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NOTES

USE OF AN ARBITRATION CLAUSE AS A DEFENSE TO 8(a)(5) CHARGE RESULTING FROM THE EMPLOYER'S REFUSAL TO BARGAIN WHEN ACTING UNILATERALLY WITH RESPECT TO A MANDATORY SUBJECT OF COLLECTIVE BARGAINING

I. THE PROBLEM SITUATION

This note concerns the problem situation which arises in an employer-union relationship where the collective-bargaining contract in force includes a mandatory arbitration procedure for resolving grievances arising under the contract. The contemplated problem arises when the employer acts unilaterally with respect to a mandatory subject of collective bargaining, for example by instituting a wage incentive plan. The union then

1. In Knight Morley Corp., 116 N.L.R.B. 140 (1956), aff'd, 251 F.2d 753 (6th Cir. 1957), the Board referred to an arbitration clause which said a grievance "may" be arbitrated as a "permissive" arbitration clause.

But see, Bonnet v. Congress of Independent Unions, Local 14, 331 F.2d 355, 359 (8th Cir. 1964), where the court said: "We should mention, perhaps, the union's suggestion that the bargaining agreement does not compel arbitration but only provides either party 'may' request it; that it is thus permissive and optional. . . . The result claimed to follow is that the arbitration here is not mandatory. We think the result is necessarily the other way. . . . The presence of this or similar language has not prevented the conclusion that a claim, if pressed, is compulsorily subject to arbitration. . . . The Fifth Circuit has flatly rejected the union's argument. Deaton Truck Line, Inc. v. Local 612 etc., International Bhd. of Teamsters, 314 F.2d 418, 422 (5 Cir. 1962) (sic.). We agree."

See also, General Drivers, Warehousemen, and Helpers, Local 89 v. Riss and Company, Inc., 372 U.S. 517 (1963), where the Supreme Court held that the fact that the word "arbitration" was not contained in the collective agreement was not a bar to enforcement under § 301 of a decision by the "Joint Area Cartage Committee" which was in accordance with the grievance procedure contained in the agreement.

These cases indicate that there is no distinction between mandatory or permissive arbitration clauses, nor is there any requirement that the grievance procedure be called an arbitration procedure. The primary consideration is whether the parties have mutually agreed on a method to solve their disputes.


This broad definition has been interpreted by the Board to encompass such areas as incentive wages, John W. Bolton & Sons, Inc., 91 N.L.R.B. 989 (1950); recall of employees, West Boylston Mfg. Co., 87 N.L.R.B. 808 (1949); board, Weyerhaeuser Timber Co., 87 N.L.R.B. 672 (1949); shift schedules, Massey Gin & Machine Works, Inc., 78 N.L.R.B. 189 (1948); piece rates, Southshore Packing Corp., 73 N.L.R.B. 1116 (1947); and work loads, Woodside Cotton Mills Co., 21 N.L.R.B. 42 (1940).

The present philosophy of the Board indicates that any decision to change operations that would substantially affect employment falls within the purview of 'terms and conditions of employment' and is therefore a mandatory subject of bargaining."
demands to bargain over the question, which the employer refuses to do on the grounds that his action is allowed under the terms of the collective-bargaining contract. The union, not wanting to arbitrate this matter for reasons of its own, files 8(a) (1) and (5) charges with the National Labor Relations Board. This note will examine the extent to which the employer can invoke the arbitration clause in the existing collective-bargaining contract to gain a stay of Board action, a dismissal of the charges before the Board, or on appeal to a federal court, secure a reversal of an adverse Board decision.

The three types of collective-bargaining contract clauses which are most important to the problem situation are the arbitration clause, the management prerogative clause, and the waiver of the duty to bargain clause. Generally, arbitration procedure provides for a multi-step processing of grievances which ultimately culminates in arbitration. The purpose of the multi-step procedure is to settle minor grievances at a su-

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3. "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 7; . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 9(a)." The National Labor Relations Act (Wagner Act) § 8(a), 49 Stat. 452 (1935), 29 U.S.C. § 158(a) (1964).

4. The question presented by this note is not similar to the question decided in Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955). In Spielberg, at the time of the Board action there was an existing arbitration decision concerning the question to the Board. The Board decided it would not upset the arbitration decision where "... the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision... is not clearly repugnant to the purposes and policies of the Act..." Id. at 1082.

5. A typical example of multi-step grievance procedure is found in Williams, Labor Relations and the Law, Reference Supplement 5 (3d ed. 1965). The steps provided in that agreement are (1) taking the grievance to the foremen, (2) if that result is not satisfactory, the grievance can then be taken to the "Plant Grievance Committee" and the "Divisional Superintendent." (3) if that result is not satisfactory, the grievance may be appealed to the "Industrial Relations Manager," (4) if that result is not satisfactory, "the Union may request that this grievance be submitted to arbitration," and any "decision or award shall be final and binding on both parties for the life of this agreement."

See also, Drake Bakeries v. Local 50, American Bakery & Confectionery Workers International, 370 U.S. 254, 257 (1962); where the opinion gives another example of multi-step grievance procedure that culminates in arbitration. In Article V of the contract the parties agreed they would "promptly attempt to adjust all complaints, disputes, or grievances arising between them involving questions of interpretation or application of any clause..." The procedure outlined is presentation by the "Shop Chairman" and "Committee" on the union's behalf to the "Shop Management." If the "Shop Chairman" and "Shop Management" cannot affect a settlement of the grievance, the Union may present the grievance to the "Plant Manager." If this does not result in a settlement then "either party shall have the right to refer the matter to arbitration..."
pervisory level before going to the expense of a full arbitration hearing. Usually, the scope of authority of the arbitrator is limited by the collective-bargaining contract to grievances which arise in the interpretation of the collective-bargaining contract. Under the typical contract the arbitrator determines the scope of his authority. Since the famous Steelworkers Trilogy, the only viable ground to obtain review of an arbitrator's decision is on the issue of arbitrability, i.e., whether the arbitrator exceeded the scope of his authority.

