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The Labor Board and the Arbitrators

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NEWS

A. REPORT OF LABOR RELATIONS LAW SECTION PROGRAM

The Labor Relations Law Section of the State Bar of Michigan held its second program of the current year, from May 27 through May 30, 1967 on Mackinaw Island, on a variety of subject matters with excellent presentations by the resource people conducting each of the various symposiums. Those who were unable to be present in this joint venture of pleasure and legal presentations will be able to at least vicariously "gather in the sheaves" of the legal wisdom disseminated during the program by the report contained herein. For those who were fortunate enough to attend plus those who didn't, the report that follows should be of immeasurable aid for future reference.

The principal speaker at the meeting was Theodore J. St. Antoine, Associate Professor of Law, University of Michigan, speaking about "The Labor Board and the Arbitrators", which speech is set forth below:

"Not long ago Bill Feldesman, the Solicitor of the National Labor Relations Board, summed up in one colorful image the task facing any person who tries to draw a clear line between the jurisdiction of the Board and the jurisdiction of arbitrators in interpreting and applying collective bargaining agreements. Feldesman likened such a person's plight to that of the deep-sea diver who received a frantic communication from his tender overhead, "Surface immediately. The ship is sinking!" Having spent a couple of months, on and off, in the murky depths of the problem, I know just how the diver felt. So I make no promises that I have uncovered for you any sunken treasure.

My talk tonight will deal with two aspects of the relationship between the Labor Board and the arbitrators. First, from the Board's side: Under what circumstances should it assume jurisdiction over an alleged unfair labor practice when adjudication

of the issue will require the Board to interpret the provisions of an existing labor contract? Second, from the arbitrator's side: Under what circumstances should he look to the labor statutes for guidance when called upon to resolve a contractual dispute between a union and an employer? Perhaps in the best of all possible worlds we would not have to concern ourselves with such jurisdictional technicalities. Ideally, all substantive questions should be decided in the same way in every forum. But we know this is not the case. Moreover, there are often significant advantages for a party in terms of time or money in being able to choose one forum rather than another. Finally (and this might still be true in that best of all possible worlds), there is likely to be a marked difference in the conclusion reached by a tribunal whose primary function is to enforce public, statutory rights, and the conclusion reached by a tribunal whose primary function is to apply private, contractual rights. For all these reasons, therefore, the battle to fix the boundaries between the realm of the NLRB and the realm of the arbitrators is a battle where much is at stake, and I suspect that right today no labor law topic is receiving greater attention.

A specific example may aid in understanding the problem confronting the Labor Board when it must determine whether to assume jurisdiction over an alleged unfair labor practice involving a matter of contract interpretation. Suppose a union has recently organized a company and has begun bargaining for a contract. During negotiations a union representative suggests that the company's health and welfare plan be included in the contract. A management spokesman demurs, insisting that for financial reasons the plan must remain within the sole control of the company. Little more is said. Talk veers to other subjects, and the health and welfare plan is never mentioned again. No reference to it is contained in the labor agreement which is eventually executed. The contract contains a standard grievance and arbitration clause, providing that all disputes over the "interpretation or application" of the agreement may be referred by either party to final and binding arbitration. There is also a generalized management rights clause. Finally, it is provided that wages, hours, or working conditions in effect on the effective date of the agreement shall be continued during its term. What happens, now, if the employer, during the life of the contract, concludes that the health and welfare plan has proven too costly, and puts into effect a reduced scale of benefits?

