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THE LABOR BOARD AND THE COLLECTIVE BARGAINING PROCESS

**A Report on the Labor-Law Seminar
of the
Kansas City Bar Association
March 25, 1970**

**With Editorial Analysis, Additional Text,
and Selected NLRB and Court Decisions**

**Edited by Howard J. Anderson
Senior Editor for Labor Services
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APPENDIX I

INTERVENTIONISM, LAISSEZ-FAIRE, AND STARE DECISIS: THE LABOR DECISIONS OF THE SUPREME COURT, OCTOBER TERM 1969

Following is the partial text of an address delivered at the August 10, 1970, meeting of the American Bar Association's Section of Labor Relations Law by Theodore J. St. Antoine, Professor of Law, University of Michigan, and Secretary of the Section of Labor Relations Law of the American Bar Association. The portion of the address reproduced deals with the Supreme Court's Boys Markets decision relating to injunctions against strikes in violation of no-strike contracts and the Court's H. K. Porter decision involving the NLRB's authority to order a party to agree to a substantive provision in a collective bargaining contract.

I. INTRODUCTION

Change and portents of change marked the first year of the Burger Court. Although October Term 1969 produced only two major labor decisions, it saw the overruling of one of the most controversial holdings of the past decade, and heard a call from several Justices for a reexamination of a central doctrine of the Warren Court, the doctrine of federal preemption. But despite these signs of flux, perhaps the deeper meaning of this year of transition was a lesson in continuity. For the two principal cases of the term indicate that the Burger Court will follow its predecessor's lead in developing two contrasting, and at times conflicting, approaches to the regulation of labor relations.

The first of these approaches, represented by Boys Markets, Inc. v. Retail Clerks Local 770, ^{1/} emphasizes judicial interventionism and a willingness to put the courts' thumb on the scales in labor disputes. The second technique is reflected in H. K. Porter Co. v. NLRB, ^{2/} It stresses a laissez-faire policy, a "hands-off" attitude that permits industrial combatants to employ their natural economic weapons or work out a peace treaty with little judicial hindrance or intrusion. I shall deal separately with these two cases and their two diverse philosophies.

II. INTERVENTIONISM AND BOYS MARKETS

1. The Decision and Its Rationale

In Boys Markets the collective bargaining agreement contained a broad no-strike clause and a provision enabling either union or employer to refer unresolved grievances over the "interpretation or application" of the agreement to final and binding arbitration. The union called a strike to protest the rearranging of merchandise in frozen food cases by store personnel who were not members of the bargaining unit. The

^{1/} 398 U. S. 235, 90 S. Ct. 1583 (1970), 74 LRRM 2257.

^{2/} 397 U. S. 99, 90 S. Ct. 821 (1970) 73 LRRM 2561.

employer then went into state court to seek an injunction against the strike and specific performance of the arbitration provision. A temporary restraining order was issued against the strike. At this point the union removed the case to federal district court and moved to quash the state court's restraining order. The district court, concluding that the dispute was subject to arbitration and the strike was a violation of contract, ordered the parties to arbitrate and enjoined the strike. The court of appeals reversed, however, holding on the authority of the Supreme Court's 1962 decision in Sinclair Refining 3/ that section 4 of the Norris-La Guardia Act prevents a federal court from enjoining a strike even if it is in breach of contract. On certiorari, the Supreme Court overruled Sinclair and sustained the power of the federal courts to enjoin strikes in situations like Boys Markets. Justices Black and White dissented.

Both Justice Brennan's majority opinion and Justice Black's dissenting opinion in Boys Markets must be read in conjunction with their parallel opinions in Sinclair for a proper understanding of the opposing arguments. Justice Black's touchstone is congressional intent. He emphasizes that the Taft-Hartley Act was written with Norris-La Guardia very much in mind. When Congress wished to limit the effect of Norris-La Guardia, it did so quite explicitly, as in section 10(h) of the National Labor Relations Act, dealing with the power of the NLRB to obtain injunctions or to enforce its orders, and in section 208(b) of Taft-Hartley, dealing with injunctions in national emergency disputes. But in section 301, the basis of jurisdiction in suits for breach of labor contracts, nothing at all is said about a pro tanto repeal of Norris-La Guardia. Moreover, this was no oversight. Both the Senate and House versions of the bill that became Taft-Hartley would have lifted the Norris anti-injunction bar in contract suits. But in conference the repealers were removed. Senator Taft reported to the Senate: "The conferees . . . rejected the repeal of the Norris-La Guardia Act." Justice Black would therefore relegate employers injured by strikes in breach of contract to damage actions and to discipline of the employees involved.

