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NOTES

LABOR LAW—JURISDICTION—Contractual Interpretation, Unfair Labor Practices, and Arbitration: A Proposed Resolution of Jurisdictional Overlap

In *San Diego Building Trades Council v. Garmon*,[1] the Supreme Court held that the state and federal courts must defer to the exclusive jurisdiction of the National Labor Relations Board when an activity is arguably an unfair labor practice as defined by the National Labor Relations Act (NLRA).[2] At the same time, section 301(a) of the Labor Management Relations Act (LMRA) provides that the courts have jurisdiction in actions alleging violations of collective agreements.[3] Two distinct factual settings have emerged in which these jurisdictional propositions are at odds.

First, the parties to a labor contract may incorporate into their agreement a provision which parallels an unfair labor practice section of the NLRA. For example, the employer may agree that he will not discriminate against employees because of their union activity. But without regard to the contractual provision, that discrimination is violative of section 8(a)(3) of the NLRA.[4] In such cases, when the same conduct is an arguable violation of both the contract and the NLRA, the Supreme Court has permitted the courts and the Board to exercise concurrent jurisdiction.[5]

The second possibility for jurisdictional overlap occurs in a somewhat more complicated factual setting. Certain conduct, such as

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1. 359 U.S. 236 (1959).

2. 29 U.S.C. §§ 157-58 (1964). As used throughout the remainder of this Note, the term "unfair labor practice[s]" refers to those actions which fall within the prohibited activities of section 8 of the National Labor Relations Act as amended.

3. 29 U.S.C. § 185(a) (1964), which reads in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The legislative history of this section clearly indicated that the jurisdiction of the courts in contractual matters was to be in lieu of Board jurisdiction. Thus, the original Senate version of the NLRA which made violation of collective agreements unfair labor practices was explicitly rejected in conference in favor of jurisdiction by the courts. H.R. REP. No. 510, 80th Cong., 1st Sess. 41-42 (1947).

4. 29 U.S.C. § 158(a)(3) (1964), which reads in pertinent part: "It shall be an unfair labor practice for an employer— . . . by discrimination . . . to encourage or discourage membership in any labor organization . . . ."

5. Smith v. Evening News Assn., 371 U.S. 195 (1962). *See also* District 50, United Mine Workers v. Chris-Craft Corp., 385 F.2d 946 (6th Cir. 1967); Star Expansion Indus. Corp., 164 N.L.R.B. No. 95, 1967 CCH NLRB Dec. ¶ 21,343; Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems*, 57 COLUM. L. REV. 52 (1957).

an employer's unilateral institution of changes in working conditions, ordinarily constitutes an unfair labor practice.[6] Under the *Garmon* doctrine, such conduct is within the jurisdiction of the NLRB. An employer may argue, however, that his changes in working conditions were sanctioned by the terms of the collective bargaining agreement, and that therefore his conduct does not constitute an unfair labor practice.[7] Whether the employer's conduct is sanctioned by the collective agreement is essentially a matter of contractual interpretation which must be resolved before an inquiry into the possible unfair labor practice is begun. However, contractual interpretation was clearly reserved for the courts by section 301(a).[8]

The leading Supreme Court decision in this area of jurisdictional overlap between the NLRA-enforcement power of the Board and the contract-enforcement power of the courts is *NLRB v. C & C Plywood Corporation*.[9] The collective agreement in *C & C Plywood* reserved to the employer "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."[10] Wages were stipulated as "closed" during the effective period of the contract, and neither party was obligated to bargain collectively on any matter not specifically referred to in the contract. Shortly after the agreement was signed, the employer initiated a plan which provided that all members of the "glue spreaders" crew would receive a premium rate if specified production standards were met. The Supreme Court held that the assertion of a contractual defense by the employer did not deprive the Board of jurisdiction to find that the unilateral pay increases, inaugurated without prior consultation with the union, constituted a violation of section 8(a)(5) of the NLRA.[11] The Court explicitly rejected the argument that the

6. NLRB v. Katz, 369 U.S. 736 (1962).

7. The same jurisdictional question arises in the converse situation. An employer may attempt to make changes in his employees' working conditions which he feels are sanctioned by the collective agreement. If the union refuses to comply with the changes, the employer would bring an action in a court under § 301(a) seeking to enforce his contractual rights. The union would then move to have the case dismissed on the ground that what is involved is an unfair labor practice within the exclusive jurisdiction of the Board. As one commentator has amply demonstrated, litigants can easily "exploit the possibilities of fabricating unfair labor practices to defeat or delay contract actions." Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 HARV. L. REV. 529, 551-52 (1963).

