

CONCURRENT JURISDICTION—NLRB AND PRIVATE ARBITRATION: A PRAGMATIC ANALYSIS

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The typical collective bargaining agreement includes a grievance-arbitration procedure through which disputes arising from the contractual relationship may be resolved. This self-imposed commitment to the private settlement of labor disputes has resulted in a system of industrial jurisprudence by which sophisticated contractual language is tempered by the "common law of the shop." The effectiveness of this system is best demonstrated by the continued reliance upon it. Nevertheless, the National Labor Relations Board,¹ either consciously or unconsciously, is establishing itself as an alternative forum by taking initial jurisdiction over cases which could be resolved in a previously unutilized private forum. This policy has injected confusion into an already complex area, and risks the creation of a new source of hostility in the field of labor-management relations. This article will examine the purported rationale underlying the Board's action, and will suggest a course of conduct designed to minimize the conflict arising out of this overlapping jurisdiction.²

I. TWO FORUMS—THE STATUTORY DILEMMA

The concurrent jurisdiction of an independent arbitrator who is chosen by the parties under the terms of their labor agreement, and the National Labor Relations Board, whose members are appointed by the President under the terms of the National Labor Relations Act³ (hereinafter referred to as the NLRA or the Act), arises in part because of the similarities between the scope of modern labor agreements and the areas policed by the National Labor Relations Board. Under the NLRA, the parties to a labor agreement are required to bargain "with respect to wages, hours, and other terms and conditions of employment. . . ."⁴ These negotiations generally result in a written

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¹ Various referred to as the Board or the NLRB.

² The analysis presented by this article is limited to the overlapping jurisdiction resulting from the Board's authority under § 10 of the Act to process complaints based on alleged unfair labor practices. Another area of overlapping jurisdiction is found in cases dealing with representation and jurisdictional disputes. Although many of the considerations developed in this article apply with equal force in those areas, the problems associated with obtaining jurisdiction over all "necessary" parties warrant separate consideration.

³ 29 U.S.C. §§ 141-87 (1964).

⁴ "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at

document which embodies the agreement of the parties. Typically, this contract includes a grievance procedure through which the parties presumably intend to resolve disputes concerning the administration of their agreement.⁵ Although these procedures vary from agreement to agreement, the underlying theory provides for progressively higher steps of union-management meetings,⁶ in the hope that problems which are not solved at one step will be examined more objectively as they move from level to level. Thus, solution of all but the most compelling issues should be accomplished by the parties themselves. For those few issues which cannot be resolved by the parties, the typical contract provides for final and binding arbitration.⁷ These agreements to submit disputes to an arbitrator are enforceable under Section 301 of the NLRA,⁸ and have been declared by Congress to be the favored method of settling industrial disputes. For instance, Section 1 of the Act declares it "... to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedures of collective bargaining..." of which arbitration of labor disputes has been declared to be "part and parcel."⁹ Section 203(d) goes on to provide that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance dis-

reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d) (1964).

⁵ In a recent survey of 1,717 major collective bargaining agreements (covering 7,438,400 employees), the Bureau of Labor Statistics found only 20 agreements which did not refer to a method of resolving grievances. Each of these 20 instances involved multi-employer agreements. See U.S. Department of Labor, *Major Collective Bargaining Agreements: Grievance Procedures*, BLS Bulletin 1425-1 (1964).

⁶ These steps correspond roughly to the union and company hierarchies. Typically, the first step will involve a meeting between the employee and his immediate supervisor. If the dispute is not resolved at that step, the employee usually may appeal his case to a higher level of management (either a department head or the plant superintendent, depending upon the number of steps provided in the contract). If the dispute remains unresolved after these meetings, the case may be appealed to the final step prior to arbitration. In large corporations this step would involve a representative from the company's headquarters staff and a representative from the international union.

⁷ In a subsequent analysis of the contracts referred to in note 5 *supra*, the Bureau of Labor Statistics discovered that only 108 agreements (covering 266,300 out of 7,438,400 employees) did not make provision for grievance arbitration. See U.S. Department of Labor, *Major Collective Bargaining Agreements: Arbitration Procedures*, BLS Bulletin 1425-6 (1966).

⁸ 29 U.S.C. § 185 (1964). This view was ascribed to in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

⁹ 29 U.S.C. § 151 (1964). *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

putes arising over the application or interpretation of an existing collective-bargaining agreement"¹⁰

Thus, Congress has indicated its high regard for the procedure of collective bargaining and has endorsed private settlements of disputes arising under the resulting labor agreements. However, in completing the statutory scheme, Congress conferred jurisdiction¹¹ upon the National Labor Relations Board to prevent any person from engaging in certain enumerated unfair labor practices.¹² Congress went on to provide, in section 10(a), that the Board's power to deal with unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . ."¹³ (Emphasis added.)

Although a persuasive argument can be made that the term "agreement," as used in section 10(a), was not intended to refer to collective bargaining agreements,¹⁴ the circuit courts have consistently enforced decisions wherein the Board has relied upon section 10(a) as establishing a discretionary right to exercise its jurisdiction.¹⁵ A similar conclusion was reached by the Supreme Court in a recent non-deference case.¹⁶ Thus for the purpose of this article it will be assumed that the Board has authority to refuse to defer to the grievance-arbitration procedure when, in the exercise of its discretion, it considers deference undesirable.¹⁷ The ensuing analysis will, therefore, explore the factors which should influence the Board's decision to accept or refuse initial jurisdiction over a particular factual situation. The conclusions derived from that examination will then be compared to the Board's actual practice.

Before proceeding with this analysis, it is necessary to place the deference problem in proper perspective. This involves not only an examination of the current status afforded the grievance-arbitration procedure by the Board, but also the position the courts have taken when confronted by a similar problem of overlapping jurisdiction.

¹⁰ 29 U.S.C. § 173(d) (1964).

¹¹ 29 U.S.C. § 160 (1964).

¹² 29 U.S.C. § 158 (1964).

¹³ 29 U.S.C. § 160(a) (1964).

¹⁴ Lev and Fishman, *Suggestions to Management: Arbitration v. the Labor Board*, 10 B.C. Ind. & Com. L. Rev. 763, 770-73 (1969).

¹⁵ E.g., *Morrison-Knudson Co. v. NLRB*, 418 F.2d 203 (9th Cir. 1969).

¹⁶ *NLRB v. Strong*, 393 U.S. 357 (1969).