Justice Brennan finds his main strength in the national policy of substituting arbitration for economic combat in contract disputes, and in the logic of the Supreme Court precedents leading up to Boys Markets. He readily concedes that section 301 did not "repeal" section 4 of Norris-La Guardia outright. But he insists that the two provisions apply to contract disputes in conflicting senses, and that the silence of Congress concerning their relationship means only that the task has been left to the courts to "accommodate" the two sections in a way "which will give the fullest possible effect to the central purposes of both." 4/ He concludes that the appropriate "accommodation" is to uphold federal injunctive power against strikes whenever the underlying dispute is subject to binding arbitration. Hopefully, this will enable a swift, inexpensive, and peaceful resolution of the issues between the parties.

Justice Brennan bolsters his conclusion by pointing to the anomaly which would exist if federal courts could not enjoin strikes in violation of contract. Little is clearer about the background of section 301 than that Congress desired to add to the

3/ Sinclair Refining Co. v. Atkinson, 370 U. S. 195 (1962), 50 LRRM 2420.

4/ Id. at 216.

remedies open to employers, not detract from them. Yet in the Avco case ^{5/} the Supreme Court held suits on labor contracts to be removable from state to federal courts, without regard to the types of relief available in the different forums. If both Sinclair and Avco were to stand, Justice Brennan contended, the practical result would be the invariable removal by unions of state court actions involving breach of a no-strike clause, thus depriving employers of the injunctive remedy that was formerly theirs.

I consider the logic of both Justice Black and Justice Brennan unassailable, once their respective premises are granted. It is hard to read the legislative history of section 301 without concluding that Congress entertained no such subtle notion as Justice Brennan's "accommodation" theory, but instead viewed the problem in much the same blunt, lawyerlike fashion as Justice Black: either Norris-La Guardia's ban on antistrike injunctions was to apply to contract suits in full force, or it was not to apply at all. And the explicit rejection of the Senate and House repealers would seem to leave small doubt about the choice. Finally, as Justice Black stressed in his Boys Markets dissent, Congress had been urged in the eight years since Sinclair to overrule that decision, and it had declined to act. In the face of such a history, only the boldest kind of judicial activism would have refused to bow to Justice Black's reasoning.

But I cannot bring myself to grieve overmuch at the demise of Sinclair. Despite the sorry record of injunctions in the labor disputes of yesteryear, I am satisfied that the principal abuses at which Norris-La Guardia was aimed--the killing of a union's organizational efforts through the hasty issuance of ex parte decrees by a property-oriented judiciary--are unlikely to find parallels in a modern court's ordering of specific performance of a union's promise not to strike. This is especially true if the union has the alternative resort of arbitration for vindication of its claims. Besides, the violence that Boys Markets does to legislative intent is but the latest, and logically almost preordained, step in a long trail of such violence that runs back through Avco all the way to the starting point in Lincoln Mills. ^{6/}

In Lincoln Mills the Supreme Court took section 301, seemingly a procedural provision designed only to grant jurisdiction to the federal courts to enforce union-employer contracts, and transformed it into a mandate to construct a whole new body of federal substantive law to govern these agreements. This is not the place to discourse on the propriety of that kind of judicial legerdemain. But if one concedes that there is a role for the judiciary to play in the enforcement of collective bargaining agreements, a matter on which I shall say a word or so later, then surely, on a policy basis, there is much to commend the creation of a uniform body of doctrine to regulate labor agreements across the country. Similarly, on a policy basis, there is much to commend the notion that unions, like employers, can be legally compelled to live up to their contractual undertakings. That would include, in the appropriate circumstances, the performance in kind of their commitment not to strike. In short, one might say that both Lincoln Mills and Boys Markets constitute bad law and good policy.

