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THE NLRB AND ARBITRATION: IS THE BOARD'S EXPANDING JURISDICTION JUSTIFIED?

Richard I. Bloch *

I. Introduction

Resolution of unfair labor practice disputes is the business of the National Labor Relations Board. Interpretation and enforcement of contract provisions of a collective bargaining agreement, however, are not. Such matters are normally left to the jurisdiction of the arbitrators and the courts. Recently, however, the NLRB has embarked upon a course which has raised questions in the minds of many regarding the jurisdictional boundaries the Board chooses to observe. The purpose of this paper is to examine the jurisdictional problem which arises when a breach of contract is also an unfair labor practice.

The trouble begins when a dispute arises over differing interpretations of a contract provision. The union, for example, alleges that the employer has made a unilateral change in the terms or conditions of employment. The defense will be either that such change was specifically permitted by the contract or that the union had waived its right to bargain over any matters outside the realm of the bargaining agreement. The Board views these cases as coming under Section 8(a)(5) of the National Labor Relations Act, which makes it an unfair labor practice for an employer to "refuse to bargain collectively with representatives of his employees."1 On the other hand, were it not for the dispute over the contract provision's interpretation, there would be no question of an unfair labor practice.

The provisions of the National Labor Relations Act overlap. Section 10(a)2 clearly vests the Board with jurisdiction over any conduct involving a violation of Section 8, regardless of any contractually agreed upon methods of settling the dispute. But Title III, Section 301 of the Act provides that suits for contract violations may be brought in Federal court.3

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2 Section 10(a) of the NLRA, 29 U.S.C. § 160(a) (1965), provides:
   The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.

Thus, while the Board has the power to interpret a contract provision, conflicting statutory provisions provide for other methods of settlement and raise the question as to when the Board should, in its discretion, defer to these alternative routes.

This overlap in function of the statutory provisions elicits various policy considerations. The nature of a settlement, for instance, may differ in character according to whether an arbitrator handles it or whether it goes to the Board. Time and money are vital considerations in the labor field, where there is so often a dire economic need to settle quickly. In an area where statutory and policy considerations overlap, an attempt at accommodation is bound to create uncertainty, and in spite of attempts to formulate guidelines in resolving disputes which arise over the jurisdictional questions, the area is still cloudy at best.

Neither legislative nor case history on the subject has been totally enlightening. Legislative history of the Act dealing with the nature of the duty to bargain suggests that the Board has no jurisdiction over these cases. Critics use the legislative history as a basis for accusing the Board of rejecting national policy favoring arbitration, thereby allowing charging parties to "use its processes for contract interpretation [and] permitting them to circumvent contractual commitments to subject contractual disputes to arbitration." On the other side, supporters of Board policy in taking jurisdiction over these cases point to Section 1 of the Act, which states that it "is the purpose and policy of this Act . . . to provide orderly and peaceful procedures" for settling disputes. In light of recent events in the labor field, however, one cannot help but wonder if the NLRB is not ignoring a most important distinction between the "providing" of orderly procedures and the policing of contractual commitments.

Since Lincoln Mills in 1957 and the later Steelworkers trilogy, the Supreme Court has attempted to articulate the respective jurisdictions of courts and arbitrators in relation to the collective bargaining agreement. In those cases, the Court saw the need to strengthen the collective bargaining process by giving full play to the private remedial machinery established by the parties themselves. But this did not specifically establish the boundaries of jurisdiction to be observed by the NLRB.

What are these boundaries? What is the effect of deciding to defer or not to defer to arbitration? What standards does the Board employ when

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4 In Carey v. Westinghouse Electric Corp., 375 U.S. 261, 272 (1964) the Court held that notwithstanding the availability of arbitration "The superior authority of the Board may be invoked at any time," and that the Board "may disagree with the arbiter" in which case the "Board's ruling would of course take precedence."


faced with the problem of contract interpretation? These are the questions I shall examine. This article will view the functions of the arbitrator and the Labor Board, as well as the arguments for their respective jurisdictions. It will examine the history of the subject from *Lincoln Mills* through the most recent words on the subject. With a view of the history of the problem and an attempt to examine realistic solutions as well as pure legal logic, the attempt will be to demonstrate the glaring need today for more specifically enunciated standards on the part of the Board. I shall propose certain aspects of the collective bargaining situation to which the Board must pay greater heed in forming its policy of deferral. Should the NLRB continue to ignore the responsibility of forming clearer jurisdictional boundaries, it will do so at the risk of undermining the strength of the collective bargaining process itself.

II. Functions of the Board and the Arbitrator

The chief distinction between the function of the Board and that of the arbitrator lies in their differing jurisdictions. In *Adams Dairy* Board Member Brown declared that:

... [T]he function of the arbitrator rarely exceeds interpretation and application of a particular provision of an existing agreement to a particular dispute.\(^9\)

The arbitrator's duty is limited in that he must enforce existing rights only. Where the parties have not yet reached agreement, the arbitrator would normally have no power to act. Brown characterized arbitration as "retrospective in nature," concerned as it is with the interpretation of existing agreements. This, he pointed out, was to be distinguished from that phase of collective bargaining concerned with "the creation of new rights or the modification of existing rights."\(^10\)

Thus, in administering Section 8(a)(5), the Board's function is quite different from the arbitrator's since the Board's concern is that terms and conditions of employment are established as a result of agreement reached through collective bargaining, and not with the interpretation or application of agreements already achieved.\(^11\)

What does this phrase "interpretation of agreements" mean? If the Board were never able to construe a contract provision, it is conceivable

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\(^8\) Cloverleaf Division of Adams Dairy Co., 147 N.L.R.B. 1410 (1964). [Hereinafter cited as Adams Dairy]

\(^9\) Id. at 1422 (concurring opinion).

\(^10\) Id.

\(^11\) Id.
that it could never decide whether or not to take jurisdiction of a case.\textsuperscript{12} The Board has repeatedly held that merely because it is forced to interpret a contract clause as \textit{incidental} to the resolution of an unfair labor practice, even though this clause is concededly within the scope of arbitration, this alone will not preclude Board jurisdiction.\textsuperscript{13} The question is when it \textit{will} indulge in this process of interpretation. The answer lies somewhere between the one extreme of never touching a matter which could be classified as contractual in form, and the other of always exercising jurisdiction because the case involves, no matter how tangentially, an unfair labor practice. For, as mentioned above, the power to prevent unfair labor practices has been granted the Board under Section 10(a) of the Act, which provides that it can proceed regardless of "any other means of adjustment or prevention that has been established by agreement, law, or otherwise." It must be remembered that the Board represents public interests in the capacity of a public agency. Its power is supreme and it is "not just an umpire to referee a game between an employer and a union."\textsuperscript{14}

An arbitrator, on the other hand, determines "private rights and private duties stemming from a private contract."\textsuperscript{15} He is an employee of the parties and must reach a conclusion satisfactory to both sides, lest (1) industrial strife remain and (2) he find himself unemployed during future disputes. His function is limited. It is generally admitted that he need interpret only the contract itself, and question only whether the terms agreed upon were obeyed. It is not his concern if performance according to the terms would constitute outright unfair labor practices; this is the Board's problem.\textsuperscript{16}

\textsuperscript{12} It is evident that the power to interpret the contractual relationship of the parties must be granted the Board, lest there be no means for deciding whether to defer to arbitration or to process the unfair labor case. Were this not the case, there would be only an arbitrary choice between deferring or not, and the statutory policies of the Act would be thwarted through its own provisions.


\textsuperscript{15} Id. at 213.

\textsuperscript{16} One writer expresses the arbitrator's function this way:

A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement. They are entitled to demand that, at least on balance, his performance be satisfactory to them, and they can readily dispense with him if it is not.