Two fundamental propositions bear on this question, and their thrust is in opposite directions. First, the enforcement of collective bargaining agreements is a matter for the courts (and, in a loose sense, for arbitrators), and not for the NLRB.[1] Second, an employer's unilateral change in working conditions without prior bargaining with the union representing his employees constitutes an unlawful refusal to bargain in violation of section 8(a)(5) of the National Labor Relations Act.[2] Although the Labor Board concedes that a breach of contract as such is not an unfair labor practice, it insists that the mere fact a labor agreement may touch upon a particular area of working conditions does not deprive the Board of its statutory jurisdiction to remedy an employer's unilateral change in those working conditions.[3]

Let me digress a moment to say that we may be seeing here an illustration of what I would describe as the inherent dynamism of administrative agencies. An administrative agency may be created by the legislature to perform a specified mission. Certain peripheral matters may generally be assumed to be beyond its ken. Nonetheless, as time passes and the momory of the original charter dims, there is an almost

1. H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42 (1947).
2. NLRB v. Katz, 369 U.S. 736 (1962).
3. C & S Industries, Inc., 158 N.L.R.B. No. 43 (1966).

inevitable tendency, especially when the agency is manned by dedicated, policy-minded officials, for the agency to chafe under the original restrictions and to push outward the frontiers of its jurisdiction. In recent years the NLRB has supplied us with at least three possible instances of this phenomenon, in its development of the doctrine of fair representation,[4] in its regulation in some limited respects of internal union affairs,[5] and, as we are examining this evening, in its "enforcement" of the collective bargaining agreement. Assessing this dynamism of the administrative agency is a subject for another day, and I mention it in passing only because our subject tonight seems to provide so striking an example.

The Supreme Court decision which comes closest to telling us how the Labor Board should act in the hypothetical case I have outlined is, of course, the famous C & C Plywood[6] holding of last January. The contract in that case reserved to the employer the right to pay a premium rate above the contractual classified wage rate to reward "any particular employee" having special qualifications. A standard "zipper clause" provided that neither party was obligated to bargain regarding any matter not specifically referred to in the contract. Shortly after the agreement was signed, the employer announced that all members of the "glue spreader" crews would receive premium pay if they met specified production standards. The Supreme Court held, reversing a court of appeals, that the mere existence of an arguable contractual defense for the employer's action did not divest the Labor Board of jurisdiction to determine whether the awarding of premium pay constituted a unilateral change of working conditions in violation of section 8(a)(5). The Court further held that the Board was not wrong in deciding that the union had not waived its right to bargain about the pay plan inaugurated by the employer. The disputed contract provision referred to increases for "particular employees," not groups of workers.

There were at least four factors in C & C Plywood which may have contributed to the conclusion reached, and in the absence of which the result might have been different

First, unlike the typical labor contract, the agreement contained no provision for final and binding arbitration. The Court made much of this point, and seemed to approve a lower court decision[7] which reached a contrary result in a case where there was a provision for arbitration. Why should the presence or absence of an arbitration clause be crucial? I'm not sure why it should. Apparently the ultimate question is whether the union has "clearly and unmistakably" waived its right to object to, or demand bargaining over, a change in working conditions by the employer. It's certainly arguable that such a waiver could be found just as well in a contract providing for resort to traditional judicial processes as in a contract providing for resort to an arbitrator to settle disputes.

On the other hand, there are both logical and practical reasons why the existence of an arbitration clause might more easily support the inference of waiver. First, arbitration has often been regarded as part and parcel of collective bargaining itself. Viewed this way, the parties' provision for arbitration could be deemed a deliberate decision by them to channel their bargaining over all disputed matters during the life of the contract through the grievance and arbitration procedure, and as a waiver

4. Miranda Fuel Co., 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963); Hughes Tool Co., 147 N.L.R.B. 1573 (1964).
5. Operating Engineers Local 138 (Charles S. Skura), 148 N.L.R.B. 679 (1964).
6. NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967).
7. Square D Co. v. NLRB, 332 F.2d 360 (9th Cir. 1964).

of their right to bargain through traditional negotiating sessions. It would of course take a considerable stretch of the imagination to regard resort to court litigation as a continuation of "collective bargaining" in any sense of the word. In addition, arbitration is usually both faster and cheaper than litigation, and it has come to have a preferred place in the Supreme Court's eyes as an instrument for settling industrial disputes.