¹⁷ Since this problem falls within an area of administrative discretion, it is not surprising that the courts are reluctant to substitute their judgment for that of the agency. Consequently, the lack of court mandates on the exercise of the Board's jurisdiction should not be taken as an affirmative decision on the merits of deference. But see Abramson, *NLRB Is the Sheriff, Not the Poacher*, 55 A.B.A.J. 853 (1969).

II. CURRENT STATUS OF THE PROBLEM

A. *The Grievance Procedure and the Courts*

The Supreme Court, by giving Section 203(d)¹⁸ of the NLRA a broad interpretation, has in effect restrained itself and the lower courts from construing labor agreements. In 1957, the Court held that agreements to arbitrate labor disputes were specifically enforceable under Section 301(a)¹⁹ of the Act.²⁰ In a later case, it broadened that concept and stated:

An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. . . . In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where . . . the exclusion clause is vague and the arbitration clause quite broad.²¹

In *United Steelworkers of America v. Enterprise Wheel and Car Corp.*,²² decided the same day, the Court severely limited the scope of review to be given to arbitration awards. The Court stated:

The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. . . .

....

It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.²³

Thus the Supreme Court has concluded that the policy expressed by Section 203(d) of the NLRA "can be effectuated only if the means chosen by the parties for settlement of their differences under a collec-

¹⁸ 29 U.S.C. § 173(d) (1964).

¹⁹ 29 U.S.C. § 185(a) (1964).

²⁰ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451 (1957).

²¹ *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-85 (1960).

²² 363 U.S. 593 (1960).

²³ *Id.* at 596, 599.

tive bargaining agreement is given full play."²⁴ The Court has, therefore, cleared the way for such interplay by removing the possibility that arbitrators will be second-guessed by the courts.

B. *The Reaction of the Board to the Grievance Procedure*

The "classic" analysis of the Board's reaction to overlapping jurisdiction has distinguished between those cases where an award is in existence and those where no award has been rendered. This distinction is valid from an historical standpoint because the Board has applied different standards to the two situations. The resulting categories, therefore, produce a convenient framework within which to examine the current status of the problem.

1. *The Scope of the Board's Review of Existing Arbitration Awards*

In the *Timken Roller Bearing Co.* case,²⁵ the Board was called upon to consider the propriety of allowing its jurisdiction to be invoked in the face of an existing arbitration award. The issue in that case involved the unilateral installation of an "employees' manual." After initially resisting arbitration on procedural grounds, the employer agreed to arbitrate the arbitrability question. After the union advised the American Arbitration Association that "the arbitrator selected should determine whether or not the case is arbitrable, and if so, he should also determine the merits of the case,"²⁶ it filed an unfair labor practice charge with the Board. In the meantime, the arbitrator found the issue to be arbitrable, and rendered a decision on the merits in favor of the employer. The Board concluded that the national labor policy could best be served by deferring, despite the fact that it believed an unfair labor practice had been committed. While preserving its discretionary right to refrain from deferring, the Board stated:

It is evident that the Union has concurrently utilized two forums for the purpose of litigating the matter here in dispute. Although the arbitrator determined the issues before him within the framework of the 1943 agreement and expressly refrained from prejudicing the rights of either party before the Board, it would not comport with the sound exercise of our administrative discretion to permit the Union to seek redress under the Act after having initiated arbitration proceedings which, at the Union's request, resulted in a determination upon the merits. In the interest of ending litigation and otherwise effectuating the policies of the Act, we

²⁴ *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 566 (1960).

²⁵ 70 N.L.R.B. 500, 13 L.R.R.M. 1370 (1946).

²⁶ *Id.* at 501, 13 L.R.R.M. at 1374.

shall dismiss that portion of the complaint relating to the respondent's refusal to bargain as to the Employees' Manual.²⁷

In the now famous *Spielberg* case,²⁸ the Board refined its approach and articulated future guidelines for cases which involve existing arbitration awards. The Board stated:

[T]he desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrator's award . . . [where, as here] . . . 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.²⁹

In a later case,³⁰ the Board declared that the hearings would be considered fair and regular where

the procedures adopted meet normal standards as to sufficiency, fairness, and regularity. As to these, each case must rest on its own bottoms. Where, as here, the parties have found that the machinery which they have created for the amicable resolution of their disputes has adequately served its purpose, we shall accept such a resolution absent evidence of irregularity, collusion, or inadequate provisions for the taking of testimony.³¹

The scope of the Board's review in relation to the statutory standards was explored in *International Harvester Co.*,³² where the Board, alluding to Section 203(d) of the Act, stated that when an arbitration award has been made the Board should

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.³³

²⁷ Id.

²⁸ *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955).

²⁹ Id. at 1082, 36 L.R.R.M. at 1153.

³⁰ *Denver-Chicago Trucking Co.*, 132 N.L.R.B. 1416, 48 L.R.R.M. 1524 (1961). In this particular case, the Board deferred to the decision of a joint employer-union committee over objections that testimony had been interrupted; the panel had declined to give any reason for its decision, and no "public" member sat on the panel.

³¹ Id. at 1421, 48 L.R.R.M. at 1526.

³² 138 N.L.R.B. 923, 51 L.R.R.M. 1155 (1961).

³³ Id. at 927, 51 L.R.R.M. at 1157.

The Board then indicated that it would defer to the arbitration award in this case since it was not *palpably wrong*. This standard was adopted because:

To require more of the Board would mean substituting the Board's judgment for that of the arbitrator, thereby defeating the purposes of the Act and the common goal of national labor policy of encouraging the final adjustment of disputes, "as part and parcel of the collective bargaining process."⁸⁴

Thus in recognizing the benefits of voluntarily arrived-at solutions, the Board has indicated an intent to hold the parties to settlements in which they themselves have participated.⁸⁵ In only a very limited number of situations will the Board disturb an existing award. These standards are consistent with the policy of encouraging the parties to settle their own disputes, and if adhered to, are not objectionable in the sense of offering an alternative forum. At the same time, these standards preserve in the Board powers delegated to it by Congress.

2. No Award Issued—The Board's Propensity to Establish Itself as an Alternative Forum

The Board's apparent propensity to defer to an existing arbitration award does not carry over into those areas where the problem has not been decided by a neutral party. Where no award has been rendered, the Board makes no distinction between cases which are pending before an arbitrator⁸⁶ and those which were dropped or never processed.⁸⁷ It is equally disposed to intervene in each type of situation. Interestingly, the Board has not always exhibited this lack of faith in the parties' abilities to resolve their own disputes.

In a very early case, *Consolidated Aircraft Corp.*,⁸⁸ the Board indicated that the national labor policy would be effectuated by encouraging the parties to utilize their own dispute-settling forum. In that case, the union had failed to use the grievance procedure to protest the employer's unilateral action in regard to wages, overtime and job classification. The Board first outlined its authority not to defer, and then stated:

⁸⁴ Id. at 929, 51 L.R.R.M. at 1158.