Given that there are alternative — public and private — routes toward settlement, which will control? When will the Board defer to the arbitral process, and why? The Board has the discretion to defer or not; thus, it must be the Board's decision, and it is the Board's duty, to formulate guidelines by which it will be able best to fulfill its responsibilities to the parties and to the public. As stated by General Counsel Ordman, the process is one of extending hospitality to the arbitration process without abdicating statutory responsibilities.

**Accommodation**

The above-mentioned process, an attempt to reconcile any conflict between Board and arbitration proceedings, to accommodate the overlapping procedures, is the key to the problem. In order to avoid circumvention of the arbitral process by the parties, the Board must, of course, steer clear of doing the work of the arbitrators. When we raise questions as to when the Board should deal with unfair labor practices in a given case and when it should relegate the parties to their contractual remedies, we really ask: Should arbitration be a prerequisite to a party's rights under an agreement? In other words, should a party be forced to go to arbitration first, if such avenue is provided in the collective bargaining agreement?

The 1960 opinion in the landmark Steelworkers trilogy laid down guidelines for the respective roles of courts and arbitrators by providing that unless the parties expressly provide otherwise, then determination of arbitrability rests with the courts. This function is a limited one. The courts may determine only whether a party seeking arbitration is making a claim that on its face is governed by the contract. The arbitrators decide the merits of the question. As we shall later see, there is a nice question as to whether the arbitrator's relationship to the courts is the same as his relationship to the Board. Regardless of this, however, the policy remains as stated in the trilogy, and the attempt must be, as Board Member Brown says, to "implement the philosophy which underlies the Supreme Court's decision in Textile Workers Union of America v. Lincoln Mills of Alabama and the Steelworkers trilogy of strengthening collective bargaining by giving full play to the private adjustment machinery established by the parties." Against such a policy is the check imposed by Section 10(a), giving ultimate jurisdiction to the Board over conduct violative of Section 8.

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17 See note 14 supra.
19 Note 7 supra.
20 Adams Dairy at 1421 (concurring opinion).
21 See note 2 supra.
Indeed, until *Smith v. The Evening News* it was not clear that a court could even hear a contract case involving an unfair labor practice.

Given the choice of routes, the problem is complicated by the fact that neither is mutually exclusive. It is even possible for a party to attempt to engage in arbitration while at the same time having filed an unfair labor practice charge with the Board. Of this practice, Member Brown said:

I believe that it is inconsistent with the statutory policy favoring arbitration for the Board to resolve disputes which, while cast as unfair labor practices, essentially involve a dispute with respect to the interpretation or application of the collective bargaining agreement.

The problem, of course, is to make that decision as to whether or not the dispute is indeed one with respect to interpretation and application of the collective bargaining process. Professor Sovern points out that an imaginative litigant may readily exploit the possibilities of fabricating unfair labor practices to defeat or delay contract actions. On the other hand, however, respondents in the unfair labor practice cases may construct "contract actions" in order to defeat the exercise of rights guaranteed by the National Labor Relations Act.

**The Arbitration Clause: A "Waiver"?**

What is the effect of an arbitration clause in a contract? Is it merely an alternative, or should parties be forced to abide by their private, mutually agreed upon machinery? In *United Steelworkers of America v. Warrior and Gulf Navigation Company*, the Supreme Court took a stance heavily in favor of arbitration. Speaking for the Court, Mr. Justice Douglas said:

[Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with Congressional policy in favor of settlement of disputes by the parties through the machinery of arbi-

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22 371 U.S. 195 (1962). It was held here that a court could hear a suit on a contract or compel arbitration or affirm an arbitration award by virtue of Section 301, even though the alleged breach of contract was also arguably an unfair labor practice. The Supreme Court held that the pre-emption doctrine did not go so far as to preclude contract actions on grievances which were arguably unfair labor practices, but neither did it say that the private agreement of the parties pre-empted the Board's jurisdiction over the unfair labor practice.

23 See note 4 supra.


25 Adams Dairy at 1423 (concurring opinion).


27 363 U.S. 574.
tration, the judicial inquiry under §301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate 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.  

This expansive approach by the Court raises the question of whether the mere inclusion of such a clause will constitute a waiver of the parties' rights to go before the Board. Board Member Brown's concurring opinion in *Adams Dairy* states his views on the subject. In this case, the Board had held that it would take jurisdiction of the case, regardless of the presence of an arbitration clause in the contract. Brown concurred insofar as he agreed that a case should not be dismissed merely because the dispute could arguably have been subjected to arbitration. Said Brown:

Such action would be contrary to the principles of *Spielberg*, which although limiting the scope of the Board inquiry, nevertheless establishes the principle that the Board has the duty where a statutory right is involved to examine the fairness of the arbitration proceedings and determine whether the results are repugnant to the Act. Since we cannot predict whether a yet to be held arbitration proceeding will comply with *Spielberg* standards we should withhold our action pending the arbitrator's award. (See *Dubo Manufacturing Company*, 142 NLRB 431.) If, after an award has been rendered there is a request for Board action, our consideration of the case would be controlled by *Spielberg*.  

Brown here expresses the view that the Board should look to the bargaining history, to past practice, and to the express terms of the contract

28 Id. at 582.
29 Adams Dairy at 1423 (concurring opinion).
30 In Smith Cabinet Mfg. Co., 147 N.L.R.B. 1506 (1964), it was held that the employer's unilateral action in establishing a second shift constituted an unlawful refusal to bargain with the union where the employer took such action with full knowledge of the union's objection to his unilateral action and the union had asserted its rights and desire to bargain about such matters.

The Board further rejected employer's contention that the dispute should be resolved through the grievance procedure rather than being adjudicated by the Board because the contract defined a grievance as a "difference between the Company and the union as to the meaning or application of the provisions of the agreement." (Italics added) The dispute before the Board was not one which grew out of misunderstanding over the terms of the contract. Instead, the complaint was directed at, and sought redress for, a denial of a statutory right guaranteed by the Act—the right of a union to bargain about terms and conditions of employment. The Board felt that to dismiss the complaint and defer to arbitration would have amounted to an abdication of its responsibilities under the Act.
to insure performance of the agreement, if possible. If either party's rights have been expressly bargained away, or in some way have been allowed to lapse in past practice, then it would be essential, in Brown's view, for the Board to defer to the arbitrator questions of interpretation and application of the contract.

Brown's theories are not the Board's guidelines. The most recent actions of the Board pay little, if any, attention to this absolutely vital area of past practice and bargaining history. The question of the effect of an arbitration clause upon a contract is, naturally, the core of the many problems of accommodation, and it is this area which is the most undefined and vague. According to Member Brown, the presence of an arbitration clause should not be controlling on the question of whether to go to arbitration. This is not to imply that parties should have a *choice* of whether or not to go to arbitration. Rather, it means that the Board need not be controlled and forestalled by the presence of the clause alone. Conversely, one suspects, the absence of such a clause should not immediately vest the Board with jurisdiction to interpret the contract provisions of an agreement. Such reasoning is not mere symmetry, but instead adheres to the statutorily expressed desire for flexibility in dealing with labor disputes.31

Having examined the functions and jurisdictions of the Board and the arbitrators, and the problem of the arbitration clause and the "waiver", I now turn to the cases themselves in order to examine some of the "solutions" to the problems raised.

### III. The Labor Board and the Collective Bargaining Contract

It is perhaps helpful to reiterate at this point that the relationship involved here is not that of the Labor Board to the arbitrators, but rather of the Board to the *contract* itself. Because the Board has the final and supreme power, the question is how it will treat the arbitration clause, or lack of such, in the contract. The focus must be on the power and concomitant discretion of the Board.

**The Policy of Abstention**

"Analytically and ideally," said Arnold Ordman, "the unfair labor practice function should be a subordinate activity to be utilized only where the free choice of representatives and the free play of collective bargaining have been frustrated by improper conduct of the parties."32 This remark

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31 See article by Bernard Cushman, Special Assistant to the General Counsel of the NLRB, entitled *Arbitration and the Duty to Bargain*, 1967 Wis. L. Rev. 612, wherein the author discusses, among other things, the need for more concern with factors such as bargaining history of the parties in determining the question of Board jurisdiction.