^{5/} Avco Corp. v. Machinists Aero Lodge 735, 390 U. S. 557 (1968), 67 LRRM 2881.

^{6/} Textile Workers Union v. Lincoln Mills, 353 U. S. 488 (1957), 40 LRRM 2113.

One might even say that we have here the rare case of two wrongs making two rights.

2. Implications and Unanswered Questions

The grievance over which the union struck in Boys Markets was subject to binding arbitration. In his majority opinion, Justice Brennan adopted language from his Sinclair dissent setting forth some guidelines for granting injunctive relief. A strike should be enjoined only if the district court finds it concerns a grievance that "both parties are contractually bound to arbitrate." ^{7/} Moreover, "the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike." I assume this language is not to be taken literally. If the employer is bound to arbitrate at the union's option, that should be enough; the union need be "bound" only in the sense that it has the right to arbitrate but not the right to strike. So too, any order to the employer to arbitrate as a condition of injunctive relief should itself be conditioned on the union's requesting arbitration. In addition, Justice Brennan emphasized that a strike injunction must meet the usual equity tests--for example, the employer must be threatened by irreparable harm, and be likely to suffer more from the denial of the injunction than the union from its issuance. But today, especially in the labor field, these limitations on equitable remedies smack more of ancient rubrics than of genuine restrictions.

Suppose a contract contains a no-strike clause but no binding arbitration procedure. Or, which is more likely, suppose the no-strike clause is broader than the arbitration provision and the union breaches the contract by striking over a matter that is not subject to arbitration. May a federal district court enjoin the strike? In a brief 1962 per curiam decision, Teamsters Local 795 v. Yellow Transit Freight Lines, ^{8/} which merely cited Sinclair as authority, the Supreme Court struck down an injunction against a strike by a union whose collective bargaining agreement did not bind either party to arbitrate disputes. Justice Brennan and the other dissenters in Sinclair, true to their rationale in that case, concurred in Yellow Transit. Yellow Transit was not even mentioned, let alone overruled, in Boys Markets. Perhaps, although I hate to harbor such a suspicion, the Court just forgot about it. But if Yellow Transit remains the law, then no federal injunction could issue against a strike in the circumstances I have mentioned. This of course would be in accord with Justice Brennan's thesis that an injunction against a strike does not undercut the policy of Norris-La Guardia so long as a union is not left defenseless, but instead can invoke binding arbitration as an alternative to striking.

Yellow Transit may be subject to some modification, however. In Boys Markets Justice Brennan said the Court was dealing only with the situation where the union's contract contained a "mandatory grievance adjustment or arbitration procedure." ^{9/} I am not sure what is meant by this. Does it mean that a strike injunction could issue not only when the union has the right to binding arbitration, but also when it has the

^{7/} 370 U. S. at 228, quoted in 90 S. Ct. at 1594.

^{8/} 370 U. S. 711 (1962), 50 LRRM 2478.

^{9/} 90 S. Ct. at 1594. (Emphasis supplied.)

more limited right to pursue a grievance through a procedure that stops short of final arbitration? If so, this would be a considerable departure from Justice Brennan's original theory that Norris-La Guardia and Taft-Hartley can be "accommodated" by allowing a strike injunction whenever binding arbitration is available to a union as a substitute for economic pressure. The right to talk is not much of a substitute for the right to strike.