⁸⁵ The reason most frequently cited for declining to give "hospitable acceptance" to an existing arbitration award is an alleged disinclination on the part of an arbitrator to decide the statutory issue. The validity of this argument is discussed later. See pp. 190-91 *infra*.

⁸⁶ *Eastern Ill. Gas & Sec. Co.*, 175 N.L.R.B. No. 108, 71 L.R.R.M. 1035 (1969).

⁸⁷ *Producers Grain Corp.*, 169 N.L.R.B. No. 68, 67 L.R.R.M. 1247 (1968).

⁸⁸ 47 N.L.R.B. 694, 12 L.R.R.M. 44 (1943).

[I]t will not effectuate the statutory policy of "encouraging the practice and procedure of collective bargaining" for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act. On the contrary, we believe that parties to collective contracts would thereby be encouraged to abandon their efforts to dispose of disputes under the contracts through collective bargaining or through the settlement procedures mutually agreed upon by them, and to remit the interpretation and administration of their contracts to the Board. We therefore do not deem it wise to exercise our jurisdiction in such a case, where the parties have not exhausted their rights and remedies under the contract as to which the dispute has arisen.³⁹

This early concern that the parties themselves try to solve disputes arising under their labor agreements was reiterated in *Hercules Motor Corp.*,⁴⁰ where the Board considered the interaction of Section 203(d) of the Act and its power to police unfair labor practices. The Board concluded:

If, instead of requiring the Union in this case to give "full play" to the grievance procedure, we were to permit the facilities provided by the Act to be used in avoidance of the bargaining agreement, we would be frustrating the Act's policy of promoting industrial stabilization through collective-bargaining agreements.⁴¹

Again in 1963,⁴² the Board, postponing an unfair labor practice hearing, stated: "It would certainly frustrate the intent expressed by Congress if the Board were now to permit the use of the Board's processes to enable the parties to avoid their contractual obligations as interpreted by the court."⁴³

Approximately one year later, the Board shifted its emphasis and began to decide cases which the parties had not pursued to the final step of their grievance-arbitration procedure.⁴⁴ In effectuating this

³⁹ Id. at 706, 12 L.R.R.M. at 45.

⁴⁰ 136 N.L.R.B. 1648, 50 L.R.R.M. 1021 (1962).

⁴¹ Id. at 1652, 50 L.R.R.M. at 1023.

⁴² *Dubo Mfg. Corp.*, 142 N.L.R.B. 431, 53 L.R.R.M. 1070 (1963).

⁴³ Id. at 432, 53 L.R.R.M. at 1070.

⁴⁴ It is interesting to note that this one-year interval had a profound effect on the *Dubo* case. After requiring arbitration in the 1963 case, the Board ignored the panel's decision and made its own factual determination. The Board found the award to be

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reversal in policy, the Board offered the following nebulous reason for refusing to defer in a unilateral action case:

We are not unmindful of the fact that the resolution of the unfair labor practice issue in this case has required our consideration, as a subsidiary issue, of Respondent's claim that it was impliedly authorized under the contract to take unilateral action on the matters complained of—a claim we have rejected as without merit. We may assume that this claim gave rise to a difference over the meaning of contractual provisions that might have been submitted for consideration under the contract's arbitration procedures. Nevertheless, we do not consider that reason enough for us to refuse either to entertain the instant unfair labor practice proceeding, or to provide the necessary redress for the violation found.⁴⁵

This trend away from deference has continued to the present. A review of the 1968 and 1969 cases⁴⁶ indicates that the Board consistently refuses to defer where no award has been rendered. The only exception to this policy is the Board's handling of the *Jos. Schlitz Brewing Co.* case.⁴⁷ However, a close reading of that case reveals that it was decided on the basis of its particular facts. Apparently, the Board made its decision on the basis of what it considered to be a harmonious bargaining relationship. The Board emphasized that the union had made no claim of anti-union motivation; that the parties had enjoyed many years of a satisfactory strike-free working relationship; and that the parties were asserting their claims in a situation "wholly devoid of unlawful conduct or aggravated circumstances of any kind. . . ."⁴⁸ It is submitted that such a standard—based on the Board's visceral reaction to the manner in which the parties have conducted their bargaining—is not a sound basis upon which the parties can make business-oriented decisions.

Thus it becomes apparent that in deciding whether or not to defer, the Board is applying different standards on the basis of whether or not a particular grievance has been decided by a neutral. The inconsistency

"ambiguous" because neither of the two members agreed with the chairman on the reasons for the decision. *Dubo Mfg. Corp.*, 148 N.L.R.B. 1114, 57 L.R.R.M. 1111 (1964); cf. note 30 supra.

⁴⁵ *Adams Dairy Co.*, 147 N.L.R.B. 1410, 1415, 56 L.R.R.M. 1321, 1323 (1964).

⁴⁶ See notes 71 and 87 infra.

⁴⁷ 175 N.L.R.B. No. 23, 70 L.R.R.M. 1472 (1968). A review of the cases decided after *Schlitz* indicates that the Board is continuing to decide cases which could be resolved in the grievance-arbitration procedure. Thus, placed in historical perspective, this case does not represent a reversal of present policy. E.g., *Cello-Foil Prods. Inc.*, 178 N.L.R.B. No. 103, 72 L.R.R.M. 1196 (1969); *Zenith Radio Corp.*, 177 N.L.R.B. No. 30, 71 L.R.R.M. 1555 (1969).

⁴⁸ *Jos. Schlitz Brewing Co.*, 175 N.L.R.B. No. 23, 70 L.R.R.M. 1472, 1475 (1968).

of these different approaches highlights the problem in this area. That is, by deferring to an existing award, the Board acknowledges that the national labor policy can be effectuated by these private settlements. However, by accepting cases where the private forum remains unutilized, the Board is not promoting the use of that forum in the first instance. The remainder of this article is devoted to an examination of specific considerations which should motivate the Board to defer in this latter situation.

III. A POLICY OF DEFERENCE

At the outset, it should be noted that even the more vocal proponents of intervention concede that they do "not propose that the board should never defer to the grievance procedure of a contract. . . ."⁴⁹ Therefore, the question to be resolved is not simply *should* the Board defer, but rather, *under what circumstances* should it defer. It is submitted that this question could most easily be answered by a rebuttable⁵⁰ presumption in favor of deference. Several compelling considerations can be offered in support of such a presumption.