8. *See* note 3 *supra*. *See also* the discussion of the legislative history of § 301 in NLRB v. Strong, 393 U.S. 357, 360-62 (1969); NLRB v. C & C Plywood Corp., 385 U.S. 421, 425-28; Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95, 101 n.9 (1962); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 510-11 (1962); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

9. 385 U.S. 421 (1967).

10. 385 U.S. at 423.

11. 385 U.S. at 427-30.

Board's resolution of the unfair labor practice charge in this case was inconsistent with the congressional intent to deprive the Board of jurisdiction over questions of contractual violation and interpretation.

> The Board's interpretation went only so far as was necessary to determine that the union did not agree to give up [its statutory rights]. Thus, the Board, in necessarily construing a labor agreement to decide this case, has not exceeded the jurisdiction laid out for it by Congress.[12]

The Court then accepted the Board's finding that since the collective agreement sanctioned increases "for particular employees," not for groups of workers, the union had not waived its right to bargain about the employer's plan.

While *C & C Plywood* may have resolved the question whether the Board automatically loses jurisdiction upon the assertion of a contractual defense, the case raises a second and even more significant problem. The courts are not the only fora which resolve questions concerning collective agreements. The great majority of labor contracts provide that disputes arising over the interpretation or application of their terms are subject to final and binding arbitration. Thus, the question emerges whether *C & C Plywood* so expands the Board's jurisdiction that it severely restricts the situations in which the Board must defer to arbitration,[13] or whether the Supreme Court's decision can be interpreted to preserve a substantial role for the arbitrator in interpreting collective agreements.[14]

Both Congress and the Supreme Court have previously indicated their concern with protecting the vitality of the arbitral process. In section 203(d) of the LMRA, Congress declared that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising

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12. 385 U.S. at 428.

13. The distinction should be noted between deference by the Board to arbitration —that is, a refusal by the Board to exercise jurisdiction—which is the concern of this Note, and the Board's honoring of an arbitration award already made. In Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955), the Board held it would abide by an award already rendered by an arbitrator if "[t]he proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." 112 N.L.R.B. at 1082. *See also* Crescent Bed Co., 157 N.L.R.B. 296 (1966); Flintkote Co., 149 N.L.R.B. 1561 (1964); International Harvester Co., 138 N.L.R.B. 923 (1962), *affd. sub. nom.* Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964).

14. The Court carefully noted in *C & C Plywood* that the collective agreement in question did not contain an arbitration provision. 385 U.S. 421, 426 (1967). The Court also explicitly distinguished the situation in *C & C Plywood* from that in Square D Co. v. NLRB, 332 F.2d 360 (9th Cir. 1964). 385 U.S. at 426 n.9. In *Square D* the Court of Appeals for the Ninth Circuit held that since "the existence of an unfair labor practice here is *dependent* upon the resolution of a preliminary dispute involving *only* the interpretation of the contract," it would not enforce the Board's award but would compel the parties to arbitrate the contractural dispute. 332 F.2d at 365-66.

over . . . the interpretation of an existing collective bargaining agreement."[15] The famous *Steelworkers Trilogy*[16] put the Court's imprimatur on that expression of congressional intent. In those cases, the Court emphasized that, as a matter of national labor policy, arbitration was to be preferred to judicial action for resolving disputes alleging contractual violations.

Because the *Steelworkers Trilogy* dealt with the relationship of arbitration to the courts rather than to the Board, the Board has not felt bound by those decisions.[17] Instead, the Board has looked to such cases as *Mastro Plastics Corporation v. NLRB*,[18] which appears to sanction Board interpretation of collective agreements despite the presence of an arbitration provision. In addition, the Board has emphasized section 10(a) of the NLRA which provides that its unfair labor practice jurisdiction "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement. . . ."[19] In essence, the Board has concluded that it has complete discretion to decide whether to defer to arbitration in disputes in which the foundation of an unfair labor practice charge depends upon a particular construction of the collective agreement.

Some commentators have felt that the Board's position is supported by the Supreme Court's citation of *Mastro Plastics* in *C & C Plywood*. The *C & C Plywood* Court cited *Mastro Plastics* for the proposition that the Board does have the power to interpret collective agreements, and that it need not defer to the courts.[20] Upon examination, however, it is apparent that the Court's concern in *C & C Plywood* was primarily with the delay that would result to the union if it were forced to take its claim to the courts for a prior

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15. 29 U.S.C. § 173(d) (1964).

16. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

17. *See, e.g.*, Cloverleaf Div., Adams Dairy Co., 147 N.L.R.B. 1410 (1964); C & S Indus., Inc., 158 N.L.R.B. 454 (1966); St. Louis Cardage Mills, Div. of American Mfg. Co., 170 N.L.R.B. No. 7, 1968-1 CCH NLRB Dec. ¶ 22,216.

18. 350 U.S. 270 (1956). In *Mastro Plastics* the collective bargaining agreement contained a general no-strike clause and an arbitration provision. Nonetheless, some members of the union went out on strike in response to an unfair labor practice committed by the employer. The Court was faced with the issue of whether the contract waived the union's right to strike in the circumstances of the case. The Court commented that "[t]he answer turns upon the proper interpretation of the particular contract before us." 350 U.S. at 279. From statements such as this the implication is drawn by some commentators that the Board has unlimited power to interpret collective agreements in the course of an unfair labor practice proceeding. *See, e.g.*, Bond, *The Concurrence Conundrum: The Overlapping Jurisdiction of Arbitration and the National Labor Relations Board*, 42 S. CAL. L. REV. 4, 32-33 (1968).

19. 29 U.S.C. § 160(a) (1964).

20. 385 U.S. 421, 429-30 (1967).

interpretation of the contract.[21] Nevertheless, when the choice is between the Board and arbitration, rather than between the Board and the courts, that concern about delay would be minimal. And although *Mastro Plastics* was itself a case in which the Court did allow the Board to interpret a collective agreement despite a provision for arbitration, it is not at all clear from that opinion that the issue of whether arbitration should have been employed was directly raised or considered.

Arbitration affords a number of practical advantages over the Board's resolution of contract matters. Because of the backlog of cases which confront the NLRB,[22] an arbitrator usually can resolve a dispute more quickly. In addition, the informal nature of the proceedings before an arbitrator renders arbitration a less expensive mode of resolving disputes. Third, an arbitrator's expertise gives him greater flexibility to tailor his award to reflect the needs of particular industries or of a particular plant.[23] Finally, empirical studies demonstrate that both employers and unions prefer an arbitrator's resolution of their differences.[24] That preference should be honored unless it is clearly repugnant to some unambiguous statutory command. In view of the apparent inconsistency between sections 10(a) and 203(d), and in view of the arguable nature of the legal precedent, the practical advantages of arbitration should tip the balance in favor of the arbitrator rather than the Board in resolving disputes which require the interpretation of a collective bargaining agreement.

There are three different interpretations of *C & C Plywood* which make it possible to preserve a preferred position for arbitration in the resolution of contractual disputes. The first and most promising of those interpretations focuses on the aspect of contract coverage. The collective agreement in *C & C Plywood* permitted wage increases "for particular employees," yet the employer's plan provided for increases for an entire group of workers. Thus the labor contract

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21. 385 U.S. at 429-30. *See also* Note, *To Board or Not to Board: NLRB v. C & C Plywood*, 14 UCLA L. REV. 692 (1967).

22. *See* THIRTY-SECOND ANNUAL REPORT OF THE NLRB 5-10 (1968).

23. As the Court commented in United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960):

> When an arbitrator . . . is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.

363 U.S. at 597.

24. *See* Jones & Smith, *The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators, and Parties*, 52 VA. L. REV. 831 (1966); Jones & Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments*, 62 MICH. L. REV. 1115 (1964).

arguably did not even apply to the dispute. Once the Board had determined that the dispute was not within the terms of the contract, no further interpretation of the contract clause itself was necessary. The employer's plan was simply an unfair labor practice, that is, a unilateral change in working conditions not sanctioned by the contract. Accordingly, only the statutory rights of the union under the NLRA were involved; and the enforcement of such rights is granted to the Board.