The second type of clause bearing on the problem situation is the management prerogative clause. The purpose of this clause is to allow the employer to carry out the general business, make managerial decisions, and institute limited changes in the operation of the business without running afoul of sections 8(a)(5) and 8(d) where such actions would fall within the scope of a mandatory subject of collective bargaining.

Interpretation of this clause plays a major role in the problem situation. The employer may in good faith interpret the management prerogative clause as allowing the unilateral action which the union contends is not permitted by the clause, or he may use the clause as a defense to an 8(a)(5) charge after instituting some type of unilateral action without having first considered whether it was allowed. The legality of the employer's action, in either case, turns on interpretation of a clause in the collective-bargaining contract and hence is an arbitrable issue.

The third type of clause, the waiver of the duty to bargain clause,
waives all rights of the parties to require collective bargaining over any matter contained in or not contained in the collective-bargaining contract. However, as will be seen later, the Board does not give these clauses a broad interpretation.

The problem is one of balancing the policy behind the National Labor Relations Act and the subjective considerations to which the Board often addresses itself, against the policy promulgated by the Supreme Court which favors the right of the parties to enter collective-bargaining contracts and establish a mutually acceptable system of self-government through arbitration procedures. As is evident, contract interpretation is of primary importance and the issue is which forum (arbitration or the NLRB) should have the primary authority to make a determination of the rights under the contract in a particular situation.

II. PROCEDURAL PROBLEMS

Once the unfair labor practice charge has been filed, the employer may decide that the question of whether he acted in compliance with the collective-bargaining contract should be arbitrated because past experience indicates the employer can win in arbitration. However, there are procedural problems within the collective-bargaining contract and the law which make it impossible for the employer to force arbitration.

In this situation, the union has the grievance with the employer's unilateral action, and may choose to force arbitration of the grievance under section 301(a) of the Labor Management Relations Act. The
union can also file 8(a)(1) and (5) unfair labor practice charges with the Board, while pursuing a section 301(a) suit in Federal court to compel arbitration. However, the union may elect to pursue its rights solely before the Board.

The employer on the other hand has no grievance to process pursuant to the arbitration clause in the collective-bargaining contract since his action is the cause of the dispute. He has no right to pursue under section 301(a), and cannot force arbitration of the question. However, this is not prejudicial if he can win before the Board or reverse an adverse decision on appeal. It is probably to the employer's advantage to continue the unilateral action as long as possible. If the unilateral action is in the nature of a wage increase or an employee benefit, the longer the action continues the more accustomed the employees become to the benefit. If the employer eventually loses, the termination of the benefit may cause employee animosity toward the union. Also, if the employer eventually wins the case before the Board or on appeal, the union may be precluded from arbitration since collective-bargaining contracts commonly contain a contractual statute of limitation within which the grievance must be filed or be barred from arbitration.

Industry affecting commerce as defined in this act, or between any such labor organizations, 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. At common law, a party to an arbitration agreement could not secure specific performance of that agreement, but was compelled to bring suit for money damages. Realizing that this common law approach was not realistic in the area of labor relations, the Supreme Court decided in Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1956), that the parties to a collective-bargaining contract could properly under the provisions of section 301(a) sue and acquire a decree for performance of the arbitration clause in the collective-bargaining contract.

There are two ways the employer can obtain review of the Board's adverse decision. One method is to refuse to comply with the Board's cease and desist order and continue the unilateral action without collective bargaining. In this case the Board will probably file a petition for enforcement under the provisions of the National Labor Relations Act § 10(e), 49 Stat. 453 (1935), 29 U.S.C. § 160(e) (1964), and the employer will defend his position at that time.

The second method is for the employer to appeal the decision of the Board and become the party moving forward by filing a petition for review under the provisions of the National Labor Relations Act § 10(f), 49 Stat. 453 (1935), 29 U.S.C. § 160(f) (1964).

"[N]o written grievance shall be valid unless submitted in writing within five (5) calendar days after the employer knew, or by reasonable diligence could have known of the facts upon which the grievance was based." Avco Corp., Electronics and Ordnance Div. v. Mitchell, 336 F.2d 289, 290 (6th Cir. 1964). The court decided in this case that the procedural question of whether the grievance was submitted within the allowable time period was for the arbitrator to decide, and the Steelworkers Trilogy precluded review by the court of that decision.
III. NLRB Decisions Which Have Passed on the Problem Situation

The problem situation of this note assumes that the union files an 8(a)(5) charge with the National Labor Relations Board, and either the union fails to process a grievance within the contractual grievance procedure, or if such a grievance has been processed it has not yet reached the stage of arbitration at the time the Board hears the case. Consequently, the Board has three courses of action: (1) The Board can find that the employer violated section 8(a)(5) and make an appropriate order to bargain collectively; (2) the Board can find that the employer did not violate section 8(a)(5) and dismiss the case; (3) the Board can defer action on the case until certain matters have been arbitrated and then limit subsequent action to matters outside the arbitrator's decision.

The Board has not clearly established what action should be taken where the collective-bargaining contract contains an arbitration clause. One member of the Board has attempted to articulate a set of criteria to follow where there is a conflict between Board remedies and collective-bargaining contract arbitration procedure. In his concurring opinion to Cloverleaf Division of Adams Dairy, Member Brown agreed with the majority that there had been a violation of sections 8(a)(1) and (5) of the NLRA; however, he did not agree with the majority reasoning. He said "... a significant number of recent cases have dealt with the Board's function under the Act where a dispute arises which may be both a violation of the Act and an arguable breach of the collective-bargaining agreement subject to arbitration." Stressing the need for criteria in this area to determine when the Board should pass on the unfair labor practice charges or when it should step aside for arbitration, Member Brown stated that "... if after an [arbitration] award has been rendered there is a request for Board action, our consideration of the case would be controlled by Spielberg." He then went on to formulate his criteria for situations where the Board should defer to arbitration:


The arbitrator is not required to decide procedural questions in the first instance before hearing the substantive evidence concerning the grievance. Rochester Telephone Corp. v. Communications Workers of America, 340 F.2d 237 (2d Cir. 1965).