32 Address by Mr. Ordman, National Academy of Arbitrators, March 2, 1967, 64 LAB. REL. REP. 232.
by the NLRB General Counsel restates the theme of Section 1 of the Act that disputes should be settled peacefully with "practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions . . . " Moreover, the legislative history of the Taft-Hartley Act shows Congressional intent to deny the Board jurisdiction over labor contract disputes. In discussing the Act, it was proposed that all breaches of labor agreements be made unfair labor practices, thus, within Board jurisdiction. Congress, however, rejected this proposal. The Joint Committee Report explained that its rejection was based upon its wish to leave the enforcement of labor agreements to "the usual processes of law and not to the National Labor Relations Board." Congress then gave Federal courts jurisdiction under Section 301 to entertain suits arising out of breaches of labor contracts. Finally, Congress passed Section 203(d), which declares that privately agreed-upon methods of settlement should be favored, the attempt being to restrict administrative supervision of bargaining as much as possible. In looking to the limitations on the obligation to bargain, and, consequently, on the Board's role in the enforcement of this obligation, Senator Walsh, Chairman of the Senate Education and Labor Committee said in 1935:

Where the employees have chosen their organization, when they have selected their representative, all the Bill proposes to do is to escort them to the door of their employer and say: 'Here, they are the legal representatives of your employees.' What happens behind those doors is not inquired into.

The Senate Committee Report made a similar statement, reflecting a desire to leave the parties room to arrive at their own bargains. It further stated the Committee's intent that the Board not concern itself with interpreting or enforcing the terms of private agreements:

The Committee wishes to dispel any possible false impression that the Bill is designed to compel the making of agreements or to permit governmental supervision of their terms.

In the legislative history, then, are the roots of a national policy favoring arbitration. But if in theory the unfair labor practice procedure should
be secondary to the arbitral process, in actuality it is doubtful that it is. Case history supports the belief that the Board is exceeding the jurisdictional boundaries imposed upon it by Congress. There is no doubt, however, that the Board has changed its tune from its previous acceptance of a national policy favoring arbitration. Critics of Board policy look back with fondness to cases such as United Telephone Company of the West, wherein the Board clearly exhibited more of a "hands-off" attitude. The agreement involved in that case specified that all wage rates, working schedules and employee privileges would remain unchanged during the life of the agreement. The work hours of certain employees were subsequently diminished, and the union demanded arbitration on the basis of an arbitration clause in the contract. Refusing to submit to arbitration, the company suggested a declaratory suit to determine whether it was precluded by contract from making the reduction. The union rejected this and charged the company with a refusal to bargain based on its refusing to submit to arbitration. The Board declined jurisdiction over the alleged unfair labor practice because any ruling it might have made would have been based strictly on contract interpretation.

In International Harvester Co., the Board refused to exercise its jurisdiction, employing Spielberg-type standards in holding that the award was not "palpably wrong" and contained "no serious procedural infirmities." While stating that Section 10 (a) gave it jurisdiction, the Board held that:

\[\text{... it is equally well established that the Board has considerable}\]

\[38\text{ It must be admitted that there are some questions as to the true meaning and application of legislative history to the individual cases. One critic of the present Board contends that the Supreme Court's declaration in American Manufacturing (note 7 supra) that federal courts should refrain from ruling on the merits of a contract dispute and allow arbitration full play, is "perforce applicable" to the Board as well as the courts. (O'Brien, supra note 5.) It is not. Indeed, in NLRB v. Acme Indus. Co., 385 U.S. 432 (1967), the Court expressly denied the applicability of such standards to the Board because the Board has powers under Sections 8(a)(5) and 8(d) which do not apply to the courts under Section 301: Section 8(a)(5) proscribes failure to bargain collectively in only the most general terms, but Section 8(d) amplifies it by defining "to bargain collectively" as including "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to... any questions arising [under an agreement].} (385 U.S. at 436). Referring finally to the liberal provisions of Section 10(a), the Court concluded that "to view the Steelworkers decisions as automatically requiring the Board in this case to defer to the primary determination of an arbitrator" would be "to overlook important distinctions between those cases and this one." (385 U.S. at 437).

\[39\text{ 112 N.L.R.B. 779 (1955).}\]

\[40\text{ 138 N.L.R.B. 923 (1962). Here, the union demanded the discharge of an employee under a valid union security agreement. When the employer refused to comply with the demand, the parties went to arbitration, and the subsequent award directed reduced seniority rather than layoff.}\]

\[41\text{ Id. at 928-29.}\]
discretion to respect an arbitration award and decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act.42

Stating that the Act is primarily designed to promote industrial peace through collective bargaining, the Board cited the Warrior and Gulf case as experience showing that contracts containing arbitration provisions "'as a substitute for industrial strife' contribute significantly to the attainment of this statutory objective."43 The case itself presents no analytical problems. Those cases wherein an arbitration award has already been rendered are, since Spielberg,44 the easy cases. Important here is the fact that the Board ignores any distinction between the relationship of the Board to the courts and the Board to the arbitrators. Indeed, in deferring to arbitration, the Board effectively aligns itself with the courts. Citing the Supreme Court's admonition to the lower courts in the Steelworkers cases to refrain from passing on the merits of the grievances in determining the question of arbitrability in Section 301 suits, the Board states:

If complete effectuation of the Federal policy is to be achieved, we firmly believe that the Board, which is entrusted with the administration of one of the many facets of national labor policy, should give hospitable acceptance to the arbitral process as 'part and parcel of the collective bargaining process itself,' [citing Warrior and Gulf at 578] and voluntarily withhold its undoubted authority to adjudicate alleged unfair labor practice charges involving the same subject matter, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural infirmities or that the award was clearly repugnant to the purpose and policies of the Act. . . .45

In Century Papers, Inc.,46 the Board took the opposite tack, refusing to give "hospitable acceptance" to the arbitration process. Instead, it exercised its jurisdiction over the case. Here, there was a grievance procedure which included an arbitration clause, but after having initiated a grievance regarding a unilateral wage increase by the employer, the union abandoned the grievance procedure and filed an unfair labor practice charge rather than appealing to arbitration. Replying to the employer's contention that the dispute involved a breach of contract which should go to arbitration, the Board pointed out that the contract provisions were "plain and unambiguous" and not reasonably susceptible to the company's interpretation that it was free to unilaterally change the wage rates.

42 Id. at 925-26.
43 Id. at 926.
46 155 N.L.R.B. 358 (1965).
The Board, therefore, decided that the dispute was not “within the exclusive province of an arbitrator.”\footnote{Id. at 361.} How does one reconcile such a decision with the Board’s policy of refraining from policing contracts, as stated in United Telephone?\footnote{See p. 98 supra.} Given an unambiguous contract provision and an arbitration clause, there is no reason why an arbitrator could not have fashioned a remedy. Yet, the Board seems to say in Century Papers that because the provision is unambiguous, the breach of such must have been in bad faith, and thus Board jurisdiction is warranted. In order to resolve the seeming conflict, it is necessary to look to the nature of the Board’s role in each case.

Before granting relief in United Telephone, the Board would have had first to determine the meaning of an individual clause in the labor contract, and then to decide whether the refusal to go to arbitration was consequently a refusal to bargain. In Century Papers, though, there was no necessity for the Board to make a binding construction of the agreement. The Board stated that the terms were unambiguous. It may be noted that even this judgement implies some “interpretation”, but it is evident that the Board must be granted some threshold powers of interpretation lest it be unable to function at all.\footnote{See pp. 91-92 supra.} The key question remains: How far will the Board go in exercising these interpretive powers when faced with specific contractual clauses? There can be no stock formula; each case presents a different perspective, and factors such as the express terms of the contract, the availability of help under arbitration, and the probability of a successful cure under one method or the other will influence the decision.