That interpretation of the Supreme Court's position is the most consistent with the central role which should be carved out for the arbitration of contractual differences. The typical arbitration provision reserves to the arbitrator the job of settling disputes by the interpretation or application of collective agreements. If the dispute is encompassed by the arbitration clause, and therefore depends upon contract interpretation for its resolution, the Board should defer to the arbitrator. On the other hand, once the Board determines that the dispute is outside the scope of the arbitration clause, there is no question of usurping the arbitrator's interpretative function by allowing the Board to entertain the dispute as an unfair labor practice charge. Under this analysis the Board's task would be limited to a determination of whether the parties have agreed to arbitrate the dispute—effectively the same determination which is made by the courts in a suit to compel arbitration.[25] In fact, in a number of cases, the Board has indicated that its willingness to entertain unfair labor practice charges in the face of an arbitration provision depends upon its determination that the dispute is outside the scope of the labor contract.[26] By such an emphasis on contractual coverage, the Board preserves the vitality of the arbitral process.

A second interpretation of *C & C Plywood* focuses on the particular type of alleged contractual violation. The dispute in *C & C Plywood* between the union and the employer did not involve a single isolated employee, but centered instead on the employer's right to institute unilateral changes in working conditions having a continu-

25. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960):

> [T]o be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, 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 the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

363 U.S. at 582-83. *See also* Atkinson v. Sinclair Ref. Co., 370 U.S. 238 (1962); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964); Jones, *The Name of the Game Is Decision—Some Reflections on "Arbitrability" and "Authority" in Labor Arbitration*, 46 TEXAS L. REV. 865 (1968).

26. C & S Indus., Inc., 158 N.L.R.B. 454 (1966); Cloverleaf Div., Adams Dairy Co., 147 N.L.R.B. 1410 (1964) (concurring opinion of Member Brown). *But see* McLean Trucking Co., 175 N.L.R.B. No. 66, 71 L.R.R.M. 1051 (April 21, 1969).

ing impact on the work force. The Board has indicated that the type of contractual violation may be an important factor affecting its jurisdiction. In a number of recent cases, the Board has distinguished between disputes involving "simple default[s] in a contractual obligation" and disputes which have a "continuing impact on [the] basic term[s] or condition[s] of employment."[27] In the former set of cases, the NLRB will apparently decline to assert its jurisdiction and will defer to arbitration. Support for that position can be found in section 8(d) of the Act, which makes the unilateral termination or modification of a collective agreement that is presently in effect an unfair labor practice.[28] An isolated breach of contract involving a single employee does not represent a "modification" of the collective agreement.

While this distinction between types of contractual violations has the virtue of preserving some role for the arbitrator, it presents the vice of not preserving a large enough role. All the advantages of arbitration—speed, savings, and the ability of an arbitrator to fashion his remedies to the needs of a particular situation[29]—are present whether the dispute involves a simple contractual default or has a continuing impact on the conditions of employment. Moreover, the typical arbitration provision confers upon the arbitrator power to resolve all disputes arising out of the interpretation or application of the collective agreement, not merely those which the Board concludes are of insignificant impact. Due respect for the intention of the parties demands that the arbitrator be given a more expansive role.

Under the third interpretation of *C & C Plywood*, jurisdiction to decide a contractual dispute would be determined by the nature of the injury caused by the employer's conduct and by the possibility of remedies for that injury through proceedings other than those before the Board. In *C & C Plywood*, the employees themselves were not monetarily injured. Indeed, the premium pay plan could only increase their compensation. The substance of the damage caused, therefore, was a diminution, in the eyes of the employees, of the union's status as an effective bargaining agent. That type of injury may have been incapable of rectification by the remedial powers of the courts. First, a damage remedy could not restore lost union status, and the intangible nature of the injury may have confronted the union with an insurmountable problem of proof in demonstrating the extent of its actual damages. Second, an injunctive remedy

27. C & S Indus., Inc., 158 N.L.R.B. 454, 458 (1966). *See also* W.P. Ihrie & Sons, Div. of Sunshine Biscuits, Inc., 165 N.L.R.B. No. 2, 1967 CCH NLRB Dec. ¶ 21,432; Eaton Yale & Towne, Inc., 171 N.L.R.B. No. 73, 1968-1 CCH NLRB Dec. ¶ 22,489.

28. 29 U.S.C. § 158(d) (1964), which reads in pertinent part:

> [W]here there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract . . . .

29. *See* text accompanying notes 22-24 *supra*.

arguably was prevented by the Norris-LaGuardia Act which prohibits federal courts from issuing injunctions "in a case involving or growing out of a labor dispute . . . ."[30] The only remedy the courts could offer would be some form of declaratory relief. Therefore, a holding that the union was required to go to the courts for an interpretation of the collective agreement could produce only delay,[31] for the union would eventually have to proceed before the Board in order to obtain effective relief.