Despite these considerations, however, the NLRB would not reach a different result in the C & C Plywood situation merely because of the presence of an arbitration clause. One court of appeals is in accord.[8] The Board and the court of appeals may be right in in their conclusion, but I think they are mistaken in placing heavy reliance on NLRB v. Acme Industrial Co.,[9] a case decided by the Supreme Court the same day as C & C Plywood. In Acme, there was a contractual provision for arbitration, and the Court nonetheless held that the Labor Board did not have to await an arbitrator's determination of the relevance of certain information requested by a union to assist it in handling grievances; the Board could go ahead and enforce the union's statutory right to the information under section 8(a)(5). But this case seems to me quite different from C & C Plywood. A union has a well-recognized statutory right to all relevant "wage data" needed by it for the intelligent negotiation and administration of the collective bargaining agreement. This right exists independently of the labor agreement. As the Supreme Court observed in Acme, the Board did not have to make a "binding construction" of the labor contract to determine the scope of the union's right to the information. In C & C Plywood, however, a substantive interpretation of the agreement was essential to the Board's conclusion that the union had not agreed to give the employer the power unilaterally to award premium pay to selected groups of employees. This obviously represented a much greater threat of conflict between the Labor Board and the arbitration process.

It is not only the absence of an arbitration clause which makes C & C Plywood an typical case. A second distinctive aspect is that the employer's unilateral change of working conditions did not cause the employees any measurable monetary loss. The employer was giving them more compensation than the contract called for. The only real damage was to the union's status as collective bargaining representative. As the Supreme Court noted, it would be hard to tell exactly what sort of relief a court could provide. The injury was one for which a Labor Board order to bargain was a peculiarly apt remedy. Although the Supreme Court explicitly drew attention to this distinction, it is clear the NLRB does not regard it as decisive. Remedies in a number of Board cases have included orders for employers to reimburse employees for lost benefits under contracts which the employer had breached or refused to "honor."[10] I am inclined to think the Labor Board will prevail before the courts on this point.

A third factor present in C & C Plywood may carry more weight with the Board. You will recall there was a clause which authorized the employer to award premium pay to "particular employees" having special qualifications. The dispute arose when the employer provided extra compensation for a whole group of employees meeting certain production standards. Did the contract provision regarding "particular" employees

8. NLRB v. Huttig Sash & Door Co., 65 L.R.R.M. 2431 (8th Cir. 1967)
9. 385 U.S. 432 (1967).
10. Schill Steel Products, Inc., 161 N.L.R.B. No. 83 (1966); Scam Instrument Corp., 163 N.L.R.B. No. 39 (1967).

even apply to this situation? Arguably it did not. A determination that the clause was not applicable would thus leave the question of premium pay for groups of employees subject to the usual rule that an employer may not institute unilateral changes in working conditions without first bargaining over the matter with the representative of his employees. I find indications in several cases that the NLRB may be receptive to this notion. Thus, it has justified the assertion of jurisdiction by saying the unfair labor practice issue did not primarily turn on an interpretation of "specific contractual provisions of ambiguous meaning, within the special competence of an arbitrator to determine."[11] At the same time, the Board concedes its function is not to construe the "full meaning or effect" of a contractual provision.[12]

I read these passages as follows. If it can be concluded that a specific contractual provision covers a particular dispute between the parties, for example, if it must reasonably be conceded that a given piece-work formula contains the "answer" to a dispute regarding the proper amount to be paid certain employees (even though there may be considerable conflict as to how that formula should be applied), the Labor Board would apparently defer to arbitration to construe the clause, at least where it is ambiguous and thus in need of interpretation.[13] On the other hand, when the basic question is not how the contract resolves a particular dispute, but whether it covers the matter at all, for example, whether a clause prescribing the treatment of "particular" employees is applicable to the treatment of groups of employees, the Labor Board will assume jurisdiction to resolve the question of coverage. For in the absence of coverage of the dispute by the contract, the parties are relegated to their statutory rights and remedies, and those are peculiarly the province of the NLRB.