**Forming Guidelines — Adams Dairy**

In deciding the Adams Dairy\footnote{147 N.L.R.B. 1410 (1964).} case in 1964, the Board formulated guidelines, both in the opinion of the majority and in the concurring opinion of Member Brown, which provide an effective background against which more recent cases may be held up for examination. Adams Dairy involved a substantial change in working conditions unilaterally instituted by the employer. Specifically, the employer subcontracted a significant portion of work which, while not resulting in the dismissal of employees, did create a matter of “legitimate concern to the exclusive bargaining representative of the employees.”\footnote{Id. at 1412.} The contract provided for arbitration in the event of a dispute concerning the application or interpretation of the terms of the agreement. The Board held, however, that such a clause did not constitute a waiver of statutory rights by the union, for such
waiver was not clearly expressed in the contract, and was not "lightly to be inferred." 52  Said the Board:

The evidence upon which the Respondent relies falls short of that requisite standard of proof and is insufficient in our opinion to establish union acquiescence in Respondent's assertion of a contractual right to undertake the disputed unilateral action. 53

In bargaining with the employer, the union had attempted unsuccessfully to include in the contract (1) a right to veto any decision to change working conditions and (2) a statement of its statutory right to bargain over the institution of such changes. The Board held that the union's lack of success did not constitute a waiver of its rights, and that the employer was therefore not justified in instituting the changes.

In assuming jurisdiction over the case, the Board characterized the dispute as one concerning "statutory obligations." The arbitration clause, it pointed out, related only to a dispute over the terms of the agreement. 54 Since this complaint did not relate to the meaning of any established term or condition of the contract, it was matter for the Board. The right to be notified and consulted in advance, and to be given an opportunity to bargain about changes not covered by contract, said the Board, was a right guaranteed by Section 8(d) of the Act.

The Board based its jurisdiction on the fact that the dispute was "basically" a statutory problem rather than a contractual one. Having made this determination the Board expressed the view that the presence of a question of contract interpretation could not deprive it of jurisdiction:

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 the 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 ... arbitration procedures. Nevertheless, we do not consider that reason enough for us to refuse to entertain the instant unfair labor practice proceeding, or to provide the necessary redress for the violation found. It is quite clear that the Board is not precluded from resolving an unfair labor practice issue, which may call for appropriate relief under the Act, simply because as an incident to such violation, it may be necessary to construe the scope of a contract which an arbitrator is also empowered to construe. [Citing statutory authority of Section 10(a)] 55

52 Id.
53 Id.
54 See Hyde's Super Market, note 60 infra.
55 Adams Dairy at 1415.
These are strong words. Taken alone, the Board’s statement places no restrictions on contract interpretation when an unfair labor practice is involved. This statement seems to indicate that the Board views as unlimited the power granted to it by Section 10 (a).

Yet, each case must stand alone, and there are other factors in *Adams Dairy* which must be considered as having influenced the Board’s position. First, there was no arbitration award, nor had the parties attempted to seek any. Secondly, this was not a case, said the Board, where the existence of an alleged unfair labor practice turned primarily on an interpretation of specific contractual provisions, “unquestionably encompassed by the contract’s arbitration provisions”, and which came before the Board in a context that made it “reasonably probable that arbitration settlement of the contract dispute would also put at rest the unfair labor practice controversy in a manner sufficient to effectuate the policies of the Act.”56

The decision to assert jurisdiction was also based on a pragmatic consideration. “It is highly conjectural,” said the Board, “that arbitration in this case, even if resorted to by the union, could have effectively disposed of the basic issue in this case—whether Respondent acted lawfully in engaging in the unilateral actions to which the instant complaint is addressed.”57 The Board referred to a history of futile arbitration between the parties and assumed on that basis that, the issues being the same, it would again be futile.

In asserting jurisdiction, however, the Board reaffirmed its desire to abstain from policing of collective agreements. It cited guidelines for deciding whether to defer to arbitration, thus attempting to avoid any possibility of “policing.” In summary, the majority indicated that it would refuse to assert jurisdiction when:

1. The case turns primarily on the interpretation of a specific contract provision.
2. The disputed issue is unquestionably encompassed by the contract’s arbitration provision.
3. It is reasonably probable that an arbitration decision would also put to rest the unfair labor practice controversy in a manner sufficient to effectuate the policies of the Act.

Board Member Brown did not agree entirely with the majority opinion. He concurred in the result only insofar as there was *no bargaining history* to show that the parties specifically wished to go to arbitration over this type of dispute. Fearful, however, that by handling too many cases involving arbitration clauses the Board would destroy the effectiveness of such provisions, Brown referred to the policy expressed in *Lincoln Mills* 56

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56 *Id.* at 1416 n.16. The Board stated that were those to be the circumstances, “clearly not present here,” deferral of Board action might most appropriately be considered. *Cf.* Crown Zellerbach Corp., 95 N.L.R.B. 753 (1951); Consolidated Aircraft Corp., 47 N.L.R.B. 694 (1943).

57 *Adams Dairy* at 1416.
and in the *Steelworkers* trilogy and warned against the possible undermining of the arbitral process. In his view, the private agreement has a high priority, and only where the parties have *not* by "practice, bargaining history, or contract resolved their respective rights and obligations with respect to the subject matter of the dispute" should the Board handle the case. Brown warned that while the mere presence of an arbitration clause should not be equated to an automatic waiver of statutory rights, it is the Board's duty to promote a high degree of responsibility among the parties to a contract by having them settle according to the methods incorporated into the agreement.

*After Adams*

Litigation since *Adams Dairy* has not been elucidating. In *Crescent Bed Co.* the Board held that it, as well as a Federal court, could order enforcement of an existing contract which an employer refused to honor, where an enforcement order is an *appropriate remedy* for such an unlawful refusal to bargain. The Board, however, held that it was not within its jurisdiction to construe specific provisions of the contract, and that if this were necessary it should be accomplished through the grievance-arbitration clause in the contract. This holding comported with its earlier decision in *Hyde's Super Market.*

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58 Id. at 1423.
59 157 N.L.R.B. 296 (1966). In this case, the charging union had brought suit against the respondent under Section 301 in a federal district court as well as filing an unfair labor practice charge before the Board. In this manner, it hoped to obtain a statutory remedy before the Board in the form of a bargaining order, and a contractual remedy from the court. Respondent argued that the basic issue was whether there was a binding contract in effect, and that this was a matter for the court to decide. The Board held that the true question was whether certain conduct by the union justified the respondent in repudiating the contract or in considering it mutually rescinded. The Board further held that this was a question which they were as competent as a court to decide, since it underlies and is directly relevant to the statutory violation of 8(a)(5) which was violated through respondent's refusal to honor the contract after a certain date.

60 Id. at 298-99. In *Hyde's Super Market*, 145 N.L.R.B. 1252 (1964), the NLRB modified a trial examiner's order which provided that the employer should "comply with the provisions" of the contract, by stating instead that he should "honor" the agreement. The Board said:

Where an employer refuses to sign a contract which has been previously agreed upon, the Board has traditionally ordered his signature upon request. Here, the contract was signed by respondent. The unfair labor practice here consisted of respondent's later repudiation of, and refusal to honor, the contract and recognize the union. Were we to adopt respondent's further contention and reject the trial examiner's recommendation that respondent "honor" the agreement, we would be failing adequately to remedy the unfair labor practice. Accordingly, while not attempting to indicate the proper interpretation of the individual terms of the contract, we believe that the respondent's duty to recognize the union and to honor the agreement is properly the subject of the Board's remedial order. 145 N.L.R.B. 1252, 1253 (1964).
Referring to the respective roles of the Board and the arbitrators, the Board said, "it is not for the Board to construe the full meaning or effect of the contractual provisions by which Respondent was permitted to make unilateral changes in incentive rates, and which has given rise to this proceeding." Instead, the Board said that the parties are free to pursue their respective contentions as to the proper interpretation of the provision under their privately established machinery. In terms of the Acme Industrial rationale, this was simply a threshold determination that a contract did exist. In light of the Adams Dairy standards, there was no reason to decline jurisdiction, for the case before the Board did not involve solely the question of specific contract clause interpretation.