In light of these cases, it is doubtful that the employer's contention that the union is barred from presenting the grievance would be sustained where the Board had specifically deferred to arbitration.

15. Id. at 1420.
16. Id. at 1423. For the Board's position in Spielberg Mfg. Co., see note 4 supra.
Wherever the record established that the parties to the dispute as part of their collective-bargaining relationship, consciously, by contract, bargaining history, or past practice have waived statutory rights, bargained such rights away, or bargained to agreement with respect to the subject matter of the dispute, I believe we should leave to the arbitrator the question of the nature of their bargain and the respective rights and obligations of each party.

Where, however, 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, we should not defer action on the unfair labor practice case even though the dispute may be generally subject to the arbitration provisions of the collective-bargaining agreement.17

Member Brown would require more than the mere existence of an arbitration clause in the collective-bargaining contract which covers the subject matter of the unilateral action before the Board would refuse to entertain the action because the "... existence of an arbitration clause alone might result in the denial or delay in the exercise of all statutory rights not guaranteed by the contract."18 Member Brown's criteria are noteworthy if for no other reason than to show at least one member of the Board's concern to formulate guidelines in a rather nebulous area of labor law.

Abstractly, Member Brown's position reflects a certain logic. If the parties bargain to agreement on a topic and that later becomes the subject of a dispute, the only remaining question is what that agreement was. The employer should not be required to rebargain the matter. Also, if the parties expressly waive rights to bargain over topics why should the Board allow one party to draw back from his agreement?19

It should be indicated, however, that the present posture of Board decisions does not give Member Brown's criteria much room to operate. First, no case has been found where the Board decided there was a waiver of the duty to bargain. Even in cases where there was an express clause stating that the parties waived their rights to require collective bargaining the Board has found that there was no waiver of the duty to bar-

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17. Ibid.
18. Ibid.
19. There is no practical difference between waiving the right to require collective bargaining and the bargaining away of the right to require collective bargaining. Member Brown made the distinction when he posed his criteria, but in this discussion they will be treated as synonymous.
gain. Given the Board’s position on waivers of the duty to bargain, this part of Member Brown’s criteria is practically meaningless. Second, rarely do the parties to a collective-bargaining contract come to any real agreement as to the meaning of the broad general clauses contained in the agreement. Member Brown’s criteria appear to require a clear indication of agreement from the history of the labor-management bargaining relationship. However, in most cases coming before the Board one will have difficulty finding such a clear agreement between the parties. As a result, under Member Brown’s text, the Board will entertain the action with the result that no arbitration will occur.

It has long been the position of the Board that where the parties have bargained to complete agreement and the collective-bargaining contract clearly reflects that such an agreement has been reached allowing a specific unilateral action, there is no violation of section 8(a)(5) even if the unilateral action is a mandatory subject of collective bargaining. In this situation it is not even necessary for the employer to argue the arbitration question because if the action is clearly allowed the arbitrator will undoubtedly come to the same result as the Board on the question, and the union will probably not attempt to arbitrate the question. Although it can be argued that the arbitrator may not agree with the Board’s interpretation, case analysis indicates that the Board is a great deal more strict in finding allowable unilateral action than most arbitrators.

20. In C & C Plywood Corp., 148 N.L.R.B. 414 (1964), rev’d, 351 F.2d 224 (9th Cir. 1965), cert. granted, 34 U.S.L. Week 3356 (U.S. April 19, 1966) the Board either did not know the waiver of the duty to bargain clause was in the contract or ignored this fact completely because the clause is not mentioned in the Board’s decision. The Board merely said it would not infer a waiver of the duty to bargain. The waiver of the duty to bargain clause is quoted and discussed by the Federal Court when this case was appealed. N.L.R.B. v. C & C Plywood Corp., 351 F.2d 223 (9th Cir. 1965), cert. granted, 34 U.S.L. Week 3356 (U.S. April 19, 1966).

Even in cases where the Board has taken cognizance of the waiver of the duty to bargain clause, the Board has not had difficulty rejecting the contention that the union waived its right to require collective bargaining. In Square D Co., 142 N.L.R.B. 332 (1963), rev’d, 332 F.2d 360 (9th Cir. 1964) the Board affirmed the Trial Examiner’s reasoning that a general waiver of the duty to bargain clause was not sufficient to waive rights over a specific grievance. The waiver clause must specifically refer to that type of grievance before there is “clear, unmistakable, and unequivocal language which the Board will recognize as a waiver.” Id. at 336.

21. “The pressure to reach agreement is so great that the parties are often willing to contract although each knows that the other places a different meaning upon the words and they share only the common intent to postpone the issue and take a gamble upon an arbitrator’s ruling if decision is required.” Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1491 (1958-59).

22. See, Ador Corp., 150 N.L.R.B. No. 161 (1965), which rearticulates this position.

23. In General Motors Corp., 149 N.L.R.B. No. 40 (1964), the employer did not argue the question of arbitration of the dispute apparently because the language of the collective-bargaining contract was so clear that there was little doubt that the Board would dismiss the charges.
tors. Therefore, this portion of Member Brown’s criteria, where applicable, is not an aid to the arbitration procedure under the collective-bargaining contract because the only cases which will be arbitrated are those where the action is clearly allowed and there is no real grievance to be arbitrated.

Where the collective-bargaining contract lacked any language which could reasonably be construed as allowing the unilateral action in question, or where the employer indicated during negotiation that he does not interpret the collective-bargaining contract as allowing the unilateral action subsequently taken, the argument that the Board should defer to arbitration has been rejected by the Board. In these situations the arbitration argument by the employer is quite obviously an attempt to avoid a clear violation of section 8(a)(5).

The difficult area is where the collective-bargaining contract contains language which could be construed to allow the unilateral action by the employer, although the contract does not clearly or specifically allow the unilateral action. It is in this hazy zone of contract interpretation that the Board has not articulated a clear set of criteria to determine where it will act or step aside to allow arbitration.