A. *Arguments in Favor of Deference*

1. *The Positive Effect of Resolving Disputes Internally*

There is a therapeutic value in requiring the parties to use the dispute-settling procedure which they themselves have established. With external crutches removed, the parties cannot avoid the difficult decisions inherent in resolving their disputes. Solutions which are achieved through direct participation by the parties are more meaningful to the maintenance of an effective relationship than are solutions imposed from without.

The Board readily acknowledges that its ability to function is due in no small part to the vast majority of relationships wherein the parties can cope with their own problems.⁵¹ A change in the Board's attitude toward deference would contribute to an increase in the number of relationships that could be so characterized. In addition, if the present deference policy continues, the Board will be faced with such an increased caseload that its viability with respect to dispute resolution may be seriously hampered.

2. *Economic Considerations*

Economic considerations also favor a policy of deference. The Board's intervention into areas where a private dispute-settling forum

⁴⁹ Abramson, *NLRB Is the Sheriff, Not the Poacher*, 55 A.B.A.J. 853, 857 (1969).

⁵⁰ See discussion of illegal contract provisions at pp. 194-95 *infra*.

⁵¹ Thirtieth Annual Report of the National Labor Relations Board 1-2 (1966).

exists is, in and of itself, a misallocation of resources. While deciding such cases, the Board's resources are diverted from cases where no alternative forum exists. The total number of cases filed with the Board has nearly doubled in the last ten years, with unfair labor practice charges accounting for 58 percent of the total.⁵² It makes little sense, therefore, to devote a considerable amount of time and money to the initial disposition of a case where there is an alternative forum wherein the facts could be developed and the realities of the shop environment could be more readily applied.

In addition to restricting the Board's activities in other areas, the present open-door policy contributes to further misallocations of resources. Since the agency assumes the cost of prosecuting a case, it, in effect, creates its own demand. That is, if the Board permits its procedures to be used to decide essentially contractual matters, it is, in effect, providing free arbitration to the charging party. The experience gained from using taxpayers' money to finance the National Railroad Adjustment Board's grievance-settling activities should dissuade the National Labor Relations Board from following a similar course of action. In the former instance, the decreased *direct* financial burden on the parties has resulted in a marked decrease in the number of cases settled at the local level. This, in turn, has resulted in a sharp increase in the number of grievances reaching the Board.⁵³ Such a situation lends itself more to gamesmanship than it does to the prevention of industrial strife.

3. *Disruptive Effect of the Board's Procedures*

The final consideration favoring deference concerns the effect that non-deference may have on the parties' relationship. Whereas deference acknowledges the respective responsibilities incumbent upon each forum, intervention completely obviates the private forum, and can have a disruptive effect upon collective bargaining. This result stems from the basic differences between a system of private settlements wherein each party participates, and the more "hostile" procedure wherein the government is pitted against one of the parties. Several factors, inherent in the Board's procedures, contribute to this result and make the Board a less desirable forum.

First, an adjudication against an employer by an arbitrator whom he had a hand in selecting is more palatable than a Board decision which is solemnized by a formal confession of guilt posted throughout

⁵² U.S. Department of Labor, Handbook of Labor Statistics 1969, Bulletin No. 1630, at 372. The other 42% is made up of representational disputes (40.1%), union-shop de-authorizations (.5%), amendments to certifications (.6%) and unit clarifications (.8%).

⁵³ Mangum, *Grievance Procedures for Railroad Operating Employees*, 15 Ind. & Lab. Rel. Rev. 474, 498-99 (1962).

the employer's plant. Moreover, an employer cannot help but become suspicious of a union's motives when he realizes that the Board has assumed the costs of prosecuting the complaint, while the union sits by and watches the drama unfold. "The net effect is an angry employer, angry with the union for precipitating the charge . . . [and] angry with the Board . . ."⁵⁴ for its complicity in the affair. Thus the parties' reaction to the Board's decision on deferring may manifest itself in renewed hostilities. This problem is compounded by the unwarranted status which accompanies the mere threat of invoking the Board's procedures in lieu of contractual remedies. An unjustified increase in power inures to those organizations which wish to avail themselves of the full potential of such threats.

The above discussion is not intended to be a blanket indictment of the Board's procedures. It does, however, highlight the fact that the deference question cannot be decided in a vacuum. In making its decision, the Board must make an honest appraisal of the parties' potential reaction to its procedures.⁵⁵

B. *Arguments in Favor of Intervention—And a Rebuttal*

Having examined the arguments which favor a presumption of deference, the reasons advanced for intervention must be considered and judged as to whether, in certain areas, they are compelling enough to rebut the presumption. The following concerns are generally articulated by proponents of intervention.

1. *An Arbitrator Might Not Consider the Unfair Labor Practice Issue*⁵⁶

As noted earlier, the Board will adhere to existing arbitration awards which comply with the *Spielberg* standards. Variations from this practice are generally based on an arbitrator's alleged unwillingness to decide the statutory issue. Although this problem is usually discussed in the context of an existing award, the concern probably underlies the Board's thinking where no award has been rendered.

*Monsanto Chemical Co.*⁵⁷ and *Raytheon Co.*⁵⁸ are two cases frequently cited for the proposition that arbitrators might not consider the statutory aspects of a particular case. Although the Board treated

⁵⁴ Lev & Fishman, *supra* note 14, at 770.

⁵⁵ The Board is apparently recognizing some of the problems associated with the effect its procedures have on the parties. See, e.g., *Combined Paper Mills Inc.*, 174 N.L.R.B. No. 71, 70 L.R.R.M. 1209 (1969), where the Board did not require the employer to post a notice of violation.

⁵⁶ See p. 194 *infra* for a discussion of the specific manner in which the various overlapping issues can arise.

⁵⁷ 130 N.L.R.B. 1097, 47 L.R.R.M. 1451 (1961).

⁵⁸ 140 N.L.R.B. 883, 52 L.R.R.M. 1129 (1963).

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these cases similarly, an examination of the salient differences between them indicates that the problem is more illusory than real.

In *Monsanto*, the Board did not defer to an arbitration award which sustained a discharge allegedly prompted by the employee's union activities. In that case, the arbitrator stated:

I have given a good deal of thought to the dilemma which arises out of the dual jurisdiction over the essence of the unfair labor practice charges. Because the NLRB has exclusive jurisdiction in the event of a conflict, and because I believe the case can be decided on other grounds, I have chosen to ignore for purposes of decision the allegations herein contained that [the employee's] Union activities played a part in his discharge.⁵⁹

From the facts recited by the Board, it appears that the arbitrator chose to ignore one whole line of defense available to the grievant. If this were so,⁶⁰ there would be a serious question as to whether the award would be accepted by the courts if their review were sought. Under the circumstances then, it was not unreasonable for the Board to have also declined to defer. However, the relatively unique decisional language found in *Monsanto*, which could understandably require intervention, must be carefully distinguished from the more typical case where the scope of an arbitrator's inquiry is in question. The Board's handling of the *Raytheon* case clearly demonstrates this point.