Yet I hesitate to take for granted that the Court will adhere to the distinction of the Sinclair dissenters, now that Boys Markets has been decided. A train of reasoning tends to build up momentum once it's set on a certain track. With the awesome wall of Norris-La Guardia breached at last, other "accommodations" may come more easily. For example, if a union strikes over a matter about which it could bring suit under a contract, why couldn't its right to a legal action be treated as analogous to its right to binding arbitration, thus permitting a federal injunction against any work stoppage? The counterargument, of course, is that the comparative speed, cheapness, and flexibility of arbitration make it, but not the right to sue, the appropriate quid pro quo for specific performance of the no-strike clause. Perhaps a middle position is possible, should the availability of privately structured procedures be considered critical. If a union is entitled to grieve over a particular issue, but not to seek an arbitral award, an injunction might be obtainable against a strike until, but only until, the grievance process has been exhausted. Some support for such an approach may be found in decisions dealing with the relationship between the Norris-La Guardia Act and the "major dispute" mediation provisions of the Railway Labor Act. 10/

If arbitrability does remain a prerequisite for an injunction against a strike over a grievance, other questions arise. Wildcat strikes, by which I here mean work stoppages not authorized by a union, constitute one of the principal problems that employers expect Boys Markets to alleviate. 11/ Ordinarily, individual employees can invoke the grievance procedure, but only the union can refer a matter to the final step of arbitration. Does this suggest that a wildcat strike cannot be enjoined because the strikers themselves cannot get their grievance arbitrated? If union representational power means anything, the answer to this has to be "No." It should be enough that the grievance is one which the union could, if it chose, submit to arbitration on behalf of the employees. 12/

What happens if a court enjoins a strike on the ground the underlying dispute is arbitrable, and an arbitrator subsequently rules that the grievance is not arbitrable? May the union then have the injunction dissolved? This problem would never be presented, of course, if arbitrators were bound by the initial judicial determination of arbitrability, but many arbitrators do not consider themselves so bound. My colleagues Professors Smith and Jones doubt that a court would upset an arbitrator's holding of nonarbitrability in the usual situation. They reason that the legal and practical results

10/ See, e.g., American Airlines v. Air Line Pilots Ass'n, 169 F. Supp. 777 (S.D. N. Y. 1958), 43 LRRM 2390.

11/ See, e.g., Unkovic, "Enforcing the No-Strike Clause," 21 Lab. L. J. 387 (1970).

12/ I leave to one side questions of possible unfair representation.

of an arbitrator's holding a grievance nonarbitrable or dismissing it on the merits would be the same, since either ruling would be predicated on the analysis that "there is no provision in the labor agreement which supports the grievance." ^{13/} But when the availability of a strike injunction is at stake, there may be a vital difference between a holding of nonarbitrability and a dismissal on the merits. The latter means that the union has had the full benefit of an alternative to the strike, as Justice Brennan envisaged. But if the arbitrator declares the matter not subject to arbitration and declines to rule on it, then the union has been deprived of both avenues of relief, contrary to Justice Brennan's Sinclair - Boys Markets philosophy. A good argument can thus be made for the dissolution of the injunction in these circumstances.

It may be insisted, however, that the court's original finding of arbitrability is res judicata. Perhaps so, but a difficulty is that the courts are under a heavy mandate from Warrior and Gulf 14/ to resolve doubts "in favor of coverage" when enforcing an arbitration agreement in the first instance. The issue may be entirely different in subsequent judicial proceedings, especially after an arbitrator has made a determination of nonarbitrability. ^{15/} It may also be insisted that many arbitrators' awards are unclear as to whether they are based on jurisdictional grounds or on the merits. This may be true now, since the question has not necessarily been regarded as all that important before; that is no reason, however, for failing to seek clarification in the future, if the basis of the award should become critical for the continuance of the injunction.

Regardless of how these issues are resolved, there should be no doubt that a strike injunction can be dissolved if it turns out to be in direct conflict with an arbitral decision. This would be the case, for example, if the arbitrator ruled that the underlying dispute was one over which the union had retained the right to strike, once a voluntary grievance procedure had been exhausted.

All this leads to one key proposition. If the Supreme Court holds fast to the notion that the accommodation of Norris-La Guardia and Taft-Hartley hinges on the arbitration clause as the quid pro quo for the no-strike clause, then it is the scope of the arbitration right of the union, and that alone, which determines the scope of the injunctive relief available to an employer. Logically, this would mean that an employer could not get a strike enjoined pending arbitration, if the union's underlying grievance is not arbitrable, even though the employer has the right to arbitrate the work stoppage itself as an alleged violation of the no-strike provision. On the other hand, Lucas Flour 16/ tells us that a binding arbitration provision constitutes an implied no-strike clause. Presumably, therefore, an employer will be able to secure an injunction, even in the absence of an express no-strike clause, against a stoppage concerning a matter which the union is entitled to refer to final arbitration.