The NLRB, like the courts, could not give an effective damage remedy. The Board does, however, have the power, in spite of the anti-injunction provisions of the Norris-LaGuardia Act,[32] to obtain from the United States courts of appeals "appropriate temporary relief or restraining order[s]."[33] Consequently, in *C & C Plywood*, the Board was uniquely empowered to grant an appropriate remedy for the employer's unfair labor practice. *C & C Plywood* thus lends itself to the interpretation that when the Board is not the only forum capable of granting effective remedial relief, it is not empowered to exert its jurisdiction over the contractual controversy. However, the practice of the NLRB has not conformed to that interpretation;[34] and recently, in *NLRB v. Strong*,[35] the Supreme Court appears to have approved the Board's position.

The employer in *Strong* was part of a multi-employer bargaining unit. After that unit successfully negotiated with the union a col-

30. 29 U.S.C. § 101 (1964), which reads in pertinent part: "No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute . . . ." The Supreme Court has not yet decided whether or not a state court is prohibited from issuing injunctions in a labor dispute or whether or not a federal district court is required to dissolve any state court injunction previously issued if the suit is removed to a federal court. Avco Corp. v. Aero Lodge 735, Machinists, 390 U.S. 577 (1968).

31. As the Supreme Court has noted, time is crucially important in obtaining relief. *See, e.g.*, Amalgated Clothing Workers v. Richman Bros. Co., 348 U.S. 511, 526 (1955) (dissenting opinion). *See also* NLRB v. Great Dane Trailers Inc., 388 U.S. 26, 30 n.7 (1967).

32. 29 U.S.C. § 160(a) (1964), which reads in pertinent part:

> The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . 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 . . . .

For applicable Norris-LaGuardia provisions, see note 30 *supra*.

33. 29 U.S.C. § 160(e) (1964), which reads in pertinent part:

> The Board shall have power to petition any court of appeals of the United States . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business . . . for the enforcement of such order and for appropriate temporary relief or restraining order . . . .

For applicable Norris-LaGuardia provisions, see note 30 *supra*.

34. In a number of cases, the Board has exercised its jurisdiction even where its remedy consisted of ordering an employer who breached or repudiated a collective agreement to pay to the employees lost monetary benefits provided for in the contract—a remedy the courts or an arbitrator is equally competent to grant. Scam Instrument Corp., 163 N.L.R.B. No. 39, 1967 CCH NLRB Dec. ¶ 21,155, *enforced*, 394 F.2d 884 (7th Cir.), *cert. denied*, 393 U.S. 980 (1968); Schill Steel Prod. Inc., 161 N.L.R.B. 939 (1966).

35. 393 U.S. 357 (1969).

lective agreement which provided for the arbitration of contractual differences, the employer attempted to withdraw from the unit and refused to sign the agreement. Previous decisions have held that failure to sign a collective agreement may constitute an unfair labor practice under section 8(a)(5) of the Act.[36] The employer did not attempt to deny the 8(a)(5) violation, but he did resist the order of the Board to pay fringe benefits in accordance with the terms of the agreement. On certiorari, the Supreme Court held that the Board had not exceeded its statutorily defined remedial powers when it ordered the employer both to sign the contract and to "pay to the appropriate source any fringe benefits provided for in the . . . contract."[37] Since, after the contract had been signed, either the courts or an arbitrator could also have ordered the employer to pay the fringe benefits, *Strong* appears to dispose of the notion that *C & C Plywood* stands for the proposition that the Board can exercise jurisdiction over disputes involving contractual interpretation only when no other forum is capable of rendering effective relief.[38]

It must be emphasized, however, that although *Strong* appears to preclude the third interpretation of *C & C Plywood*, it does not undermine the other two suggested interpretations. In *Strong*, the employer's refusal to sign the collective agreement and to pay the fringe benefits did have a continuing impact both on the relationship between the employer and the union and on the affected employees. Therefore, *Strong* fits into the analysis under which the Board's deferral to arbitration depends upon its assessment of the degree of harm caused by the employer's conduct.