Case analysis indicates that in this hazy zone where there is no clear case one way or the other, the Board looks to one or more factors which tilt the scales either toward immediate Board action or toward deferring to arbitration. The most complete list of factors is found in American Oil Co., where the Board adopted the Trial Examiner’s intermediate report which listed several factors which influenced his decision. These factors were:

(1) . . . the evidence of the collective bargaining history between the parties [the parties had had an amicable relationship]; (2) the economic considerations which motivated the Respondent’s [employer’s] decision; (3) the evidence of the employer’s past practices, and the union’s knowledge, concerning the use of common carriers; (4) the absence of any anti-union or other discriminatory motive [emphasis added]; (5) the lack of any evidence of ‘significant detriment’ to the unit drivers of the use of common carriers; (6) the absence of any actual change in the terms and conditions of employment of the unit drivers, as a result of Respondent’s unilateral action; (7) the opportunity afforded the union during negotiations of the various con-

26. 155 N.L.R.B. No. 64 (1965).
tracts to bargain about the use of common carriers; (8) and finally, Respondent's willingness, announced to the union before the close of the hearing, to discuss any matters wished to negotiate. ... 27

One additional factor not included in this list, but which is often pointed out by the Board, is the employer's past record concerning arbitration of similar or identical grievances. Where the employer has previously asserted before the arbitrator that such a grievance is not an arbitrable issue or where the employer has attempted to frustrate the whole arbitration process by refusing to process grievances, the Board is hostile to the argument that the arbitrator should now be allowed to decide a similar grievance. 28

Of the eight factors presented by this case, it should be noted that four of them, (1), (2), (4) and (8), concern the employer's relationship with the union. All four of these factors show a good and amicable working relationship with the union without any intention to undermine the union's position. This consideration is also present where the employer has not tried to frustrate the arbitration process by refusing to process grievances or by questioning jurisdiction.

An examination of all the cases found embracing the problem situation where the Board found there was no 8(a)(5) violation or where the Board deferred to allow arbitration, indicates that the Board looks to, makes mention of, and is swayed by the actions of the employer toward the union and the existence of an amicable relationship between the parties. Where the Board did not believe the employer was consciously carrying out the campaign to undermine the union, 29 where the Board could find no "bad faith" in the employer's interpretation of the contract and belief the action was allowed, 30 where there was a reasonable interpretation with no anti-union animus, 31 or where the employer had a good bargaining record with the union and had not violated any of the rights guaranteed in section 7 of the NLRA, 32 the Board has accepted the employer's defense that the dispute is one which should be arbitrated rather than decided by the Board.

27. Ibid.
USE OF AN ARBITRATION CLAUSE

However, in the cases where an 8(a)(5) violation has been found, there was not always some anti-union action on the part of the employer pointed out by the Board, but in most of the cases there were anti-union actions. For example, where the employer had refused even to discuss the action either before or after it was carried out, where the employer had asserted during negotiations that the collective-bargaining contract prohibited the action taken, or where the employer had previously refused to process grievances similar to the one before the Board, the Board has rejected the employer's argument that the Board should properly step aside to allow the matter to be arbitrated.

Of the cases found within the problem situation where the Board decided the employer had violated section 8(a)(5), in only one did the Board not mention some anti-union action on the part of the employer. However, the nature of the unilateral change in this case was of such a nature to be a "significant detriment" to the employees who had their wages reduced, and consequently there was an actual change in the terms and conditions of employment.

Presence of one or more of the factors is not always fatal to the employer's defense. In *Leroy Machine Co., Inc.*, the employer had acted unilaterally in two separate areas. One of the unilateral actions was a major change of the terms and conditions of employment, and the employer had tried previously to frustrate the arbitration process by refusing to arbitrate this type of grievance. It is not surprising that the Board found the employer had violated section 8(a)(5) and issued a bargaining order over that unilateral action.

However, with respect to the other unilateral action, the employer had never tried to frustrate the arbitration process and the unilateral action was not a major change in the terms and conditions of employment.

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34. See, Cloverleaf Division of Adams Dairy, 147 N.L.R.B. 1410 (1964).
37. This is one of the considerations mentioned in American Oil Co., 155 N.L.R.B. No. 64 (1965). Probably, the Board's reasoning is that where the grievance causes a "significant detriment" to the employees or a major change in the conditions of employment, it is better to force the parties to bargain to complete agreement than allow the arbitrator to interpret vague or ambiguous language of the contract with the result of possible irritation or conflict caused by his decision.
38. 147 N.L.R.B. 1431 (1964).
39. The first charge before the Board was that the employer had unilaterally acted to set new rates of pay for new jobs without consulting the union. Leroy Machine Co., Inc, 147 N.L.R.B. 1431 (1964).
40. The second charge before the Board was that the employer had violated § 8(a)(5) when without first bargaining with the union he required certain employees with bad work records to take physical examinations. *Leroy Machine Co., Inc.*, 147 N.L.R.B. 1431 (1964).
ment. Even though the Board found an 8(a) (5) violation with respect to the first action, the Board decided that the broad management prerogative clause gave the employer the right to carry out the second action without first bargaining over the action.41

These factors are only significant in the unclear cases before the Board where the language in the collective-bargaining contract could possibly be construed to give the employer the right to carry out the unilateral action. It is in this hazy zone, between the obvious cases, that the Board apparently struggles to find a legal argument upon which to build its case after being subjectively swayed one way or the other. Without placing these cases within this subjective framework of factors, the Board's decisions appear confusing, contradictory, and perhaps arbitrary.

IV. Recent Federal Cases

Two cases have recently been decided by the Ninth Circuit Court of Appeals which reflect a new approach to the problem of whether the Board can properly act where the alleged unfair labor practice is dependent on the proper interpretation of the collective-bargaining contract.