^{13/} Smith and Jones, "The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law," 63 Mich. L. Rev. 751, 761 (1965).

^{14/} United Steelworkers v. Warrior & Gulf Nav. Co., 363 U. S. 574, 583 (1960), 46 LRRM 2416.

^{15/} Cf. Wellington, "Judicial Review of the Promise to Arbitrate," 37 N. Y. U. L. Rev. 471, 483-84 (1962).

^{16/} Teamsters Local 174 v. Lucas Flour Co., 369 U. S. 95 (1962), 49 LRRM 2717.

On at least one point, however, I suspect the rigid logic of this analysis will bend. My hunch is that the Supreme Court will now allow the federal courts to "specifically enforce" an arbitrator's order directing a union to halt a strike, regardless of whether the grievance triggering the strike is arbitrable or not. ^{17/} This result would actually make more sense than Boys Markets. The policy of Norris-La Guardia is set against the abuses of an uncomprehending judiciary. The intervention of an arbitrator, chosen by the parties themselves for his special competence in industrial relations, minimizes the chances of any serious misstep by a court.

Amidst this welter of speculation, it is comforting to grasp one small certitude. Even if the employer, as well as the union, is entitled to utilize the grievance and arbitration procedure, he need not do so as a prerequisite to seeking an injunction against a strike. Boys Markets itself establishes this point. The injunction suit is thus to be distinguished from the damage action, where the employer must first go to arbitration if the contract authorizes him to. ^{18/}

If Boys Markets does indeed mean that an employer's right to federal injunctive relief depends on the extent of the union's arbitration rights, and not on the reach of the no-strike clause, we may still have to struggle with some federal-state conundrums. Norris-La Guardia does not apply in terms to state courts, and strong dictum in Boys Markets indicates it will not be extended to them. This opens the possibility that we may again find ourselves aboard the Avco removal merry-go-round, albeit a smaller model. An employer obtains a state court restraining order against a strike over a nonarbitrable issue; the union removes to federal court and moves to quash. If, as appears likely, the unanswered Avco question is resolved by concluding the federal court is bound to dissolve any state injunction beyond the original power of the federal judiciary, then we are left with a lesser version of the same dilemma that led to Boys Markets. ^{19/}

My hope is that one of these giddy rides will prove enough, and that this time the Court will refuse to get on the merry-go-round in the first place. Norris-La Guardia may not be applicable to the states directly. But why not say that the "accommodation" worked out in Boys Markets between Norris-La Guardia and Taft-Hartley--whatever its exact dimensions--is now binding on state courts as part of the federal substantive law of section 301? Unhappily, the Supreme Court declined to shed any light into this particular cranny when it apparently had the opportunity. General Electric Co. v. IUE Local 191 ^{20/} involved the dissolution upon removal of a state court injunction against a strike, where the parties had stipulated "the controversy"

^{17/} See, e.g., New Orleans Steamship Ass'n v. Longshoremen Local 1418, 389 F. 2d 369 (5th Cir. 1968), 67 LRRM 2430, cert. denied, 393 U. S. 828 (1968), 69 LRRM 2434. See also Bartosic, "Injunctions and Section 301: The Patchwork of Avco and Philadelphia Marine on the Fabric of National Labor Policy," 69 Col. L. Rev. 980 (1969).

^{18/} Drake Bakeries, Inc. v. Bakery Workers Local 50, 370 U. S. 254 (1962), 50 LRRM 2440.

^{19/} Cf. Lesnick, "State - Court Injunctions and the Federal Common Law of Labor Contracts: Beyond Norris-La Guardia," 79 Harv. L. Rev. 757 (1966).

