,[160] a unilateral change in jobs,[161] plant removal, or establishment of new plants.[162]

In Section 8 (a) (5) cases, the Board applies the same principles that it has enunciated in *Spielberg,* including, in those instances where an arbitration remedy exists but has not been used, a recognition that the parties *should* be willing to use the contract procedures. Thus, in *Montgomery Ward & Co.* (footnote 162), the NLRB, in dismissing a complaint, said that although the employer notified the union of the intended establishment of new truck terminals:

> . . . the Union never requested the Respondent to bargain concerning their establishment, [hence] the Respondent did not violate Section 8 (a) (5) of the Act by their establishment. . . .
>
> Yet, despite the collective bargaining agreement devised by the parties themselves for settling such a dispute, the Union chose instead to file the instant charges—thus asking the Board, in effect, to intervene and resolve the dispute. In these circumstances, the Board would be frustrating the Act's policy of promoting industrial stabilization through collective bargaining if we were to intervene in this dispute, instead of requiring the Union in this case to give "full play" to the established grievance procedure. (p. 1164)

The NLRB's concept in Section 8 (a) (5) cases, as in other

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159 162 NLRB No. 129, 64 LRRM 1177 (1967).
160 See also *Puerto Rico Telephone Co.,* 149 NLRB 950, 57 LRRM 1397 (1964).
161 *McDonnell Aircraft Corporation,* 109 NLRB 930, 34 LRRM 1472 (1954); *Flintkote Company, op. cit.,* note 90.
162 *Montgomery Ward & Co., Inc.,* 137 NLRB 418, 50 LRRM 1162 (1962).

8 (a) and 8 (b) cases, is that both parties should exercise good faith in complying with the provisions of the contract. If one party fails to do so, the NLRB will use its discretionary power, as in *Acme Industrial,* not to defer to the arbitration process.

The problem confronting the NLRB exists in those states where there is labor relations regulatory legislation.[163] In a recent Michigan case,[164] a union charged an employer with breach of Section 16 (6) of the Michigan Labor Mediation Act, the counterpart of Section 8 (a) (5), for failure to check off dues of members as provided by contract. The employer urged the existence of the contractual grievance procedure leading to final and binding arbitration. The trial examiner, citing the Michigan statute[165] which prohibits deductions from wages without authorization by each employee, refused to defer to the arbitration procedure, and, citing *Spielberg,*[166] *Raytheon,*[167] and *Raley's,*[168] said:

> The Labor Mediation Board has not had occasion to announce its policy on the myriad questions posed by the voluntary agreement of parties to channel into a grievance procedure disputes which also involve possible unfair labor practices. That public policy in Michigan favors resolution of disputes by arbitration is indicated by the special provisions of Section 9 (d) of the [Michigan Labor Mediation Act] relative to procedures for voluntary arbitration. However, there may be circumstances in which the Board should not defer to arbitration. In the instant case, the undersigned would recommend that the Board not withhold the exercise of its jurisdiction. A bargaining unit issue is involved; this is one of the areas of the Board's special expertise. More to the point, no grievance has been filed and there is a definite possibility that the unit placement issues cannot be resolved through the grievance-arbitration procedures of the contract in question. (p. 549)[169]

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163 Howlett, "State Labor Relations Boards and Arbitrators," 17 *Lab. L. J.* 26 (1966). State problems in this area may be expected to increase as more states grant the right of representation to public employees and require public employers to bargain with their exclusive bargaining representative.

164 *Woodward General Hospital and Clerical, Technical and Professional Employees Union, No. 417, 1966 Labor Opinions 544* (1966).

165 Mich. Stat. Ann. 28.585.

166 *Op. cit.,* note 96.

167 *Op. cit.,* note 115.

168 *Op. cit.,* note 137.