More important, however, the basic dispute in *Strong* was not a matter of contract interpretation or application. As the Supreme Court explicitly noted in its opinion, the employer's refusal to sign the collective agreement may not have been a breach of contract.[39] If the refusal was not a contractual violation, the employer had merely

36. H.J. Heinz Co. v. NLRB, 311 U.S. 514 (1941); Gene Hyde, 145 N.L.R.B. 1252, *enforced*, 339 F.2d 568 (9th Cir. 1964). The obligation to sign a written contract stems from the definition of the duty to bargain collectively, embodied in § 8(d) of the NLRA, which reads in pertinent part:

> [T]o bargain collectively [includes] . . . the execution of a written contract incorporating any agreement reached if requested by either party . . . .

29 U.S.C. § 158(d) (1964).

37. 393 U.S. 357, 358 (1969).

38. In the last paragraph of its opinion in *Strong*, the Court noted that, although the refusal to sign the collective agreement may not have been a breach of contract, it was an unfair labor practice. *See* text accompanying note 39 *infra*. The argument can be made, then, that the action dealt with in *Strong* could not have been brought in the courts under § 301(a), but only before the Board as an unfair labor practice, and that therefore the Board was the only forum that could grant effective relief. That argument overlooks the fact that, while the employer's refusal to sign may not have been a breach of contract, the Board's relief went beyond simply remedying the refusal to sign. Once the employer in *Strong* was ordered to sign the contract, the Board was not the only forum that could have given the relief of ordering the employer to pay fringe benefits under its terms.

39. 393 U.S. at 362.

committed an unfair labor practice; and the union was relegated to its statutory rights and remedies. But in order to give complete relief from the statutory violation, the Board also enforced union rights under the contract. That added relief should not, however, obscure the fact that the original dispute was not contractual. Consequently, *Strong* is consistent with the position that when a dispute does arise out of an effective collective agreement, the Board should defer to arbitration for a resolution.

Arguably, then, the Supreme Court has yet to resolve a case in which there is a direct clash between the unfair labor practice jurisdiction of the Board and the jurisdiction of an arbitrator over questions of contractual interpretation. It is impossible to say whether the Court will seek to preserve an expansive role for arbitration by adopting any of the suggested interpretations of its holding in *C & C Plywood.* Indeed, the Court of Appeals for the Eighth Circuit has concluded that the Supreme Court is moving in the opposite direction—that the major thrust of recent decisions has been to emphasize, to protect, and to give priority to statutory rights.[40] If that court's analysis is correct, questions of contractual interpretation are of only secondary importance. And under that analysis, if the Supreme Court is presented with the direct clash between the arbitrator's power to construe collective agreements and the Board's power to remedy unfair labor practices, it would apparently favor the Board, at least to the extent of granting concurrent jurisdiction. That result would ignore the preference of both employers and unions for the arbitration of their contractual differences[41] and the advantages that arbitration has over Board construction of collective agreements.[42] As this Note has demonstrated, *C & C Plywood* and the other recent decisions of the Supreme Court do not require such a dissipation of the arbitral process.

40. NLRB v. Huttig Sash & Door Co., 377 F.2d 964 (8th Cir. 1967) wherein the court concluded:

> We detect . . . a desire, and perhaps even a policy, on the part of the Court to give impetus to the various ways of settling labor disputes; to expedite these matters; to avoid delay either in the courts or in the arbitration process; to emphasize and protect, in cases of doubt, and to give priority to, statutorily declared rights; to regard as no more than secondary any contract interpretation aspect of what is regarded as basically an unfair labor practice dispute or as merely related to primary Board function under the Act; to take a broad, and not a narrow or technical, approach to the Act and to the multiplicity of channels available for resolving disputes; and not to close the door upon Board expertise when such restraint is clearly not violative of congressional mandate.

377 F.2d at 970-71. For an analysis of *Huttig*, see Note, *Labor Law—Unfair Labor Practices—Board Jurisdiction When an Arbitration Clause Is Used,* 9 B.C. IND. & COM. L. REV. 497 (1968). *See also* Browne, *The Court, the NLRB, and Free Collective Bargaining—A Second Look,* 54 A.B.A.J. 560 (1968); Lesnick, *Arbitration as a Limit on the Discretion of Management, Union, and NLRB: The Year's Major Developments,* in N.Y.U. EIGHTEENTH ANNUAL CONFERENCE ON LABOR 7, 22-30 (1966); Wollett, *The Agreement and the National Labor Relations Act: Courts, Arbitrators and the NLRB—Who Decides What?,* 14 LAB. L.J. 1041 (1963).

41. *See* note 24 *supra.*

42. *See* text accompanying notes 22-23 *supra.*