^{20/} 90 S. Ct. 1883 (1970), 74 LRRM 2257, vacating and remanding 413 F. 2d 964 (5th Cir. 1969), 71 LRRM 2257.

was not subject to arbitration. In a per curiam order the Supreme Court merely vacated the judgment of the court of appeals, which had been based on Sinclair, and remanded for further consideration in the light of Boys Markets.

3. Some Thoughts on Judicial Interventionism

Boys Markets represents a remarkable exercise in judicial activism, if you gauge these things by the extent to which a court has managed to thwart, or at least reshape, the legislative design. Now, judicial activism is traditionally regarded as a nefarious usurpation of power by any person who finds his ox being gored by a particular manifestation of it. I cannot resist commenting that the employer representatives who today are cheering Boys Markets should recognize that it springs from the same judicial impulse that gave rise to such much-maligned forerunners as Lincoln Mills and Warrior & Gulf. Similarly, union counsel ought to acknowledge, however ruefully, that their earlier victories could hardly have been achieved without the kind of judicial boldness that led, almost ineluctably, to their comeuppance in Boys Markets.

Beyond these partisan high jinks, there lies a policy question of the utmost gravity. To what extent are the courts capable, either with or without legislative authorization, of formulating sound policy for the resolution of labor disputes, or capable, specifically, of intervening effectively to enforce collective bargaining agreements? Harry Shulman and Harry Wellington of Yale have long espoused the view that the administration of labor contracts may best be left to the parties themselves.^{21/} They argue that the courts' sporadic intrusions interfere with the freedom of collective bargaining and the flexibility of private arbitration systems, without offsetting gains for industrial peace and stability.

An indictment like this from two such perceptive and experienced critics cannot easily be dismissed. But I think it exhibits several deficiencies. First, it fails to pay sufficient heed to the American propensity for taking our troubles to court. Since the time of De Tocqueville it has become a commonplace that nearly all our political and social questions wind up becoming judicial questions. Against this background of a pervasive rule of law, it is probably unrealistic to expect our courts to keep their hands off so central an institution of modern industrial society as collective bargaining. My second and major objection to the Shulman-Wellington thesis is that it exaggerates the dangers and underestimates the benefits of judicial intervention. Collective bargaining and arbitration are not fragile hothouse plants that threaten to disintegrate at the slightest touch; they are hardy natural outgrowths of the American labor scene, and they have already demonstrated their adaptability to a changing environment. Some years ago this Section heard predictions at its annual meeting that arbitration might not survive Warrior & Gulf. Today our system of court-enforced arbitration continues to flourish, and studies disclose that it meets with the general approval of both employers and unions.^{22/} Moreover, my judgment is that labor

^{21/} Shulman, "Reason, Contract and Law in Labor Relations," 68 Harv. L. Rev. 999, 1024 (1955); H. Wellington, Labor and the Legal Process 123-25 (1968).

^{22/} Jones and Smith, "Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments," 62 Mich. L. Rev. 1115, 1116-19 (1964).

peace can be significantly promoted by discreet doses of judicial remedies. Unions may not like it, for example, but experience under both the national emergency procedures and the "mandatory" injunction provision of Taft-Hartley shows that most of them will comply with court orders against striking. In any event, I should hope that in the near future we could be enlightened by some solid empirical research on the practical impact of Boys Markets.

Having said this, I still think there is an important lesson to be drawn from the Shulman-Wellington warning against excessive judicial meddling in labor disputes. The courts (or any quasijudicial agency) seem much better qualified to compel the parties to fulfill their preexisting obligations, whether assumed voluntarily or imposed statutorily, than to define those obligations initially. Court enforcement of labor contracts, for example, still leaves the larger share of the responsibility for working out mutual rights and duties to the parties themselves. Conversely, intervention by the courts is more likely to be injurious to autonomous bargaining relationships when the result is the setting of substantive standards. Looked at this way, Boys Markets poses nowhere near as much of a threat to healthy collective bargaining as a decision like Borg-Warner, 23/ in which the Court took upon itself (and the NLRB) the task of telling unions and employers what subjects they may and may not insist on negotiating about. Here, it seems to me, there is a real risk of freezing negotiations in out-worn molds, and of depriving private bargaining of one of its prime assets, its flexibility. Here is where the costs of interventionism may well outweigh its value.