In the first case, *Square D Co. v. NLRB*,42 the employer and the union had a collective-bargaining contract which contained a grievance procedure ending with binding arbitration. The contract also contained a waiver of the duty to bargain clause43 and a management prerogative clause44 which gave the employer the unlimited "right of management" except where restricted in the agreement. A dispute arose when the employer unilaterally started a "group incentive plan" and refused to bargain over the plan or supply the union with information about the plan.45

41. The collective-bargaining contract contained a management prerogative clause which gave management the right to "... determine the qualifications of employees." The Board construed this clause to allow the employer to require the employees to take physical examinations without bargaining with the union. Member Brown agreed with the majority that the Board should not hear the case; however, he would stay action until the arbitrator had decided the correct interpretation of the collective-bargaining contract and then act accordingly rather than dismissing the case entirely. Member Fanning dissented arguing that such language did not show a clear and unequivocal contracting away rights in that area. With in interpretation such as this, it is questionable if Member Fanning would ever find a unilateral action allowed by the collective-bargaining contract. *Leroy Machine Co., Inc.*, 147 N.L.R.B. 1431 (1964).

42. 332 F.2d 360 (9th Cir. 1964).

43. See note 9 supra.

44. See note 8 supra.

45. It should be noted that although there was unilateral action involved in this case, the main issue before the Board was the union's right to acquire information
The union filed 8(a)(5) and (1) charges, and the Board decided against the employer and ordered the employer to bargain. 46

On appeal, the employer argued that an arbitrator must first determine if the union had by the terms of the contract waived its rights to require collective bargaining with respect to establishment of the group incentive plan before the Board could determine if the employer had committed a violation of section 8(a)(5) by refusing to supply the union with the requested information. The Board argued that it has sole jurisdiction on all unfair labor practices by statutory decree 47 and the Steelworkers Trilogy did not lessen the Board’s power. The Board pointed out that since the Trilogy only limited federal courts in their interpretation and review of arbitration decisions, they had no application to the Board’s position in the case at bar. The Board also cited Timkin Roller Bearing Co. v. NLRB 48 in support of their position.

The Court of Appeals reversed the Board and refused to enforce the Board’s order. Timkin was distinguished because in that case there was no express waiver of the duty to bargain clause in the collective-bargaining contract. The court recognized the Board’s pre-emptive power in cases where the rights contained in the collective-bargaining contract and the statutory rights in the NLRA were the same, but the court pointed out that the “. . . existence of an unfair labor practice . . . is dependent pertinent to the unilateral action so the union will be better able to present a case when the grievance involving the unilateral action is arbitrated. This should be distinguished from the problem involved in this note where the dispute before the Board is whether the unilateral action is allowed.

The question of Board action to require the employer to supply information when there is an arbitration clause in the collective-bargaining contract is beyond the scope of this note. See generally, Hercules Motor Corp., 136 N.L.R.B. 1648 (1962); and Sinclair Refining Co., 145 N.L.R.B. 732 (1963).

46. Square D Co., 142 N.L.R.B. 332 (1963), rev’d, 332 F.2d 360 (9th Cir. 1964).
47. The National Labor Relations Act (Wagner Act) § 10(a), 49 Stat. 453 (1935), 29 U.S.C. § 160(a) (1964). “The Board is empowered, as hereinafter provided, 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. . . .”
48. 325 F.2d 746 (6th Cir. 1963), cert. denied, 376 U.S. 971 (1964). In this case there was a dispute concerning a wage rate change. The union filed grievances concerning the change and subsequently asked for “wage data” concerning the methods used by the employer to set the new wage rates. The employer refused to supply the data and the union filed 8(a)(5) charges with the Board. There was no dispute that the employer could make wage rate changes in certain “circumstances” and the question in the grievance was whether these “circumstances” were present. The question before the Board was the same question in Square D Co., that is, whether the union could demand and acquire information to be used during the arbitration of the grievance. The employer argued that there was a waiver of the duty to bargain in this case because the union had failed to gain an inclusion of a clause concerning wage data in the collective contract. The court upheld the Board saying there must be a “clear and unmistakable” relinquishment of the right to require the employer to supply the information.
upon the resolution of a preliminary dispute involving only the interpretation of the contract.”

Therefore the Board could not properly decide the question until the question of whether the union had waived its rights to require collective bargaining had been arbitrated.

Shortly after deciding *Square D, C & C Plywood Corp.* was appealed to the Ninth Circuit Court of Appeals. The employer again asserted that the unilateral action was taken in a good-faith belief that it was allowed by the collective-bargaining contract, and even if the collective-bargaining contract did not expressly permit the action the only issue presented to the Board was the proper interpretation of the collective-bargaining contract. Therefore the employer contended the matter was not properly before the Board on an unfair labor practice charge.

The court noted that the Board was compelled to construe the collective-bargaining contract. Therefore, the Board’s holding that the charges did not arise out of the interpretation of the collective-bargaining contract was rejected. The court thought it undeniable that the controversy before the Board was the correct interpretation of the management prerogative clause. Since interpretation of the management prerogative clause was necessary to establish an unfair labor practice, the charges before the Board did not turn “entirely” on the provisions of the NLRA. “[T]he very existence of the alleged unfair labor practice is ‘dependent upon the resolution of a preliminary dispute involving only the interpretation of the contract.’”

In *Square D* the court pointed to the waiver of the duty to bargain clause as the clause which had to be interpreted by the arbitrator before the Board could properly determine if there was an unfair labor practice. In this case, however, the court did not address itself to the waiver of the duty to bargain clause, but decided the management prerogative clause must be interpreted before the Board could properly determine if there

52. “We note, moreover, that the rational of the Board majority in construing the contract as it did was as unique as it was circuitous. The course of reasoning was that the provisions of the collective-bargaining agreement are ‘so contrary to labor relations experience’ that the union should never have executed such a contract; and since the provisions in question should never have been agreed to by the union, it must be presumed that the union did not intend them, since the union’s ‘prompt protest against Respondent’s posting of the new wage schedule . . . belies any such intent.’” N.L.R.B. v. C & C Plywood Corp., 351 F.2d 224, 227 (9th Cir. 1965), cert. granted, 34 U.S.L. WEEK 3356 (U.S. April 19, 1966).
53. N.L.R.B. v. C & C Plywood Corp., 351 F.2d 224, 227 (9th Cir. 1965).
had been an unfair labor practice. Therefore, it is possible that the Ninth Circuit would not require a waiver of the duty to bargain clause to be contained in the collective-bargaining contract to refuse to enforce a Board order where it was necessary to interpret the collective-bargaining contract before an unfair labor practice could be found.