A fourth point should be noted about the Board's assumption of jurisdiction in C & C Plywood. The dispute did not involve a single isolated employee, or even several individual instances of disagreement between the union and the employer regarding the way the contract should apply to a number of employees. Rather, the employer was asserting the right unilaterally to change working conditions in a way which would have a continuing impact on the work force. The Labor Board seems to regard this distinction as significant. In one case, for instance, the Board sharply distinguished between a unilateral change which has a "continuing impact on a basic term or condition of employment" and a "simple default in a contractual obligation."[14] In the latter situation, I gather, the Board would decline jurisdiction. Some statutory support for this analysis can be found in section 8(d) of the NLRA, which makes it an unfair practice for a party to a labor contract to "terminate or modify" the contract without following certain prescribed procedures. A simple breach, especially when isolated, would hardly be regarded as an attempted "modification."

By now you are in a position to assess the differences and similarities between C & C Plywood and my opening hypothetical, and to predict how the Labor Board and the courts will eventually deal with the somewhat more typical situation outlined in the hypothetical. (To be honest, I have to tell you that my "hypo" was an abbreviated

11. C & S Industries, Inc., 158 N.L.R.B. No. 43 (1966); Adams Dairy Co., 147 N.L.R.B. 1410 (1964).
12. Crescent Bed Co., 157 N.L.R.B. No. 22 (1966). But cf. Scam Instrument Corp., 163 N.L.R.B. No. 39 (1967).
13. There may be some illogic here. If a clause clearly governs the dispute, I'd say the Board should ordinarily defer to the arbitrator regardless of whether the provision is "ambiguous."
14. C & S Industries, Inc., 158 N.L.R.B. No. 43 (1966).

version of the first question on my last labor law examination; that of course means I regard it as unanswerable!) Before going on, however, let me try to clarify one possible source of confusion. The contract in C & C Plywood contained a standard "zipper clause." This clause played no significant part in the Court's thinking. Assuming a zipper clause may have the effect of waiving the union's right to demand bargaining during the term of the contract over a change in working conditions proposed by the union, I take it a zipper clause does not necessarily waive the union's right to object to, or demand bargaining over, a change in working conditions proposed (or imposed) by the employer. Only a "clear and unmistakable" waiver of the latter right, through a quite specific management rights clause or otherwise, will suffice. In the hypothetical I presented at the outset, there was no zipper clause, but there had been an allusion to the health and welfare plan during the negotiation of the contract. As you know, under the Jacobs Manufacturing[15] rule there is no duty to bargain during the term of a contract regarding any matter which has been either incorporated in the contract or thoroughly discussed in pre-contract negotiations. My hypothetical left it unclear whether there had been a sufficiently full exploration of the health and welfare plan to bring the Jacobs Manufacturing rule into play. But even if there had been, it would not be enough to conclude that the union was thereafter precluded from demanding bargaining about changes it might propose in the plan. It would be necessary, to save the employer from a possible section 8(a)(5) violation, to go further, and to conclude that the union had also waived its right to object to the employer's unilateral changes, thereby leaving complete control over the plan in his hands.

Insofar as the NLRB focuses on the element of contract coverage as the critical determinant of its jurisdiction,[16] its approach seems generally sound, although I might add, or at least emphasize, a couple of qualifications. Fastening upon the issue of contract coverage absolves the Board of the charge that it is usurping the function of another tribunal to enforce the labor agreement. For the very question to be decided is whether the contract applies to the particular matter in dispute. If it does not, then only the statute is left as a source of rights and remedies. I see no reason why the Board should be foreclosed from its traditional jurisdiction to enforce statutory rights merely because a party can construct a plausible contractual defense to the alleged violation.

Moreover, after some initial doubts, I have come to sympathize with the Board's notion that a party's "repudiation" of a labor agreement in whole or substantial part is to be equated with a refusal to bargain, and the party may be ordered to "honor" the contract.[17] Although the repudiation problem hardly fits under the "contract coverage" concept we have been discussing, it is probably reasonable for the Board to conclude that a union or employer which executes and then flagrantly disregards a contract has in effect made a sham of the collective bargaining process itself. A finding of an unfair labor practice and an appropriate remedy are then in order, even though the aggrieved party might, as an alternative, have sought relief from an arbitrator or a court.