169 Under Section 23 of the Michigan Labor Mediation Act (Mich. Stat. Ann. 17.454 (25)), a "recommended order" of a trial examiner becomes the order of MLMB if no exceptions are filed within 20 days after service of the recommended order on the parties. In this case, no exceptions were filed; hence MLMB did not review the trial examiner's decision.

## Conclusions

There was a suggestion by some arbitrators at the regional meetings that arbitrators might apply "the law" if it were "clear" that a provision in a labor contract were contrary to statute, but should not do so if the NLRB or the courts had not construed the provision in question to be invalid.[170]

But in determining whether the law is "clear," or subject to argument, the arbitrator makes a *value judgment.* That an arbitrator should do so follows logically from court decisions that enforce arbitration of claims that may involve both breach of contract and violation of statute.[171] If an arbitrator is to handle such cases intelligently, he must give consideration to the statute.

If "hot cargo" clauses may be enforced solely through lawsuits and not by economic action,[172] is an issue involving such a contract provision a proper subject for arbitration? There would seem to be no basis for an arbitrator's avoiding a determination of the enforceability of a "hot cargo" provision if arbitration, as the courts have held, is a remedy concurrent with litigation.[173]

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[170] An arbitrator who seemed to espouse the view that if the law is "clear" an arbitrator should so find, is illustrated in *Penick & Ford, Ltd.,* 62-2 ARB § 8669 (Maurice O. Graff, 1962), who held that *Town & Country* was not applicable, and then went on: "Of course, should the decision in the *Town & Country* case come to be applicable in ALL subcontracting cases, then the complexion of arbitration proceedings on this subject will change abruptly. It is not the impression of this Arbitrator that this matter has been clarified to that degree by this particular decision of the National Labor Relations Board."

[171] *Trailways of New England, Inc.* v. *Street, Electric Railway and Motor Coach Employees,* 343 F.2d 815, 58 LRRM 2848 (1st Cir., 1955), *cert. denied,* 382 U.S. 879 (1965), 60 LRRM 2255 (contended that strike was violation of Section 8(d) of National Labor Relations Act); *Carey* v. *General Electric Company,* 315 F.2d 499, 52 LRRM 2662 (2nd Cir., 1963), *cert. denied,* 377 U.S. 908, 84 S.Ct. 1162 (1964), 55 LRRM 3023 (possibility that grievances involved unfair labor practices did not bar arbitration of grievances under contract); *Humble Oil & Refining Company* v. *Independent Industrial Union,* 337 F.2d 321, 57 LRRM 2112 (5th Cir., 1962), *cert. denied,* 380 U.S. 952 (1965), 58 LRRM 2720 (arbitration required even though establishment of union's claim did constitute unfair labor practice of refusal to bargain); *Seltzer & Co.* v. *Livingston,* 61 LRRM 2581 (S.D. N.Y., 1966) (arbitration required even though unresolved question of representation issue pending before National Labor Relations Board).

[172] *National Labor Relations Board* v. *International Brotherhood of Electrical Workers, Local 683,* 359 F.2d 385, 61 LRRM 2646 (6th Cir., 1966); *Sheet Metal Workers International Association, Local 48* v. *Hardy Corporation,* 332 F.2d 682, 56 LRRM 2462 (5th Cir., 1964).

[173] *Todd Shipyards Corporation* v. *Industrial Union of Marine and Ship Building Workers of America,* 344 F.2d 107, 58 LRRM 2826 (2nd Cir., 1965), seems to suggest that if a subcontracting clause breaches Section 8(e) of National Labor Relations Act, it is not arbitrable, although the language of the opinion is not clear.