Although the Board's reasoning in this case was tenuous, it may be that the Board's result was correct. There was no arbitration clause in the collective-bargaining contract in this case. Therefore, the only method available to the union to acquire an interpretation of the collective-bargaining contract was by a section 301(a) suit in federal court. The Steelworkers Trilogy established the policy that arbitration is to be preferred over federal court interpretation of collective-bargaining contracts. Square D was a continuation of that policy to situations where the question was between Board interpretation and arbitration interpretation. C & C Plywood, on the other hand, introduces the policy that federal court interpretation is to be preferred over Board interpretation. The court pointed to the Steelworkers Trilogy in Square D in support of the contention that the rights under the collective-bargaining contract should first be arbitrated. Therefore, Square D is of questionable support of C & C Plywood where there was no arbitration clause.

Assuming Square D is not properly used to support the court's decision, the question remains if C & C Plywood presents a persuasive argument. Since there was no arbitration clause in the collective-bargaining contract there was no system of self-government established by the parties. The problem was therefore not one of trying to maintain the parties' working labor-management relationship. Moreover, the employer's refusal to follow the Board's order to cease and desist from the unilateral action resulting in a petition for enforcement by the Board indicated a poor labor-management relationship between the parties. Such action also shows a lack of good faith on the part of the employer.

In such a situation, where the collective-bargaining contract is capable of several different interpretations, it seems more persuasive that the federal policy toward labor relations would be furthered by requiring the parties to meet over a collective bargaining table to resolve their differences in a mutually acceptable manner rather than forcing a possible literal interpretation by a judge who unlike an arbitrator views the case without the benefit of the full industrial context.

V. THE FEDERAL LOGIC AND ARGUMENTS AGAINST THE PRESENT TREND IN FAVOR OF ARBITRATION

In 1960 the Supreme Court handed down decisions in three closely
related cases known as the *Steelworkers Trilogy*. These three cases continue to have profound effect on the judicial approach to labor arbitration, and in their broadest sense they advance the policy that labor arbitration enjoys a prominent position in labor law.

There has been a great deal of written discussion of the *Trilogy* analyzing the substance of the cases and the possible long range effects, but basically the substantive doctrines of the cases can be boiled down to the following:

1. The existence of a valid agreement to arbitrate, and the arbitribility of a specific grievance sought to be arbitrated under such an agreement, are questions for the courts ultimately to decide (if such an issue is presented for judicial determination) unless the parties have expressly given an arbitrator the authority to make a binding determination of such matters.

2. A court should hold a grievance non-arbitrable under a valid agreement to use arbitration as the terminal point in the grievance procedure only if the parties have clearly indicated their intention to exclude the subject matter of the grievance from the arbitration process, either by expressly so stating in the arbitration clause or by otherwise clearly and unambiguously indicating such intention.

3. Evidence of intention to exclude a claim from the arbitration process should not be found in a determination that the labor agreement could not properly be interpreted in such a manner as to sustain the grievance on its merits, for this is a task assigned by the parties to the arbitrator, not the courts.

4. An award should not be set aside as beyond the authority conferred upon the arbitrator, either because of claimed error in interpretation of the agreement or because of alleged lack of authority to provide a particular remedy, where the arbitral decision was, or might have been the result of the arbitrator's interpretation of the agreement; if, however, it was based not on the contract but on an obligation found to have been imposed by law, the award should be set aside unless the parties have expressly authorized the arbitrator to dispose of this as well as any contract issue.


Because the Steelworkers Trilogy was the first major attempt by the Supreme Court to place arbitration in a favored judicial position, the Court went to lengths to point out the reasons for its decision. The Court said that collective-bargaining contracts are not analogous to ordinary contracts since they reflect an industrial context in which they were made. The arbitrator, who is aware of this industrial context, is better able to interpret the collective-bargaining contract than a judge isolated from the operation and history of the particular employer-union relationship. It seems obvious that the Court feared a literal reading of collective-bargaining contracts would not reflect the true meaning of the collective agreement in a particular employer-union context.

The Court desired to push toward a method of settling labor management grievances which would achieve the congressional goal of industrial peace. This goal, the Court decided, could best be achieved by letting the parties settle the grievances by a procedure established by the parties themselves. By enforcing arbitration awards without wide latitude in court review the parties would accept the arbitrator’s decision more readily thus promoting a form of self-government within the industry.

This system of self-government is desirable in the Court’s opinion because the parties can work out rules and solutions which are acceptable to both, thereby reducing to a minimum economic warfare and the resulting economic waste. The ideal sought is one of labor and management working together with minimum friction and maximum benefit to both.

The Court also pointed out that arbitration is itself a form of col-

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56. The Supreme Court quoted from Walker, Life in the Automatic Factory, 36 Harv. Bus. Rev. 111, 117, which said in part: “Persons unfamiliar with mills and factories—farmers or professors, for example—often remark upon visiting them that they seem like another world. This is particularly true if, as in the steel industry, both tradition and technology have strongly and uniquely molded the ways men think and act when at work . . . a miniature society . . . . He discovers that the society of which he only gradually becomes a part has of course a formal government of its own—the rules which management and the union have laid down—but that it also differs from or parallels the world outside in social classes, folklore, ritual, and traditions.” United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 596 (1960).