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15. Jacobs Mfg. Co., 94 N.L.R.B. 1214 (1951).
16. I do not mean to suggest the Board itself necessarily takes this limited view of its jurisdiction. See, e.g., Scam Instrument Corp., 163 N.L.R.B. No. 39 (1967) (employer unilaterally imposed insurance rider "in violation of its subsisting collective-bargaining agreement").
17. Hyde's Super Market, 145 N.L.R.B. 1252 (1964), enforced, 339 F.2d 568 (9th Cir. 1964); Crescent Bed Co., 157 N.L.R.B. No. 22 (1966).

As indicated earlier, however, I have some reservations about the Board's doctrine. First, I think it would be a mistake to insist that a "specific" contractual provision must be found applicable to a dispute before the Board will hold the matter is covered by the agreement, and decline jurisdiction in deference to arbitration. As we have been told so often, labor contracts are not ordinary contracts. Sometimes their meatiest parts appear between the lines, and can only be deciphered in the light of past practice and bargaining history. Board member Brown has explicitly recognized this. He has declared that wherever the parties consciously by contract or bargaining history or past practice have waived statutory rights or "bargained to agreement" with respect to the subject matter of the dispute, the Board should let the arbitrator determine the nature of their bargain and their respective rights and obligations.[18] I think it well accords with the realities of collective bargaining to look beyond the "specific" provisions of a contract in assessing the full measure of the parties' agreement, and there is some Board support for this approach.[19]

My second qualification is that genuine doubts on the issue of contract coverage should be resolved in favor of coverage (and thus in favor of arbitration) and against Board jurisdiction. It is national labor policy to encourage the private settlement of labor disputes. The grievance and arbitration procedure is the customary method for such private settlement. In my experience, even rather hotly contested arbitrations do not introduce the same adversary note as does an unfair labor practice proceeding before the Board. To foster amicable industrial relations, therefore, I would prefer to see the usual contractual dispute channelled to arbitration, and Board intervention reserved for those unhappy instances in which normal collective bargaining (including, of course, contract administration) has truly broken down.

I now turn to consider a second puzzling aspect of the NLRB- arbitration relationship, this time from the perspective of the arbitrator. To what extent, if any, should he take into account the labor statutes and the interpretative Board decisions in his construction of a labor agreement? I enter upon this portion of my discussion with some trepidation, for I fear that I must place myself at odds with the distinguished chairman of the Michigan Labor Mediation Board, Bob Howlett. At least this will provide you with one side benefit; in order to present the smallest possible target, I intend to be as brief as I can.

In a thoughtful and thought-provoking talk before the National Academy of Arbitrators in March, Chairman Howlett contended that an arbitrator should give consideration to the labor statutes when applicable to a contractual dispute before him, and not confine himself to the parties' own agreement. Otherwise, he argued, arbitration will not be entitled to "deference" from the NLRB, or to full recognition from the courts in suits to enforce arbitral awards. These are solid, practical arguments, and they may eventually carry the day. Nevertheless, I must disagree with Chairman Howlett's conclusion.

Arbitrators, strictly speaking, do not enforce contracts; courts enforce contracts. All the arbitrator can properly do in the usual case is tell the parties what they meant by their agreement--or, more exactly, what they would have meant had they ever dealt specifically with the problem which has now arisen. An arbitrator is a creature of the contract. It is the source and limit of his authority, and he has no license to look beyond its borders for some external standard by which to nullify or restrict its operation. The Supreme Court itself has said that an arbitral award is legitimate

18. Adams Dairy Co., 147 N.L.R.B. 1410 (1964) (concurring opinion).
19. See New York Mirror, 151 N.L.R.B. 834 (1965).

only if it "draws its essence" from the collective bargaining agreement, and that an arbitrator exceeds the scope of the submission if he bases his decision on his view of the "requirements of enacted legislation."[20]

Apart from legal theory, there are highly pragmatic reasons why the arbitrator should limit his inquiry to the labor contract (and the past practices and bargaining concessions impliedly incorporated therein), and not essay the formidable task of statutory construction. Frequently there is bitter dispute between the parties not only about the legality of a particular interpretation of a contract clause, but also about the intended meaning of the clause itself. One party may be prepared to fight the legal question through to the "highest court in the land." But first it wants from the arbitrator a definitive ruling on just what the clause in dispute means. I feel a party to a labor agreement is entitled to that ruling, totally divorced from any expression of opinion by the arbitrator about the clause's legality. In bargaining for arbitration, it is most likely that the parties bargained for the arbitrator's opinion on the contract, and not for his opinion on the law.