In that case, two employees were discharged for allegedly engaging in conduct which violated the contract's no-strike clause. The parties' arbitrator found that the employees had participated in a walk-out. The Board, citing *Monsanto* for the proposition that the arbitrator did not reach the statutory issue, found that no walk-out had occurred. Thus, in deciding this case, the Board did no more than substitute its judgment on that factual issue. This fact distinguishes *Monsanto* from *Raytheon*. In the former, the arbitrator had specifically declined to decide a factual question whereas in the latter, the question had been answered; thus the *Monsanto* reasoning was inapplicable. The dissenting members in *Raytheon* persuasively contended that:

[T]he arbitrator did not resolve the matter *in vacuo*. He considered all the facts presented to him which would ameliorate the discharges' alleged misconduct or temper their penalty, and he took into account any circumstances which

⁵⁹ 130 N.L.R.B. at 1099, 47 L.R.R.M. at 1452.

⁶⁰ There remains a distinct possibility that the Board made a big issue out of mere ambiguous decisional language. If this were so, this case would then be an example of the Board expanding its jurisdiction and offering itself as an alternative forum.

might indicate that the discharges were pretextual or spurious. . . .

. . . .

Moreover, the arbitrator, by virtue of his long arbitral experience under contracts between the Company and the Union, possessed intimate knowledge of the labor relations setting of this particular shop and an understanding of the relationship of the parties involved.⁶¹

There is no reason to believe that the parties and their arbitrators will not see the real issues in a particular case, nor is there any reason to believe that they will not explore all of the facts. The relatively infrequent occurrence of restricted arbitration awards similar to the one found in *Monsanto* does not warrant the concern of the Board in this area as exhibited in *Raytheon*. The remote possibility of arbitral non-involvement is simply not a persuasive argument against deference.

2. *The Union May Not Adequately Represent an Employee*

It is not difficult to create a hypothetical situation wherein the conduct of the employee representative should be subject to close scrutiny. For instance, a member of a dissident political faction may feel concerned about the vigor with which his personal grievances are being processed by members of the incumbent opposition. However, regardless of how valid his concern may be, this factor is not relevant to the deference issue. Various independent remedies are available for violation of an employee's right to fair representation. The courts, both state and federal, have consistently recognized an employee's right to be represented fairly and impartially by his bargaining agent. In 1944, the Supreme Court construed the Railway Labor Act⁶² as imposing "upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates."⁶³ This duty was subsequently imposed upon bargaining agents who are certified under the National Labor Relations Act.⁶⁴

In 1962, the National Labor Relations Board created a new cause of action whereby an employee could enforce his right to fair representation within the framework of the Board's jurisdiction. In arriving at its conclusion, the Board reasoned:

⁶¹ 140 N.L.R.B. at 890, 52 L.R.R.M. at 1133.

⁶² 45 U.S.C. §§ 151-88 (1964).

⁶³ *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202 (1944).

⁶⁴ E.g., *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

The privilege of acting as an exclusive bargaining representative derives from Section 9 of the Act, and a union which would occupy this statutory status must assume "the responsibility to act as a genuine representative of all the employees in the bargaining unit. . . ."

. . . .

Viewing these mentioned obligations of a statutory representative in the context of the "right" guaranteed employees by Section 7 of the Act "to bargain collectively through representatives of their own choosing," we are of the opinion that Section 7 thus gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment. This right of employees is a statutory limitation on statutory bargaining representatives, and we conclude that Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious or unfair.⁶⁵

By taking this action, the Board has negated concerns over the costs associated with assuring fair representation through court action. Thus, individual employees possess a separate and distinct right to fair representation—a right enforceable through the National Labor Relations Board. There is little doubt that appropriate remedies can be fashioned for violations of this right.⁶⁶ The Board can, therefore, protect individual employees by deciding the specific fair representation issue without making any determination on the underlying contractual dispute.

3. *The Board Enforces "Public Rights"*

The public interest argument is the most elusive of the arguments in favor of intervention and is, therefore, the most difficult with which to deal. It is easy to say that public policy compels a certain result. It is equally easy to accept the statement without critical examination. The remainder of this article is devoted to an examination of specific

⁶⁵ *Miranda Fuel Co.*, 140 N.L.R.B. 181, 184-85 (1962), enf. denied, 326 F.2d 172 (2d Cir. 1963). The *Miranda Fuel* doctrine was upheld by the Fifth Circuit in *Local 12, URW v. NLRB*, 368 F.2d 12 (5th Cir. 1966). The Supreme Court has left the question open. *Vaca v. Sipes*, 386 U.S. 171 (1967).

⁶⁶ See *Port Drum Co.*, 180 N.L.R.B. No. 90, 73 L.R.R.M. 1068 (1970); *Local 485, IUE AFL-CIO*, 170 N.L.R.B. No. 121, 67 L.R.R.M. 1609 (1968). In both cases the respective unions refused to process grievances on behalf of the affected employees.

Board cases reported during 1968 and 1969,⁸⁷ in an effort to determine whether or not some aspect of public policy required intervention. Essentially, the issue is whether the enforcement of "private" rights through the grievance-arbitration procedure produces results which are contrary to or inconsistent with the "public" considerations expressed in the Act.⁸⁸ Since different considerations apply to different functional areas, it is necessary at this point to distinguish the various ways by which the Board, in the exercise of its unfair labor practice jurisdiction, may enter an area which is also subject to the parties' labor agreement.

There are three general ways for the problem to arise. First, the Board may be called upon to weigh the statutory validity of a particular contractual provision. In these cases, a party may assert that the action requested of him, although mandatory under his labor agreement, is in violation of the Act. In the second area, the Board may be asked to exercise an ancillary type jurisdiction which would require it to construe a contractual provision before it can make a determination of the unfair labor practice charge. This situation occurs most frequently where a union, in the face of an existing labor agreement, complains that an employer has violated Section 8(a)(5) of the Act.⁸⁹ Finally, overlap may occur where the Board and an arbitrator have jurisdiction over precisely the same question, but each allegedly applies a different standard. Typical cases in this area involve discipline (frequently discharge) for conduct which is protected by the Act.