In C & S Industries, the contract contained a provision stating that "there shall be no change in the method of payment of any employee covered by this agreement without prior negotiation and written consent of the union." The Board gave several reasons for taking jurisdiction of the case, the first of which was that employed earlier in Century Papers. The Board held that the pertinent language of the contract was clear and unambiguous and that it, therefore, did not fall within the "special competence of an arbitrator to determine" whether the contract prohibited the employer's unilateral installation of a wage plan. Next, citing Adams Dairy, the Board held that it was not reasonably probable that an arbitrator could fashion an award sufficient to "put the statutory infringement finally at rest in a manner sufficient to effectuate the policies of the Act." Citing Section 10(a) of the Act, the Board said that it was "not precluded from resolving an unfair labor practice issue calling for appropriate relief under the Act, simply because as an incident thereto it may be necessary to construe the scope of a contract" which an arbitrator could also have construed.

The opinion applies the guidelines established in Adams Dairy and appears to construct a strong basis upon which to justify Board jurisdiction. Yet, one cannot help but question the meaning of putting the infringement to rest in a manner "sufficient to effectuate the policies of the Act." The Board order was to rescind the unilaterally-instituted incentive plan and to cease and desist from instituting changes in the wage-hour rates. This could have been accomplished by an arbitrator. In factually similar cases, arbitrators have imposed remedies requiring disestablishment of unilaterally-instituted wage plans which were inconsistent

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62 See p. 106 infra.
64 Id.
65 See note 46 supra.
66 C & S, supra note 63 at 460.
67 Id. at 459.
with contract wage provisions and have gone so far as to award back pay to employees whose earnings were cut by the use of the modified plans.68 One must assume from the opinion that the Board decided against deferral, recognizing that while the arbitrator can fashion the same remedy as the Board, he need not do so. The decision implies that Member Brown's theories as expressed in Adams Dairy will remain secondary considerations as far as the Board is concerned, for C & S Industries is a case wherein Brown would have the dispute go to arbitration. Admitting that the issue was not "essentially" a contract dispute, and that the resolution of the unfair labor practice does not turn specifically on a contract provision, still this was a case that could have been handled under arbitration, that indeed could have been put at rest in a manner sufficient to effectuate the policies of the Act. If the Board in C & S Industries has said that the arbitrator, in order to handle the case, must fashion a remedy not only equal, but superior, to the Board's, then it is adding another dimension to the jurisdictional problem, and the policy first expressed in Lincoln Mills, dictating that Board jurisdiction should be exercised sparingly, is being forsaken.

IV. Today's "Answers"

The cases discussed above make it clear that the Board conceives its jurisdiction as extending into the area of contract interpretation and into the enforcement of rights not specifically guaranteed by statute. The cases exhibit a variety of guidelines and approaches so far as Labor Board jurisdiction is concerned, from the "hands-off" attitude of United Telephone to the strict control evidenced by the Board in C & S Industries.

Neither the law nor the policy considerations behind the Board's jurisdictional decisions is clear, interwoven as they are with a plethora of variables. However, in 1967 three cases were handed down—two from the Supreme Court and one from the Eighth Circuit Court of Appeals—which may provide a checklist of clues for determining Board action in the future. Acme Industrial69 and C & C Plywood,70 handed down the same day by the Supreme Court, and Huttig Sash & Door71 represent the latest efforts to deal with the jurisdictional conflict. These three cases lean heavily on one another, and the approach taken in each serves to highlight the jurisdictional problem as well as present possible solutions to it. It is to these cases that I now turn my attention.

71 NLRB v. Huttig Sash & Door Co., 377 F.2d 964 (8th Cir. 1967).
Prospectus

Acme Industrial

Acme Industrial\(^2\) follows the philosophy of Carey v. Westinghouse,\(^3\) wherein it was stated that the availability of arbitration for resolving an issue does not displace the Board's power to adjudicate the same issue but is only a factor in considering the question of deferral. In Acme, the Board issued an order to the employer to furnish the union with information needed for determining if the collective bargaining agreement had been violated. The Court of Appeals for the Seventh Circuit refused to enforce the order, ruling that the existence of a binding arbitration clause foreclosed the Board from exercising its statutory jurisdiction. The court cited the Steelworker trilogy as articulating a national labor policy favoring arbitration, thus requiring the Board's deferral to arbitration when construction and application of the labor agreement itself are in issue.\(^4\)

The Supreme Court reversed. The court denied the applicability of the Steelworkers trilogy to a situation involving the Board's, rather than the courts', relationship to the arbitrator,\(^5\) and in so doing, recognized the very distinction ignored by the Board in International Harvester Co. Admitting for the moment, however, that the policy of the Steelworkers cases was thought to apply to the Board as it does to the courts, "that policy," said the Supreme Court, "would not require the Board to abstain here."\(^6\)

For when it ordered the employer to furnish the requested information to the union, the Board was not making a binding construction of the labor contract.\(^7\)

According to the Court, the Board was here acting upon a simple discovery-type standard, and was deciding nothing about the merits of the case. The Court characterized the Board's action as a "threshold determination"\(^8\) of the potential relevance of the information. This, it said, would in no way threaten the power which the parties had given the arbitrator to make binding interpretations of the labor agreement, for even should it appear that the subcontracting had occurred, the arbitrator could still rule that there had been no breach of contract because no workers had been laid off.

The structure of this case is important. The case turned primarily on the interpretation of a specific contract provision, regardless of the Supreme Court's characterization of it as a "threshold determination".

\(^2\) 385 U.S. 432 (1967).
\(^3\) 375 U.S. 261 (1964).
\(^4\) 385 U.S. at 435. See also p. 3 supra.
\(^5\) Id. at 436.
\(^6\) Id. at 437.
\(^7\) Id.
\(^8\) Id. at 438.
Furthermore, the disputed issue was encompassed by the contract's arbitration provision, and there is no doubt that an arbitrator as well as the Board could have settled the case by issuing an order to supply the information.

The Court justified the Board's exercise of jurisdictional powers by claiming that it aided the arbitral process:

Far from intruding upon the preserve of the arbitrator, the Board's action was in the aid of the arbitral process. Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originally initiated as grievances had to be processed through to arbitration, the system would be woefully overburdened.79

In view of the fact that the General Counsel of the NLRB has characterized the unfair labor practice procedures as secondary to the arbitration process,80 such a view is patently inconsistent. Furthermore, the Court speaks of unburdening the arbitral process. Since the Board is itself overwhelmed with cases,81 it is curious that the Board should be extending its services to remedial processes which, according to legislative and case history properly belong to the arbitrator.

C & C Plywood

C & C Plywood differs from Acme Industrial, its companion case, in that the Board's determination in C & C Plywood, that the employer had no contractual right to institute a premium pay plan, was a determination on the merits.

In C & C Plywood the Respondent was charged with having violated Section 8(a)(5) and (1) by unilaterally instituting a premium pay plan during the term of a collective agreement, without prior consultation with the union representative. The resultant order was to cease and desist, directing Respondent to bargain with the union and to rescind the previously instituted premium plan. The Court of Appeals for the Ninth Circuit refused enforcement of the order, however, on the grounds that the pro-

79 Id.
80 See pp. 96-97 supra.
81 One of the most pressing and challenging problems facing the National Labor Relations Board in recent years, and particularly since 1958, has been the greatly increasing pressure of a burgeoning case load which has set new records each year since 1961. Thus, in fiscal year 1966, combined representation and unfair labor cases reached an all-time high of 28,993 cases—3.5 percent higher than FY 1965 and a 73 percent increase over FY 1958. Address by Mr. Arnold Ordman, Feb. 27, 1967, 64 LAB. REL. REP. 181.
vision in the contract "arguably" allowed such action by the employer.\textsuperscript{82} Thus, said the Court of Appeals, the Board was divested of jurisdiction to entertain the unfair labor practice charge. In refusing to enforce the Board’s order, however, the Court of Appeals did not hold that the provisions of the agreement had been \textit{misinterpreted} by the Board. Rather, it held the Board had exceeded its jurisdiction in finding that Respondent had violated Section 8(a)(5) of the Act because:

\ldots the existence \ldots of an unfair labor practice does not turn entirely upon the provisions of the Act, but arguably upon a good-faith dispute as to the correct meaning of the provisions of the collective bargaining agreement \ldots \textsuperscript{83}

The decision is consistent with the policy established in \textit{Lincoln Mills} and the guidelines set down in \textit{Adams Dairy}. Given a case which turns entirely upon the provisions of a contract clause, the Board should withhold the exercise of its jurisdiction.