57. The Supreme Court cited Cox, Current Problems in the Law of Grievance Arbitration, 30 Rocky Mt. L. Rev. 247 (1957-58), in which Professor Cox gives his reasons why arbitration decisions should not be subject to court review. He states that collective agreements are not like other contracts, ‘their meaning is governed by the ‘unstated assumptions’ and the ‘vast store of amorphous methods, attitudes, fears and problems.’ In statutory interpretation the plain meaning rule has yielded much of its rigidity to a willingness to project the policy upon the specific occasion . . . yet judges who are not familiar with industrial relations and who have still less chance of familiarizing with the background of the contract, if they intrude into merits, are driven to reliance upon the words.” Id. at 262.
lective bargaining, and promoting collective bargaining is one of the
goals of the National Labor Relations Act.58

Because the goal sought is continuing industrial peace and stability
with the resulting end of economic warfare and economic waste,59 the
Supreme Court reasoned that the best method to achieve such a goal is
for the parties themselves to create a workable system of self-government
whereby they can resolve their differences in their own mutually agree-
able manner.60 The logic of the federal courts appears to place this goal
as their first premise.

The second premise in the federal logic that evolves from the Steel-
workers Trilogy is that arbitration is the best method of achieving this
system of self-government which will eventually result in industrial peace
and stability.61 The Court believes “. . . arbitration is a stabilizing in-
fluence only as it serves as a vehicle for handling any and all disputes that
arise under the agreement.”62 With industrial peace as the goal, the Su-
preme Court sees the choice as “. . . between having that relationship
governed by an agreed-upon rule of law or leaving each and every matter
subject to a temporary resolution dependent solely upon the relative
strength, at any given moment, of the contending forces.”63 Therefore
the Court reaches the result that arbitration of all grievances arising under
the collective-bargaining contract is the best method of achieving indus-
trial peace.

With this broad language in mind the logical conclusion resulting
from the two premises is that arbitration should be strengthened and en-
couraged in all situations. Even in the problem area posed by this note,
arbitration is to be preferred under the Supreme Court’s reasoning over

58. “For arbitration of labor disputes under collective bargaining agreements is
part and parcel of the collective bargaining process itself.” United Steelworkers of
59. “The present federal policy is to promote industrial stabilization through the
collective agreement.” United Steelworkers of America v. Warrior and Gulf Navigation
“A collective bargaining agreement is an effort to erect a system of industrial
self-government.” Id. at 580.
60. “A major factor in achieving industrial peace is the inclusion of a provision
for arbitration of grievances in the collective bargaining agreement.” Id. at 578.
61. “But the grievance machinery under a collective bargaining agreement is at the
very heart of the system of industrial self-government. Arbitration is the means
of solving the unforeseeable by molding a system of private law for all the problems
which may arise and to provide for their solution in a way which will generally accord
with the variant needs and desires of the parties. The processing of disputes through
the grievance machinery is actually a vehicle by which meaning and content are given
to the collective bargaining agreement.” (Emphasis added.) Id. at 581.
63. United Steelworkers of America v. Warrior and Gulf Navigation Co., 363
U.S. 574, 580 (1960).
USE OF AN ARBITRATION CLAUSE

Board action, the fear being that the Board's decision may disrupt the working system of self-government and thereby result in a disruption of industrial peace.

It would appear from the trend of recent cases that the Supreme Court may be laying the foundation for a future decision that would exclude the Board from acting on matters encompassed in the collective contract and require the Board to stay action on any alleged unfair labor practices until the rights of the parties under the agreement have been decided by arbitration. Such decisions as *Square D* and *C & C Plywood* show a significant trend by the lower federal courts in this direction.

To evaluate the desirability of the present trend of the law and the possible future conclusion in this area one must critically analyze the premises on which it is based. There is little to say against the first premise of the Supreme Court that industrial peace can best be achieved by a workable system of self-government.

It is the second premise that arbitration of "any and all" disputes which arise under the agreement is the "only" way arbitration can be made a stabilizing influence in labor relations which causes problems. Such a premise is weak, if for no other reason, because of its absolute terms. In no area of law can only one solution be the answer to all problems. The very heart and strength of our legal system is the broad concept that the rule that should be applied is the rule which best affords a result consistent with the reason behind the rule.

It is submitted that arbitration, while it does to a great degree further the ideal of a workable system of self-government, is not to be preferred in all cases where grievances arise under the collective-bargaining contract.

If arbitration is to further a workable system of self-government two requirements are necessary. First, the parties must want to arbit-

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64. Subsequent Supreme Court decisions have followed and extended the Court's policy toward arbitration. In Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962), the Court in a cursory fashion using a footnote to the decision disposed of the question of pre-emption by the Board where a party was trying to enforce under § 301(a) an arbitration clause in a collective-bargaining contract over a grievance that was arguably an unfair labor practice.

Lucas Flour was subsequently strengthened in Smith v. Evening News Ass'n, 371 U.S. 195 (1963), where the court held that federal court jurisdiction was not displaced even if the alleged grievance was "concededly" an unfair labor practice. The Supreme Court refused to pass on the question of jurisdiction where the Board and the arbitrator simultaneously rendered conflicting decisions on the same grievance and merely stated "... we shall face those cases when they arise." *Id.* at 198.

Another area, unit representation, which had formerly been a sole function of the Board has been dualized in Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964), where the Court held that the union could force arbitration of the representation question under § 301(a) of the L.M.R.A. However, in this case the Court noted that: "Should the Board disagree with the arbitrator ... the Board's ruling would of course take precedence." *Id.* at 272.
trate the grievance at least to the point where they will accept the arbitrator's decision. Second, there must be a competent arbitrator who has the confidence of both parties. This is not to say that the parties must be in perfect harmony before arbitration will successfully implement self-government, but it is manifest that arbitration cannot implement or maintain a system of industrial self-government where the arbitrator's decision will cause further disputes and irritation. As Dean Shulman stated, a wrong decision "by an arbitrator may cause more harm by disturbing the parties continuing relationship than by the injustice in the particular case."

As a result of the Steelworkers Trilogy an arbitrator's decision is harder to upset than either a court or Board decision. Both the courts' and the Board's decisions are subject to review on appeal. However, the Steelworkers Trilogy limits the area of court review to the question of arbitribility where the grievance is under the contract. Where the arbitrator through incompetence or through honest error makes the wrong decision or one which will act to disrupt the existing system of self-government there is practically no way to reverse this decision if the grievance was one which could properly be arbitrated under the agreement.