These three categories are not necessarily exclusive. They do, however, provide a sound basis for an examination of the public-interest aspect of this problem.

a. *Alleged Invalidity of the Contract Provision Itself.* In a very few cases, resolution of the statutory issue is a condition precedent to meaningful contractual discussions. Such a situation arises where the validity of the contract is dependent upon either the construction of the National Labor Relations Act or the effect to be given to the Board's administrative actions. A party may raise a statutory defense to a contractual complaint and argue that the action requested of him would cause him to violate the Act. For instance, a party may claim that an existing contract clause, either on its face or by reason of the

⁸⁷ More specifically, those cases reported in volumes 67-72 of the Labor Relations Reference Manual.

⁸⁸ This "public" policy is expressed in 29 U.S.C. § 151 (1964) which declares it "to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining"

⁸⁹ 29 U.S.C. § 158(a) (5).

requested construction, is violative of the Act's "hot cargo" provision.⁷⁰ This question should be directed to the Board.

Similarly, the validity of a party's action may be controlled by the Board's activities in related areas. In *Monsanto Chemical Co.*,⁷¹ a maintenance of membership provision was found to have been "illegally applied" since the incident in dispute occurred at a time "when the Union had not yet been certified under Section 9(e) to enter into a union security agreement, and was therefore without authority to enforce the Union security clause."⁷² The certification election was held approximately two and one-half months after the petition was received and the contract signed. Thus the validity of the contract provision was directly dependent upon the Board's attitude toward the retroactivity of its certification election. Such a question is best referred to the Board in the first instance.

In the specific situations described above, it can be concluded that the public concern, as expressed by the legislature, may not be adequately represented by one of the parties to a labor agreement. Therefore, except as an arbitrator's decision on a factual question may tend to make the unfair labor practice issue moot, the Board's exercise of its jurisdiction in this area is not improper. However, as indicated in the following sections, legitimate fears here should not be allowed to cloud issues in distinguishable areas.

b. *Ancillary Jurisdiction—Employer Unilateral Action.* The "public interest" issue discussed in this section involves employer-initiated action taken without first attempting to bargain with the union as required by Section 8(a)(5) of the Act. During 1968 and 1969, the propriety of deferring to the grievance-arbitration procedure was discussed in nine of these cases.⁷³ Except for its decision in the *Jos. Schlitz* case, which was discussed earlier,⁷⁴ the Board repeatedly refused to defer to the parties' grievance-arbitration procedure. An examination of the Board's handling of these cases reveals that they involve essentially contractual issues which could be resolved in the private forum in a manner consistent with the public interest as expressed in the Act.

⁷⁰ 29 U.S.C. § 158(e).

⁷¹ 97 N.L.R.B. 517, 29 L.R.R.M. 1126 (1951).

⁷² Id. at 519, 29 L.R.R.M. at 1127.

⁷³ *Cello-Foil Prods., Inc.*, 178 N.L.R.B. No. 103, 72 L.R.R.M. 1196 (1969); *Union Carbide Corp.*, 178 N.L.R.B. No. 81, 72 L.R.R.M. 1150 (1969); *Zenith Radio Corp.*, 177 N.L.R.B. No. 30, 71 L.R.R.M. 1555 (1969); *Boston Edison Co.*, 176 N.L.R.B. No. 132, 71 L.R.R.M. 1400 (1969); *Combined Paper Mills, Inc.*, 174 N.L.R.B. No. 71, 70 L.R.R.M. 1209 (1969); *Jos. Schlitz Brewing Co.*, 175 N.L.R.B. No. 23, 70 L.R.R.M. 1472 (1968); *Wisconsin Southern Gas Co.*, 173 N.L.R.B. No. 79, 69 L.R.R.M. 1374 (1968); *Eaton Yale & Towne, Inc.*, 171 N.L.R.B. No. 73, 68 L.R.R.M. 1129 (1968); *Omaha Neon Sign Co.*, 170 N.L.R.B. No. 150, 68 L.R.R.M. 1585 (1968).

⁷⁴ See p. 187 supra.

In the typical case in this area, the employer, by way of his "contractual" defense to the unfair labor practice charge, claims that the issue before the Board has already been bargained over and has been resolved under the terms of the current collective bargaining agreement. Therefore, the resolution of the unfair labor practice issue is directly dependent upon a contractual determination which can best be made in a private forum. For example, in *Cello-Foil Products, Inc.*⁷⁵ the dispute centered around the contractual validity of the employer's unilateral installation of a pressman trainee position. In sustaining the employer's action, the Board stated: "[W]e are of the opinion that [the employer's] interpretation of the contract is correct and that its actions, which are permitted thereby, do not violate the Act."⁷⁶

Similarly, in *Boston Edison Co.*,⁷⁷ the Board construed the parties' labor agreement as permitting a three-member committee (two members representing the company and one representing the union) to change the hospitalization plan's "waiting period" by equating the words "working days" with eight hours. The Board found that the "proper interpretation of the provisions of the Plan conferred upon the Disablement Benefits Committee power to make the change. . . and that in doing so through its two members on the Committee, [the Employer] did not commit an unfair labor practice within the meaning of Section 8(a)(1) or (5) of the Act."⁷⁸

In a case decided adversely to the employer's position,⁷⁹ the Board found a refusal to bargain where an employer eliminated the shipper loader position after a scale had been installed to weigh-count forgings. The employee who had held the position was transferred to the existing (non-incentive) industrial truck driver position, a classification which the company believed encompassed the employee's new responsibilities. The Trial Examiner found that, aside from a general waiver clause, the disputed change was covered by other provisions of the contract which permitted the employer "to reestablish a production rate or change an incentive rated job due to a technological change in method and equipment."⁸⁰ The Board did not articulate its reason for reversing the Trial Examiner's finding on this contractual question.⁸¹ However, the significance of the "changed methods" argument

⁷⁵ 178 N.L.R.B. No. 103, 72 L.R.R.M. 1196 (1969).

⁷⁶ *Id.*, 72 L.R.R.M. at 1197.

⁷⁷ 176 N.L.R.B. No. 132, 71 L.R.R.M. 1400 (1969).

⁷⁸ *Id.*, 71 L.R.R.M. at 1403.

⁷⁹ *Eaton Yale & Towne, Inc.*, 171 N.L.R.B. No. 73, 68 L.R.R.M. 1129 (1968).

⁸⁰ *Id.*, 68 L.R.R.M. at 1131.