The Supreme Court reversed, nine to nothing. It held that in necessarily construing a labor agreement to decide the unfair labor practice case, the Board had not exceeded its jurisdiction as laid down by Congress. The difficulty lies in the relationship of the unfair labor practice to the contract clause. Were the unfair labor practice present irrespective of the contract clause, there would be no jurisdictional problem.\textsuperscript{84} The unfair labor practice, however, was \textit{dependent} for its existence upon the interpretation of the agreement. Thus, the entire case revolves around the Board’s initial examination and interpretation of the clause in question.

Respondent argued that since there was a clause in the contract which \textit{might} have allowed him to go to arbitration, the Board was powerless to determine whether in fact that provision \textit{did} authorize the unilateral action. The question, argued Respondent, was one for a state or Federal court under Section 301.

The Supreme Court responded by indicating that the absence of an arbitration clause meant that the end result of the grievance procedures,

\textsuperscript{82}The provision, Article XVII, read as follows:

A. A classified wage scale has been agreed upon by the Employer and the Union, and has been signed by the parties and thereby made a part of the written agreement.

The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude or the like. The payment of such premium rate shall not be considered a permanent increase in the rate of that position and may, at the sole option of the Employer, be reduced to the contractual rate . . . .

\textsuperscript{83}NLRB \textit{v.} C & C Plywood Corp., 351 F.2d 224, 228 (9th Cir. 1965).

\textsuperscript{84}The fact that a contract remedy exists in the courts (or that arbitration may be available) is, as shown earlier, not in itself sufficient to deny the Board its jurisdictional powers.
"if differences between the parties remained unresolved, was economic warfare, not the 'therapy of arbitration.'"85 Hence, the Board's action was not inconsistent with its previous recognition of arbitration as "an instrument of national labor policy for composing contractual differences."86

Respondent further argued that the legislative history of the 1947 amendments to the Act supported its contention that the Board should refuse to exercise its jurisdiction. The Court, however, disagreed: "It is said that the rejection by Congress of a bill which would have given the Board unfair labor practice jurisdiction over all breaches of collective bargaining agreements shows that the Board is without power to decide any case involving the interpretation of a labor contract. We do not draw that inference from this legislative history."87 Admitting that the Board should not have general jurisdiction over all alleged contract violations arising out of ambiguous provisions of the collective bargaining agreement,88 the Court maintained that in this case, the Board did not construe a labor agreement to determine the extent of the contractual rights given the union. The Court said of the Board's action:

It has not imposed its own view of what the terms and conditions of the labor agreement should be. It has done no more than merely enforce a statutory right which Congress considered necessary to allow labor and management to get on with the process of reaching fair terms and conditions of employment—'to provide a means by which agreement may be reached.' The Board's interpretation went only so far as was necessary to determine that the union did not agree to give up these statutory safeguards.89

Thus, the Supreme Court employed in C & C Plywood the "threshold determination" argument which it used in Acme Industrial and held that this was a warranted exercise of Board authority.

Finally, the Supreme Court argued that the Board's assertion of jurisdiction was justified by expediency, citing some of the problems involved in the alternative of not going before the Board. The Court mentioned the inordinate delays that labor organizations would face were they not able to go before the Board in cases like this, where there was no arbitration procedure provided for in the agreement.90

Policy dictates that the Board should not be in the business of enforcing

85 C & C Plywood, 385 U.S. at 426.
86 See International Harvester Co. supra, p. 98.
87 C & C Plywood at 427.
88 Id.
89 Id. at 428.
90 "The union would have to institute a court action to determine the applicability of the premium pay provision of the collective bargaining agreement. If it
labor contracts. Yet, according to the Court, the Board has a green light to do so whenever there are "obstacles" the existence of which Congress could not have intended. One must then ask: Given a situation involving an alleged unfair labor practice and a disputed contract provision—is there any case which will be material solely for the courts, and not for the Board? According to the Supreme Court's opinion in *C & C Plywood*, there is not, and the opinion therefore appears to fly in the face of strong national policy favoring private resolution of contractual difficulties.

But *C & C Plywood* is a special case. In order to give the case a fair reading, it is necessary to examine those circumstances that set this case apart from others.

**The Lack of an Arbitration Clause in C & C**

How meaningful is the lack of an arbitration clause here? The Court initiated its discussion of the case by pointing out the absence of such a clause, and by its reference91 to the lower court's citation of *Square D Co. v. NLRB*,92 hinted strongly that had there been an arbitration clause, the decision might have been different. In *Square D* the Court of Appeals for the Ninth Circuit held that the Board had no jurisdiction over cases involving alleged unilateral changes of wages, hours or terms or conditions of employment where "... the existence of an unfair labor practice . . . is dependent upon the resolution of a preliminary dispute involving only a question of interpretation of the contract."93 The problem here is that it is impossible to predict the outcome of a *Square D* case before the Supreme Court, particularly in light of *Acme Industrial*. The contract in *Acme* provided for compulsory arbitration, but the Court rejected the concept that in the presence of such a clause, an arbitrator's determination would be prerequisite to the union's rights under Section 8(a)(5).

Earlier in this discussion, the possible waiver effects of an arbitration clause were examined. In *C & C Plywood*, there was no arbitration clause, and in *Square D* there was. In the former case, the parties did not have to go to arbitration, and in the latter they did. But, as *Acme Industrial* readily shows, this is not conclusive evidence that the arbitration clause is the key factor. The decision concerning jurisdiction in each case turns on several factors, the most important of which are included in this chart;

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succeeded in court, the union would have to go back to the Labor Board to begin an unfair labor practice proceeding. It is not unlikely that this would add years to the already lengthy period required to gain relief from the Board. Congress cannot have intended to place such obstacles in the way of the Board's effective enforcement of statutory duties. For in the labor field, as in few others, time is crucially important in obtaining relief." *C & C Plywood* at 429-30.

91 *C & C Plywood* at 426.
92 332 F.2d 360 (9th Cir. 1964).
93 *Id.* at 365-66.
The conclusions which may be drawn from the chart are as follows: In *C & C Plywood* there was no arbitration clause, while there was one in *Square D*. The chance of expressing a waiver of statutory rights was present, therefore, in *Square D*, but not in *C & C Plywood*. In both cases, it was necessary to interpret a clause in the contract in order to find if an unfair labor practice existed. The reasoning behind approving Board jurisdiction in *C & C Plywood* but not in *Square D* could then be seen as an emanation of the following accepted labor policy: In the case where interpretation of a contract clause is necessary, it should be handled by an arbitrator if possible. In *Square D*, there was this possibility, but in *C & C Plywood*, there was not. Indeed, as the Supreme Court pointed out, the alternative to the Board's asserting its jurisdiction was "economic warfare", not the "therapy of arbitration."

Whereas a contract with an arbitration clause provides for a third party decision, one lacking such clause is essentially unchanneled, and in this situation, the concept of Board intervention can be more easily reconciled.