III. LAISSEZ-FAIRE AND H. K. PORTER

1. The Decision in Context

Focusing on such cases as Lincoln Mills, Boys Markets, and Borg-Warner could easily give a distorted view of the Supreme Court's labor teachings. At least as prominent as the interventionist approach reflected in those decisions is a laissez-faire philosophy that was a parallel development of the Court during the Warren years. The latter policy is one of judicial (and administrative) abstention in labor disputes. It puts the emphasis on the right of both unions and employers to bring to bear their natural economic weapons in industrial combat, and to arrive at the terms of their bargaining settlements, with no substantial legal regulation. Thus, in the Insurance Agents case, 24/ a union was allowed to engage in "quickie" work stoppages and other harassing tactics without being held in violation of its bargaining duty. The Court observed that "if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract." 25/ In Brown Food 26/ and American Ship, 27/ the Court reiterated the theme of the parties'

23/ NLRB v. Wooster Div. of Borg-Warner Corp., 356 U. S. 342 (1958), 42 LRRM 2034.

24/ NLRB v. Insurance Agents Union, 361 U. S. 477 (1960), 45 LRRM 2704.

25/ Id. at 490.

26/ NLRB v. Brown, 380 U. S. 278 (1965), 58 LRRM 2663.

27/ American Ship Building Co. v. NLRB, 380 U. S. 300 (1965), 58 LRRM 2672.

freedom to apply economic pressure when it sustained the use of the lockout by employers as a bargaining tactic.

The H. K. Porter decision ^{28/} of this term indicates that laissez-faire will maintain a central position in the thinking of the Burger Court. A company refused to bargain about a proposal for the check-off of union dues, and the refusal was found by the NLRB not to be in good faith, but to be solely for the purpose of frustrating any agreement. The Labor Board initially entered the usual bargaining order, which operates only prospectively and leaves the employer with the ill-gotten gains of his stalling stratagem. Later, in response to a suggestion from a court of appeals in round one of the enforcement proceedings, the Board required the employer to grant the union a contract clause providing for the check-off. This was the first time in the 35-year history of the National Labor Relations Act that the Board had attempted to impose a particular contract provision on any party. The Supreme Court declared the order invalid, however, holding that the NLRB has no power to compel a company or a union to agree to any substantive contractual provision. Two Justices, Douglas and Stewart, dissented.

In his majority opinion for the Court, Justice Black relied heavily on the wording, policy, and legislative background of section 8 (d) of the NLRA. He pointed out that the object of the Act was not to enable government regulation of the terms of employment, but "to ensure that employers and their employees could work together to establish mutually satisfactory conditions." ^{29/} Section 8 (d) provides that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." Justice Black recognized that literally this language only defines the duty to bargain, and does not restrict the scope of the remedy once a violation of the duty has been established. Nevertheless, he refused to agree that the remedial powers of the Board were not limited by the same considerations that led Congress to enact section 8 (d). Said he: "It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties."^{30/} Freedom of contract, as a keystone of national labor policy, thus prevailed over what might otherwise have been a fair result in an individual case.

2. H. K. Porter and the "Make-Whole" Remedy

H. K. Porter is unexceptionable, and perhaps not too important, on its facts. Its principal significance lies in what it can tell us about the Supreme Court's receptivity to the controversial "make-whole" remedy that unions are now seeking in refusal-to-bargain situations. Three years ago, in Ex-Cell-O Corp. and companion

^{28/} H. K. Porter Co. v. NLRB, 397 U. S. 99, 90 S. Ct. 821 (1970), 73 LRRM 2561. See also Tex Tan Welhausen Co. v. NLRB, 397 U. S. 819, 90 S. Ct. 1516 (1970), 74 LRRM 2064, rev'g per curiam 419 F. 2d 1265 (5th Cir. 1969), 72 LRRM 2885.

^{29/} 90 S. Ct. at 823.