⁸¹ In reversing the Trial Examiner, the majority merely indicated that ". . . we see no basis for inferring that the Union surrendered to [the Employer] the right unilaterally to make a sweeping change in the method of compensating employees for performing loading functions." *Id.*

and the respective roles of the two forums was not lost on the two dissenting members of the Board who argued that:

If there is any situation in which the Board should defer to the parties' own agreed-upon methods for resolving contract disputes, this is the case. . . . [T]he parties have an established bargaining history; they have a dispute involving substantive contract interpretation, each party asserting a reasonable claim in good faith and in a situation wholly devoid of 8(a)(1) or other unlawful conduct; and they have contractual grievance-arbitration procedures which Respondent has urged the Union to use for resolving their dispute.⁸²

The similarity between the public and private interests in this area is perhaps best demonstrated by the Board's handling of the facts in *Zenith Radio Corp.*⁸³ There the Board not only found the employer's unilateral action (the creation of repairman positions and the adoption of new pay classifications) permissible under the current labor agreement, but also stated that, in its opinion, the employer was "*required* to issue the disputed reclassification."⁸⁴ (Emphasis added.) Although this gratuitous contractual decision probably would not be binding in a subsequent arbitration proceeding,⁸⁵ it does demonstrate the extent to which the Board can become involved with contractual matters.

Thus a review of the unilateral action cases indicates that there is no appreciable conflict between the public and private interests. The Board and arbitrators are pursuing essentially the same question, that is, have the parties bargained over a particular subject—not should they so bargain. This essentially contractual question should be resolved by experienced arbitrators who are the most knowledgeable in the field of interpreting and administering labor agreements. There is, after all, nothing sinister about the unilateral act which precipitates the jurisdiction of the grievance procedure (there being no provisions for declaratory judgments or advisory opinions in most contracts). It is an integral part of the parties' continuing duty to bargain.

c. *Discipline Cases.*⁸⁶ During 1968 and 1969, the question of deferring to the grievance-arbitration procedure was discussed in

⁸² Id., 68 L.R.R.M. at 1133.

⁸³ 177 N.L.R.B. No. 30, 71 L.R.R.M. 1555 (1969).

⁸⁴ Id., 71 L.R.R.M. at 1558.

⁸⁵ Cf. *IUE v. General Elec. Co.*, 407 F.2d 253 (2d Cir. 1968), cert. denied, 395 U.S. 904 (1969).

⁸⁶ The following discussion assumes that an employee has been fairly represented. See pp. 192-93 *supra*.

eleven discipline cases. The Board deferred in two⁸⁷ and partially deferred in another.⁸⁸ In all three of these instances an arbitration award was in existence, and the Board's approach was consistent with the previously discussed *Spielberg* doctrine. The Board reached the merits of the remaining eight cases⁸⁹ and decided the factual issue presented in them. In order to appreciate the significance of that fact, and before the performance of the private forum can be properly related to the public's undisputed interest in certain kinds of discipline cases, it is necessary to understand the effect that collective bargaining and the grievance-arbitration procedure has had on industrial discipline.

Historically, no issue has contributed more to an employee's desire to organize than has the employer's unrestricted authority in the area of employee discipline.

Even where there was little evidence of . . . irresponsible behavior on the part of management, the union seeking to organize employees often impressed upon employees the protection offered by collective bargaining against unfair disciplinary treatment. It is a mistake to feel that a union's contribution is limited to periodic contract improvements; it has a great influence on disciplinary policies and actions. This is felt on almost a daily basis during the life of an agreement, either because of the silent presence of the union or because the union has been quick to prosecute grievances relating to allegedly unfair discipline.⁹⁰

Considerations such as these have contributed to the fact that most modern labor agreements provide a limitation on the exercise of management's right to discipline.⁹¹ In the few instances where no

⁸⁷ *Eazor Express, Inc.*, 172 N.L.R.B. No. 201, 69 L.R.R.M. 1081 (1968); *W.R. Grace & Co.*, 179 N.L.R.B. No. 81, 72 L.R.R.M. 1455 (1969).

⁸⁸ *McLean Trucking Co.*, 175 N.L.R.B. No. 66, 71 L.R.R.M. 1051 (1969).

⁸⁹ *Dresser Indus., Inc.*, 178 N.L.R.B. No. 51, 72 L.R.R.M. 1065 (1969); *Steves Sash and Door, Inc.*, 178 N.L.R.B. No. 27, 72 L.R.R.M. 1041 (1969); *Eastern Ill. Gas & Sec. Co.*, 175 N.L.R.B. No. 108, 71 L.R.R.M. 1035 (1969); *Morrison-Knudson Co.*, 173 N.L.R.B. No. 12, 69 L.R.R.M. 1232 (1968); *Milne Truck Lines*, 171 N.L.R.B. No. 25, 69 L.R.R.M. 1109 (1968); *Evans Prods. Co.*, 171 N.L.R.B. No. 138, 68 L.R.R.M. 1577 (1968); *John Klann Moving and Trucking Co.*, 170 N.L.R.B. No. 133, 67 L.R.R.M. 1585 (1968); *Producers Grain Corp.*, 169 N.L.R.B. No. 68, 67 L.R.R.M. 1247 (1968).

⁹⁰ S. Slichter, J. Healy and E. Livernash, *The Impact of Collective Bargaining on Management* 624 (1960).

⁹¹ In a recent study of 1,697 major collective bargaining agreements in which a grievance procedure exists, no contracts were found to exclude discharge cases. Out of 1,609 contracts which provided for arbitration, only 34 contracts limited the scope of the arbitrator's authority in the area of discipline. Of that number, only four excluded all disciplinary matters. The 30 remaining contracts excluded specific issues such as the degree of discipline and probationary employees. See U.S. Department of Labor, *Major*

express limitation exists, some arbitrators have implied a "just cause" standard, reasoning that a company's unrestricted right to terminate the employment relationship could be used to negate all substantive provisions of the labor agreement.⁹² Consequently, in the vast majority of contractual relationships, the parties have restricted management's right to discipline except for "just cause." There is no reason to believe that the results achieved by this voluntarily accepted standard would run contrary to the public interest as expressed by the Act. Nevertheless, the Board has repeatedly demonstrated a lack of faith in the parties' commitments.