In *Acme Industrial*, there was an arbitration clause and thus the possibility of waiver, but here there was no need for any preliminary interpretation of the contract to find the unfair labor practice. The Supreme Court said:

There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties. . . . The only real issue in this case, therefore, is whether the Board must await an arbitrator's determination of the relevancy of the requested information before it can enforce the union's statutory rights under Section 8(a)(5).

(Emphasis added.)

Attractive as this reasoning may be for the moment, we shall see in *Huttig* that we cannot depend on it, and it is thus necessary to look to other factors in *C & C Plywood* responsible for the decision.

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94 C & C Plywood at 426.
95 Id. at 435-36.
96 See p. 113 infra.
The Nature of the Breach

As mentioned before, C & C Plywood is a special case, and factual changes could easily have affected its outcome. For instance, had the breach itself been of a different nature, the decision might have been different. The breach here was the institution by the employer of a change in the pay plan. The Court of Appeals took the view expressed in Jacobs Manufacturing Co.97 that if the parties have bargained about any matter and discussed or incorporated it into the agreement, then during the contract term, there is no further obligation to bargain. The duty to bargain is thus exhausted and the complainants are left only with their contract rights, which are matters for the courts, not the Board. However, the Board views a unilateral change in working conditions as an unfair labor practice regardless of the terms of a contract. In other words, the nature of the 8(a)(5) violation is particularly heinous in the Board's view, and such action could conceivably lead the Board to disregard the possibility of other modes of settlement, whereas a different type of Section 8 violation might not. Furthermore, the type of change instituted was wide-sweeping in effect, and as opposed to affecting just one employee or two, could have had significant effects on the entire working force.

The Nature of the "Injury"

With the possible exception of damage done to the bargaining agent's pride and status, there was no real injury in C & C Plywood. Indeed, the employees benefitted financially. What the union was fighting for was its power and prestige as a bargaining agent; but while the Board would have no difficulty in issuing an order to honor the contract, as it did in Hyde's Super Market,98 a court might have had difficulty fashioning a remedy in the absence of damages arising from the breach of contract. Thus, had the employer's action inflicted real injury on the employees, as in the case of a diminution of wages, a court would have had no trouble awarding damages as a remedy, and the Board, therefore, might have been less likely to assert jurisdiction.

The importance of these peculiar facts is uncertain. No one can predict with any degree of certainty the outcome of the same case with minor factual variations, particularly since the Courts of Appeals and the Board have split on such fundamental issues as the value of arbitration or the obligation to bargain further over contract material. In giving the Board jurisdiction on the unfair labor practice cases, C & C Plywood discounted the interpretive problem and Acme ignored the arbitration clause. In light of these cases, the best guess is that somehow a mixture of the two elements might provide the key to the Board's decisions. But Huttig

97 94 N.L.R.B. 1214 (1951).
98 See note 60 supra.
Sash & Door Co.\(^9\) removes these last vestiges of hope. After \textit{Huttig} it is evident that neither an arbitration clause nor a contract interpretation nor a mixture of both factors will control the Board's reasoning.

\textbf{\textit{Huttig}}

In \textit{Huttig} the Board found that employer had violated Section 8(a)(5) and (1) of the Act by unilaterally modifying the contract in mid-term in spite of the union's objection and without following the prescribed procedure specified in Section 8(d) and the agreement itself. It found that the company's contention that the wage reduction was permitted by contract "must fall in view of the plain and unambiguous provisions of the contract."\(^{10}\) Furthermore, it held that the complaint should not be dismissed simply because Huttig's conduct could have been challenged under the contract's grievance and arbitration procedure. In so holding, it relied on the Supreme Court's decisions in \textit{Acme Industrial} and \textit{C & C Plywood}.

The Board decided, and the Court affirmed, that the employer had not fulfilled his obligation to bargain, having unilaterally reduced certain wages. The remaining issues in that case, factually similar to \textit{C & C Plywood}, were these:

1. Does the Board have jurisdiction to determine whether the employer was guilty of an unfair labor practice when, in so doing, the Board is required to evaluate the employer's interpretation of the collective bargaining agreement?
2. Does the Board have unfair labor practice jurisdiction when the contract provides for grievance procedures and arbitration?

\textbf{The Issue of Board Jurisdiction in the Presence of Contract Evaluation}

The \textit{Huttig} court recognized the logical inconsistency of emphasizing in \textit{C & C Plywood} the absence of an arbitration clause as a reason for assuming jurisdiction, while specifying in \textit{Acme} the wish to "unburden" the arbitral process in the presence of that clause. Yet the court regarded this inconsistency as:

\begin{quote}
... rendered meaningless ... in what we regard as the other over-riding and vital features of the two decisions, namely, that, of itself, \textit{neither the presence of a problem of contract interpretation nor the presence of an arbitration provision in the contract deprives the Board of jurisdiction}. (Emphasis added.)\(^{10}\)
\end{quote}

\(^9\) 377 F.2d 964 (8th Cir. 1967).
\(^{10}\) \textit{Id.} at 966.
\(^{10}\) \textit{Id.} at 969.
The policy behind such Board actions, according to the court, was that of expediting the entire labor dispute settlement process. Avoiding delay either in the courts or in the arbitration process, emphasizing and protecting statutory rights—all these should take priority in the face of a contract interpretation problem in "what is regarded as basically an unfair labor practice dispute" or a "primary Board function under the Act".102

The response to such arguments is obvious. Who is to decide what is "basically" an unfair labor practice case and what is "primarily" a Board function? There is no question but that the Board makes this decision, and one is thus no closer to the answer than before. In eradicating any possible effect of an interpretative problem on the question of Board jurisdiction, Huttig takes one more step in creating a wide-open field before the already crowded docket for the Labor Board.

The Issue of Board Jurisdiction in the Presence of a Contract Provision for Grievance Procedure and Arbitration

Having decided that a contract interpretation problem would not stand in the way of Board jurisdiction in this case, there was no problem for the court to decide that an arbitration clause should not make any difference. Citing Smith v. Evening News Assn.103 and Carey104 the Court said: "There is no necessary or automatic mutual exclusiveness as between the contract remedy and the unfair labor practice remedy."105 Although it noted the lack of an arbitration clause in C & C Plywood and the possibility of economic warfare were the parties left to their own devices, the Huttig court discounted this factor as an overriding element in the decision. "We feel," said the court, "... that this is only one factor in the Court's decision and that it is not the pivotal factor."

Any concern one might have about the controlling significance of the absence or presence of the arbitration provision, and thus of the particular precedential authority of C & C Plywood here, is set at rest or is at least alleviated, we think by the companion decision in Acme. (Emphasis added.)106

The "Spectrum Approach"

Huttig provides a package full of policy considerations which underlie the problem of Board jurisdiction. In one paragraph107 the court outlines the following rationales for Board jurisdiction:

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102Id. at 970.
103 See note 22 supra.
104 See note 4 supra.
105 Huttig, supra note 71 at 970.
106 Id. at 969.
107 Id. at 970.
1. The need for avoiding inordinate delay in the recognition and implementation of a labor organization's rights.

2. The same recognition that there may be more than one way to settle a dispute.

3. The emphasis upon preserving rights statutorily expressed.

4. The obvious effectiveness of the Board remedy and the possible need to obtain it anyway.

5. The emphasis, as expressed in *Acme*, on the Board's pre- eminent jurisdiction under Section 10(a) of the Act.

6. The desirability of not rendering unavailable the Board's expertise in its traditional area.

All these considerations, said the Court, bear on the problem of jurisdiction and "prompt us to conclude that the presence of a contract provision for both grievance procedure and arbitration does not eliminate Board jurisdiction of an unfair labor practice charge in the present context."\(^\text{108}\)

There can be little doubt, then, that the Board will be able to take jurisdiction of any unfair labor practice case. By virtue of *Acme*, *C & C Plywood*, and finally *Huttig*, a contract interpretation problem is no longer a roadblock to Board jurisdiction. Furthermore, there can no longer be any doubt as to the effect (or lack of such) of an arbitration clause in an agreement. These three cases present the Board with a wide range of factors to take into consideration regarding jurisdiction. These elements, like those listed above in *Huttig*, create a total picture that the Board will view before deciding whether to exercise its jurisdiction. The final question is whether this "spectrum approach" should be the Board's method of operation, and, if not, then what?