Whenever an arbitrator decides a subcontracting case, he cannot, if the NLRB is to "defer" to his opinion and award, avoid consideration of such decisions as *Fibreboard Paper Products Corporation* v. *National Labor Relations Board* [174] and *Town & Country Manufacturing Company, Inc.* v. *National Labor Relations Board.*[175] An arbitrator who decides a plant-removal case is—or at least was—required to take into account *Glidden Co.* v. *Zdanok* [176] and *Oddie* v. *Ross Gear & Tool Co., Inc.*[177]

Suggestion was also made at the regional meetings that not all arbitrators are lawyers; therefore, interpretation of legal provisions should not be within the role of arbitrators. There is nothing in the National Labor Relations Act which requires that members of the NLRB be lawyers. This has not prevented the NLRB's non-lawyer members from participating in the decision of legal questions.

It is clear that a suit for breach of contract and the arbitration of a contract issue may, depending upon the circumstances, be presented either to a court or to an arbitrator. Theoretically the roles of the arbitrator and the NLRB are mutually exclusive. But the history of the past dozen years has made it clear that there is, in fact, overlapping jurisdiction that is "concurrent," although the NLRB,

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174 379 U.S. 203, 85 S.Ct. 441, 57 LRRM 2609 (1964).
175 316 F.2d 846, 53 LRRM 2054 (5th Cir., 1963).
176 288 F.2d 99, 47 LRRM 2865 (2nd Cir., 1961). I think it is now generally agreed that this case is no longer of persuasive force on either arbitrators or courts.
177 305 F.2d 143, 50 LRRM 2763 (6th Cir., 1962), *cert. denied,* 371 U.S. 941, 83 S.Ct. 318 (1962), 51 LRRM 2717. See, for example, *Purex Corporation, Ltd.,* 45 LA 174 (Lawrence R. Guild, 1965), where the arbitrator discussed the position taken both by the U. S. Supreme Court in *Fibreboard* and by the NLRB in *Westinghouse Electric Corporation,* 150 NLRB 1574, 58 LRRM 1257 (1965); *Hughes Aircraft Company,* 45 LA 184 (Byron E. Guse, 1965), where the arbitrator held *Fibreboard* inapplicable; *Lion Match Co.,* 40 LA 1 (Israel Ben Scheiber, 1963), where the arbitrator discussed NLRB rules and held that under these decisions a collective bargaining agreement survived relocation and followed employees to a new plant; *Celanese Corporation of America,* 33 LA 925 (G. Allan Dash, Jr., 1959), where the arbitrator analyzed a number of court decisions and arbitration opinions and awards to determine whether a subcontracting issue was arbitrable; *Paragon Bridge & Steel Co.,* 44 LA 361 (Harry N. Casselman, 1965), where the arbitrator in deciding a plant removal case discussed both *Glidden* and *Ross Gear,* and criticized the former decision; and *H. H. Robertson Co.,* 37 LA 928 (Clair V. Duff, 1962), where the arbitrator distinguished the facts before him from *Glidden, Ross Gear* (district court decision), and *David Fried* v. *Glenn Electric Heater Corporation,* 198 F. Supp. 248, 48 LRRM 3153 (D.C. N.J., 1961). In *Remington Rand Univac Division of Sperry Rand Corporation,* 41 LA 321 (James J. Healy, 1963), the arbitrator disagreed, holding that a dispute basically involved a representation question, hence was within the exclusive jurisdiction of the NLRB.

under its statutory powers, may disagree with and reverse an arbitral decision. If this concurrent area of labor relations is to mean anything, arbitrators must be willing to accept the responsibility of considering and deciding issues arising under the National Labor Relations Act. If arbitrators confine themselves solely to the contract language, there is no reason for the NLRB to show "deference" to arbitrators, and no reason for courts to require arbitration of any contractual issue where a question involving the National Labor Relations Act may be involved.

Indeed, if arbitrators are to confine themselves to such a limited role in the administration of collective bargaining contracts, one wonders whether a system of labor courts to determine issues arising under collective bargaining agreements, both statutory and contractual, might not be preferred to the present tri-administration (arbitrator, court, and NLRB) system. Fortunately, the courts have not shown a tendency to confine arbitrators to the minor role which some of our colleagues endorse. And the NLRB has not espoused so narrow a philosophy.

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