Many of our best arbitrators are not lawyers. They are not sought out for their expertise in labor law, but for their expertise in industrial relations. There is no reason to think, especially in the close, hard cases, that they will bring any superior insight to the interpretation of statutory and decisional materials. When the law is in a state of flux (a not unusual posture for labor law), the non-lawyer arbitrator will probably be a step or two behind the times. But even if he is the most accomplished of legal scholars, our experience in waiting out Board decisions on novel questions suggests that an arbitrator's tangling with subtle legal issues would add markedly to the length and expense of the proceedings.

Am I saying that an arbitrator should make an award which he believes is contrary to federal labor law? Yes. The remedy for the aggrieved party is to seek relief from the Labor Board, or to challenge the award in court when enforcement proceedings are brought. Doesn't this mean the NLRB can no longer respect or "defer" to arbitration, under its Spielberg[21] doctrine, when an unfair labor practice allegation involves a matter that has previously been the subject of an arbitral award? This question pinpoints what I consider an area of fuzzy thinking in the Spielberg line of cases. Now, comity between different tribunals always has a good bit of appeal. But it may have prevented a critical inquiry into exactly what it is about the arbitrator's award that the Board defers to in the subsequent unfair labor practice proceeding. Is it the award as a whole? Is it the arbitrator's construction of an applicable statute? Or is it merely his findings of certain facts and his interpretation of certain contractual provisions which happen also to be essential parts of the unfair labor practice case? I would say it is only the last.

The Board in my view has no business abdicating its responsibility for interpreting a statute specially entrusted to its charge. Similarly, it has no business as a public tribunal honoring a private award simply in gross, as it were. On the other hand, where the arbitration has been fair and regular, it seems entirely proper not to allow a party to relitigate disputed facts or disputed contract interpretations that also bear upon the issues before the Board. In most instances, this approach would not vary the results reached under the Board's current rationale. But it would have the healthy effect of maintaining a more understandable demarcation line between two tribunals that are in actuality entirely different in their origin and function.

20. Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).
21. Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955).

Having said all this, I cannot conclude without marking out one area where Chairman Howlett and I may be in substantial agreement. Although I insist an arbitrator's duty is ordinarily to interpret and apply the labor agreement and not the statute, this naturally does not mean that the parties are precluded from referring to him a disputed question of statutory interpretation if they so wish. Furthermore, when a contract provision is fairly susceptible to two different interpretations, one plainly valid and one plainly invalid under existing law, I find nothing out of order in the arbitrator's choosing that interpretation which will uphold the legality of the agreement. The parties may be presumed to have intended to comply with the law. Possibly this makes my dispute with Chairman Howlett merely a matter of degree, but in the law matters of degree have a way of becoming decisive. In any event, there seems to me a world of difference between letting the statute tip the scales in favor of a lawful reading of a truly ambiguous contract clause, and letting the statute (or the arbitrator's view of it) prevail against a reasonably clear expression of the parties' contractual intent. The arbitrator may follow the former course, but, as a creature of the contract itself, he may not the latter.

As I indicated earlier, a large part of the problem I have treated this evening has already received the searching (if somewhat hurried) scrutiny of the students in my last labor law class. In a sense, then, you have been imbibing not only my own views but a distillation of the views of all those bright young minds. That is heady stuff. It being Sunday, and this being Michigan, and the State's strictures against the Sunday preveying of distillates apparently destined to be with us for some little time yet to come, I feel I have run counter to community mores as long as I dare. Service from this rostrum is therefore now suspended."