The scope of the dispute between the parties will significantly determine the long range effect of an arbitrator's decision. If a dispute arises over some unilateral action by the employer which is of such a nature or magnitude that it will significantly affect the union's position, a decision by the arbitrator allowing continuation of the action cannot help but

65. "The important question is not whether the parties agree with the award but rather whether they accept it, not resentfully, but cordially and willingly. . . . But general acceptance and satisfaction is an attainable ideal. Its attainment depends upon the parties' seriousness of purpose to make their system of self-government work, and their confidence in the arbitrator." Shulman, op. cit. supra note 6, at 1019.

66. "That confidence will ensue if the arbitrator's work inspires the feeling that he has integrity, independence, and courage so that he is not susceptible to pressure, blandishment, or threat of economic loss; that he is intelligent enough to comprehend the parties' contentions and empathetic enough to understand their significance to them; that he is not easily hoodwinked by bluff or histrionics; that he makes earnest effort to inform himself fully and does not go off half-cocked; and that his final judgment is the product of deliberation and reason so applied on the basis of the standards and the authority which they entrust to him." Ibid.

The " . . . autonomous rule of law and reason . . . relies upon wholehearted acceptance by the parties and requires a congenial and adequate arbitrator, . . . who is neither timid nor rash and feels a responsibility for the success of the system." Id. at 1023-24.

67. The parties may " . . . differ with one another and they may differ with the arbitrator. But disagreement with the arbitrator by one or the other of the parties is normal and expectable and of itself, not at all unhealthy." Id. at 1018.

68. "The interpretation no matter how right in the abstract, is self-defeating and harmful to both sides if its day to day application provides further occasion for controversy and irritation." Ibid.

69. Ibid.
cause future friction and irritation between the parties. If the whole issue sought to be arbitrated is in the hazy zone of collective-bargaining contract interpretation, and if an adverse result to one or both of the parties will act to tear down the system of self-government of the parties, it would seem more reasonable to require the parties to re-enter negotiation until a mutual solution to the question could be reached. If one accepts the argument that arbitration is not the best method of maintaining a workable system of industrial self-government in all cases where a grievance arises under the collective-bargaining contract, one is left with the problem of formulating a set of criteria to determine in what situations the Board should exercise its jurisdiction instead of first allowing arbitration of the grievance.

The problem situation toward which this note is directed unlike other grievances which could arise under the contract and could also arguably be violations of sections 8(a)(2), (3) or (4), assumes the only violation which could be found would be sections 8(a)(5) and (1). This of course means the remedy enforced by the Board would be an order to bargain collectively. The choice therefore is between allowing arbitration of the grievance with possible subsequent Board action on any matter not covered by the arbitrator’s decision, or immediate Board action to force collective bargaining without arbitration.

It is submitted that the criteria used by the Board in their decision of whether to act or step aside for arbitration, and the criteria which the courts should use to determine whether to enforce the Board’s order to bargain collectively should be directed toward the determination of which action will best promote and maintain the parties’ working system of self-government. Since a workable system of self-government is the eventual goal ascribed to, it follows that any judgment should be based on determining which tribunal will best affectuate this goal in the particular case.

The following criteria are submitted as a possible set that should be used by the Board when deciding between acting or refusing to act so that the parties can arbitrate the grievance. When the contract shows the

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70. "... When the system works fairly well, its value is great. When their autonomous system breaks down, might not the parties better be left to the usual methods for adjustment of labor disputes rather than to court actions on the contract or on the arbitration award?" Id. at 1024.

See also, Cox, op. cit. supra note 21, at 1491. "Once a contract is executed the pressure to maintain it is so great that the arbitrator can hardly acknowledge that since there was no meeting of the minds upon the question before him, there was no contract, and therefore the parties should go back and negotiate a solution."

71. These criteria assume that there is language in the contract which could be interpreted either for the employer or for the union and the main issue is who should make this determination. In the obvious cases where the contractual language is capable of only one interpretation, the contractual language should control. If the contract
parties have previously bargained over an arbitrable grievance arising under the contract resulting from the employer's unilateral action and subsequent refusal to bargain, and where it appears from the facts and circumstances of the case that the parties have a system of self-govern ment which has worked effectively in the past and has a substantial chance of continuing to succeed in the future if the parties are allowed to arbitrate the grievance, and the grievance itself is not one of such magnitude to the position of the other party that an adverse decision by the arbitrator will act to disrupt the system, the Board should step aside and allow the parties to settle the dispute in the manner provided in their collective-bargaining contract.

However, where it appears the parties have not previously bargained over a grievance resulting from the employer's unilateral action, or the parties have not established a workable system of self-government, or their system of self-government has broken down, or a decision by the arbitrator will cause irritation or undermine one of the parties' positions and thereby tear down the existing system of self-government, there is no reason for the Board to step aside and a more desirable result will be achieved by Board action, that is, forcing the parties to bargain collectively until a mutually acceptable result is reached.

Although the Board has not formally articulated such a position, it is thought that in most cases the criteria suggested above closely approximate the position taken by the Board. As was pointed out above, the factors used by the Board in their subjective analysis go directly to the existing relationship between the employer and the union. There is no reason for the Board to defer to arbitration where the employer has previously tried to frustrate the arbitration process, or where the employer is carrying on a campaign to undermine the union, or where there will be a "significant detriment" to the employees because of a substantial change in the terms and conditions of employment. In all of these situations where there is an arguable case that the unilateral action was allowed by the collective-bargaining contract, the Board's deference to arbitration rather than requiring collective bargaining will in all probability result in a substantial detriment to a working system of self-government or an amicable relationship between the parties.

clearly allows the action then the parties have already bargained to agreement and the Board should dismiss the charges. If the contract clearly does not allow the action then the Board should find an 8(a)(5) violation and issue a collective bargaining order.