For example, in *Eastern Illinois Gas and Securities Co.*,⁹³ the Board assumed jurisdiction of a case wherein an employee alleged that he had been discharged for activities which are protected by the Act. The discharged employee had been the self-appointed spokesman of a group of senior employees who were protesting the assignment of junior employees to "more desirable indoor work." Approximately one month after these discussions took place, the employee was informed that he had been discharged. When pressed for a reason, the company indicated that his employment was being terminated for telling those "men that they were being treated unfairly . . . [and for his] remark about being unconcerned if the gas lines were properly installed. . . ."⁹⁴ The employee admitted the former charge, but denied the latter and filed a grievance protesting his dismissal. That grievance was processed through the various steps and, at the time of the Board's decision, was pending before an arbitrator who had been selected by the parties. Nevertheless, the Board assumed jurisdiction indicating that: "Here we do not have an issue which falls within the special competence of an arbitrator to determine. Rather, we find that the dispute is primarily one which calls for resolution under the provisions of the statute which we are charged with enforcing."⁹⁵ In support of this conclusion, the Board described at great length one element of the employer's defense. The employer had reasoned that the senior employees' request was contrary to the terms of the collective bargaining agreement and was, therefore, not a proper subject for presentation by anyone other than a union representative. The Board highlighted the sophistication of the argument as follows:

It is true that under Section 9(a), the collective-bargaining

Collective Bargaining Agreements: Grievance Procedures, BLS Bulletin 1425-1 (1964) and U.S. Department of Labor, Major Collective Bargaining Agreements: Arbitration Procedures, BLS Bulletin 1425-6 (1966).

⁹² See F. Elkouri and E. Elkouri, *How Arbitration Works* 410-13 (1960).

⁹³ 175 N.L.R.B. No. 108, 71 L.R.R.M. 1035 (1969).

⁹⁴ *Id.*, 71 L.R.R.M. at 1036.

⁹⁵ *Id.*, 71 L.R.R.M. at 1035 n.1.

agreement defines, the permissible area within which an employer may adjust directly with employees grievances presented by them. Thus, if a grievance poses demands which are in conflict with the contract, an employer may lawfully refuse to resolve the matter without the presence of a union representative. However, it does not follow that Section 9(a) thereby confers on an employer the right to discharge an employee for the act of grieving. Respondent's view of the proviso would lead to the incongruous result of, on the one hand, granting an employee freedom to present his complaints to his employer without the intervention of the bargaining representative and on the other, subjecting that employee to the peril of discharge should his complaint contradict the terms of the contract.⁹⁶

However, in its eagerness to reach the statutory issue, the Board lost sight of an arbitrator's function in deciding "just cause." If the facts developed by the Board are taken as true, the issue before the arbitrator would merely involve the propriety of firing an employee for admittedly complaining about work assignments and allegedly *making statements* which might indicate a lack of concern for his work. (There was apparently no question raised concerning the quality of his work.) There is no reason to believe that the arbitrator would lose sight of that issue. To conclude otherwise is a disservice to that profession and the parties who created the private forum.

Similarly, in *Producers Grain Corp.*⁹⁷ the Board stepped in and decided a discharge case which was pending before an arbitrator. The issue in that case—again taking the facts developed by the Board as true—was the validity of the discharge of an employee for failing to bring in a doctor's note immediately upon his return from being sick. The employee, who had six years of company service, was willing to go home and get a note, and did, in fact, subsequently offer a note to the employer. Other evidence developed at the hearing indicated that the employer had been very flexible in the administration of the doctor's excuse rule. It is not surprising, therefore, that the Board concluded that the discharge had been based on the employee's activity as a union organizer. It would also come as no great surprise if the arbitrator had found that the employee had not been discharged for "just cause." The Board simply substituted itself as a trier of fact in a case where the parties' own forum could have been utilized.

The Board's treatment of these discipline cases indicates that, in reality, there is no significant difference between the public's concern

⁹⁶ Id., 71 L.R.R.M. at 1036.

⁹⁷ 169 N.L.R.B. No. 68, 67 L.R.R.M. 1247 (1968).

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and the parties' own interests as they have expressed them in their labor agreements. The collective bargaining standard of "just cause" will produce a result that is consistent with the country's labor policy. Therefore, as was found to be true in the unilateral action cases, it appears that the Board's reliance on public policy is nothing more than a statement of a conclusion that it has decided to intervene.

CONCLUSION

At the present time, the National Labor Relations Board is applying contradictory standards in its dealings with private dispute-settling procedures. On the one hand, the Board defers to existing arbitration awards and tacitly admits that the statutory policy can be effectuated by these settlements. On the other hand, it pursues a policy which is not designed to encourage the use of private forums when an award does not already exist. Surely this latter policy does not encourage the parties to settle their own problems.

The arguments normally advanced in support of this intervention have been examined and have been found to be without substantial merit. In particular, the "public interest" argument has been shown to be based on misconceived impressions concerning the nature of the private forum. No conflict has been shown to exist between the public and private interests in the areas of unilateral action and employee discipline. Settlements arrived at in the private forum were shown to be compatible with the public interest as it is outlined in the Act.

At the same time, the pragmatic reasons which favor a policy of deference have been examined and have been found to be compelling. Of particular importance was the disruptive effect intervention can have on the creation or continued existence of a viable contractual relationship. This concern becomes more immediate when the policy of intervention is seen in relation to the vast misallocation of resources that it produces. By gratuitously opening this alternative forum the Board is, in effect, creating its own demand. This action not only increases the overall work load, but it also causes the Board to divert its attention from other important areas. This burden, which is ultimately borne by the taxpayer, is totally unjustified.

As the Board continues its policy of accepting cases which could properly be resolved in the parties' private forum, it allows its procedures to be catalogued among the weapons to be utilized as bargaining tactics. In addition, by bearing the prosecuting costs, the Board allows labor organizations to avoid the hard decisions inherent in the resolution of any industrial dispute. A party's motives are suspect on both of the above counts when he invokes the Board's jurisdiction in lieu of a forum upon which he himself agreed.

A pragmatic reading of the cases indicates that administrative in-

tervention is not necessary where the public point of view is represented by one of the parties in a viable alternative adversary system. This fact, taken together with the positive contributions to be gained by deference, leads to the conclusion that the Board should defer in those areas where a dispute is arguably covered by the parties' labor agreement. The rationalization that a case has been fully litigated in the Board's procedures will become more and more available unless the Board closes its doors to disputes which are cognizable by the parties' agreed upon dispute-settling procedure. A presumption in favor of deference would recognize the simple fact that a semblance of "industrial peace" can come only when the parties understand that they must resolve their disputes themselves. "The concept of collective bargaining—'of two powers seeking their respective goals in a free and open market'—is a workable solution which depends on minimal external intervention."⁹⁸ Only by full utilization of the private dispute-settling procedure can this free system of collective bargaining be preserved.

⁹⁸ Abodeely, *The NLRB and the Unit Clarification Petition*, 117 U. Pa. L. Rev. 1075, 1099 (1969).