**V. Conclusion: Practicality v. Logic**

Recalling Member Brown's warning in *Adams Dairy*\(^\text{109}\) the Board must be cautious in the future lest the power of the arbitration clause and indeed the strength of the private agreement be sapped by present far-reaching boundaries of Board jurisdiction.

*C & C Plywood*, *Acme* and *Huttig* are all founded on strong legal logic. They leave in their wake, however, precedent potentially destructive to the very goals toward which they aspire. Instead of providing for industrial peace through private settlement, these cases present potential disputants with the means, now more than ever, of circumventing national policy favoring arbitration. If the Board is to refrain from the policing of private agreements, then modifications in its policy will have to be made. More consideration will have to be given not to whether the Board can take jurisdiction in the individual case, for little doubt remains as to that

\(^{108}\text{Id.}\)

\(^{109}\text{See text accompanying note 58 supra.}\)
point, but rather whether it should. The question for the Board should be whether or not the overall goal of industrial stability will be better served by deferring to the arbitral process. I shall attempt in this section not to propose a new set of standards for the Board, but rather a hierarchy of some of the value considerations used in defining Board jurisdiction in the individual cases.

The Nature of the Breach

Under the principles enunciated in Admas Dairy, Smith Cabinet, Huttig, Century Papers and C & S Industries, it is apparent that the Board will not defer if it concludes either that (1) contract issue is insubstantial or (2) the case involves a matter central to the system of collective bargaining established by the Act and requiring the application of principles developed under the Act and not merely traditional principles of contract interpretation. On the other hand, the Board has indicated it will defer in circumstances where challenged conduct is not particularly dangerous to the collective bargaining process and where the arbitration process will clear up the contract dispute and the unfair labor practice charge.110

The primary concern in the question of jurisdiction, then, is the nature of the breach. In other words, how serious is the alleged improper conduct? If the conduct is of a nature subversive to the basic principles of collective bargaining, then the Board has indicated it will take jurisdiction, regardless of privately agreed-upon remedies.111 The key to this question is: What is subversive to the principles of collective bargaining? The Board views any delay or cost in exercising remedial measures as subversive, thus justifying its assumption of jurisdiction in the face of an arbitration clause. But this remedial course ignores any concept of prevention, and does so at the expense of the private agreement. We have seen that there are unfair labor practices so flagrant and potentially dangerous, (particularly in regard to 8(a)(5) violations) that any re-

110 Address by Mr. Ordman, note 81 supra.
111 Likewise, if but for Board jurisdiction, there would be no ready solution to the breach, the Board should take the case. This is where C & C Plywood fits in. There, the union's alternative would be to have gone to court. Speaking for the Supreme Court, Justice Stewart pointed out the difficulty in establishing a basis for recovery. He said:

The precise nature of the union's case in court is not readily apparent. If damages for breach of contract were sought, the union would have difficulty in establishing the amount of injury caused by respondent's actions. For the real injury in this case is to the union's status as bargaining representative, and it would be difficult to translate such damage into dollars and cents. C & C Plywood at 429 n. 15.

On the other hand, Justice Stewart noted that an injunction might be barred by Section 7 of the Norris-LaGuardia Act (Anti-Injunction Act) 29 U.S.C. §§ 101-115.
medial action should not be forestalled by the contract; but the justification for action in these cases should not be extended to cover all situations.

The Agreement of the Parties

After having disposed of those cases that must, by nature of the breach involved, go to the Board, one must look to the nature of the contract. While we may grant that parties should not be penalized because of some lapse in their thinking in drawing up the contracts, the line between paternalism and policing is far too thin to let the Board be a corrective agency for mis-made agreements. There is no doubt, for instance, that the policies espoused in *Huttig* are valid and admirable ones. However, should the desirability of not rendering the Board's "expertise" unavailable outweigh an agreement by the parties to go to arbitration? Indeed, as stated in the *Warrior and Gulf case*, the labor arbitrator has a degree of expertise which may be unavailable to the Board.

It is true that arbitrators differ in quality and that bad bargains may be entered into, but prospective fear of this should not be enough to effectively deny the arbitration procedure. In fact, should an arbitration settlement be repugnant to the policies of the Act, the principles established in *Spielberg* will take care of the problem, for the Board will be able to modify or reverse the resultant order.

While it must be admitted, then, that public policy is not always best served by saying, "you made your bed, now lie in it," one must heed Board Member Brown's warning in *Adams Dairy* that the strength of the contract itself is dependent on the Board's careful exercise of their preemptive powers.

If the value of the individual agreement is to be preserved, then, cases

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112 363 U.S. 574 (1960). The Court stated, at 576:

>The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law — the practices of the industry and the shop — is equally part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment . . . . For the parties' objective in using the arbitration process is primarily to further their common goal of interrupted production under their agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

113 "[I]t has not been possible for the Board to find that all arbitrators are as wise as Solomon, or as just. And being chosen for a term of years or life, arbitrators do not always have, nor need they have, the perspective of members of the judiciary or of a quasi-judicial agency such as the NLRB." Harris, *The National Labor Relations Board and Arbitration — The Battle of Concurrent Jurisdiction*, 16 SYRACUSE L. REV. 545 (1961).

114 See note 44 supra.

115 See text accompanying note 58 supra.
articulating a national policy favoring arbitration such as the *Steelworkers* will have to be brought to the fore.\textsuperscript{116} Brown's concurring opinion in *Adams Dairy*, expressing the necessity of greater faith in the contract itself, must become a model for the majority opinions of the Board. If such a trend is to be established, cases like *Acme Industrial* will have to undergo serious re-examination. *Acme* is an example of legal logic overwhelming any concept of practicality. Not only was there a binding arbitration clause in the contract, but the court admitted that an employer should supply the requested information. The Supreme Court characterized the Board's action as a "threshold determination" and justified jurisdiction on these grounds. But this does not change the fact that the intent of the parties at the time of contracting was thus disregarded and made virtually meaningless. Admitting that there was no harm done in this case, the question remains as to the strength of the next contract.

Furthermore, the Board's effort to "aid the arbitral process" in these cases seem at best to be misguided energy in view of the tremendous case load before the Board today. In retrospect, the *Acme* decision is questionable because it enables, for example, the *Huttig* court to proclaim\textsuperscript{117} that neither the presence nor absence of an arbitration clause will have any controlling significance on the question of Board jurisdiction. Surely this is contrary to the principles of the *Steelworkers* cases and to the overall goal of industrial peace as expressed in the Act itself. To this extent, *Huttig*, too, must be re-examined for while no one can base the "final word" on an arbitration clause by itself, such a provision must be elevated to a higher level of importance.

**Conclusion**

If the unfair labor practice is to truly remain a "subordinate activity", then the whole focus demonstrated by the most recent cases must change. Considerations such as time and money, as well as those factors expressed in *Huttig*, are still vitally important to the labor field. Resolution of industrial disputes is generally a more time consuming, thus a more expensive process when handled by the Labor Board. Moreover, the solidity of future agreements, or at least the care with which they are drawn, rests on giving weight to contracted-for remedial methods.

The emphasis must, in the future, be on requiring parties to resolve their problems through the machinery established by agreement. This responsibility rests directly with the Board, for only by requiring adherence to contractually agreed-upon settlement methods will it "promote a higher degree of responsibility upon the parties to such agreements, and thereby promote industrial peace."\textsuperscript{118}

\textsuperscript{116} While it is admitted that the *Steelworkers* cases do not apply to an arbitrator-Board relationship, there can be no doubt that the policy expressed therein does apply.

\textsuperscript{117} See p. 114 *supra*.

\textsuperscript{118} Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 454 (1957).