^{30/} Id. at 825-26.

cases, 31/ the Board was asked to require employers to reimburse their employees for the loss of wages and fringe benefits that they would have obtained through collective bargaining if the employers had not violated section 8(a) (5) of the NLRA by refusing to bargain in good faith. Ex-Cell-O still rests within the bosom of the Board. Meanwhile, in the Tiidee Products case, 32/ the Court of Appeals for the District of Columbia Circuit held that the Labor Board was authorized to enter a make-whole order in a situation where an employer's objections to a representation election were patently frivolous and unsupported. H. K. Porter was distinguished on the ground it dealt with the "compulsion of a future contract term," while Tiidee dealt with "past damages . . . based upon a determination of what the parties themselves would have agreed to if they had engaged in the kind of bargaining process required by the Act." 33/

Undoubtedly, the remedy sought in Porter flew more in the face of section 8(d) policy than the remedy at issue in Ex-Cell-O or Tiidee. The imposed check-off would have become a part of the labor agreement governing the parties' future relations. The make-whole reimbursement order would apply only until the employer resumes good-faith bargaining; it would not add a term to any subsequent contract. Nonetheless, these technical arguments cannot hide the substantial merit of the employer's position in an Ex-Cell-O situation. The Wagner Act Congress, and even more the Taft-Hartley Act Congress, were adamant that there was to be no "governmental supervision" of contract terms. 34/ While it is true that the statutory expression of this policy in section 8(d) deals directly with the duty to bargain, not with the reach of remedial orders, it can hardly be maintained after Porter that section 8(d) is irrelevant here. As a practical matter, an Ex-Cell-O reimbursement remedy would in all likelihood tend to have a significant impact on the terms of any contract subsequently negotiated by the parties. The union will inevitably want to regard the scale by which the make-whole award was calculated as its "floor" in bargaining. This would seem true even though reimbursement takes the form of a single lump-sum payment to each affected employee, and even though the weekly pay check and other benefits remain constant, pending a new agreement.

There should be room here for a sophisticated judgment. As the Supreme Court has frankly acknowledged, a "tension" exists between the principle of uncompelled contract and the statutory duty to bargain. 35/ Realistically, neither principle can be given unfettered play without damage to the other; the "ultimate problem is the balancing of conflicting legitimate interests" 36/ I hesitate to place too much reliance on the Board's peculiar competence to strike the balance in these circumstances, since the Supreme Court seems inclined to recognize such administrative

31/ Ex-Cell-O Corp., No. 25-CA-2377; Zinke's Foods, Inc., No. 30-CA-372; Herman Wilson Lumber Co., No. 26-CA-2536; Rasco Olympia, Inc., No. 19-CA-3187.

32/ IUE v. NLRB, 73 LRRM 2870 (D. C. Cir. Apr. 3, 1970).

33/ Id. at 2877.

34/ S. Rep. No. 573, 74th Cong., 1st Sess. 12 (1935); S. Rep. No. 105, 80th Cong., 1st Sess. 24 (1947); H. R. Rep. No. 570, 80th Cong., 1st Sess. 34 (1947).

35/ NLRB v. Insurance Agents Union, 361 U. S. 477, 486 (1960), 45 LRRM 2704.

36/ Id. at 499, quoting from NLRB v. Teamsters Local 449, 353 U. S. 87, 96 (1957), 39 LRRM 2603.

expertise only when it suits the Court's fancy. ^{37/} Yet I should think this the sort of case that is preeminently suited for the exercise of informed discretion by a specialized agency. Over thirty years of experience with the usual bargaining order must be assessed to determine the need for a more drastic remedy. And then an educated hunch must be essayed regarding a crucial matter with which no one has any experience at all, namely, the possible effects of a reimbursement order on the parties' future bargaining and contractual relationships. My own feeling is that if the Board becomes convinced on the question of need, it should be granted the indulgence of a bit of experimentation on the question of effect. H. K. Porter does not foreclose that approach, although it leans the other way.

^{37/} Compare NLRB v. Erie Resistor Corp., 373 U. S. 221 (1963), 53 LRRM 2121 with American Ship Building Co. v. NLRB, 380 U. S. 300 (1965), 58 LRRM 2672.