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THE LAWYER'S FORUM

ARBITRATION IN THE SETTLEMENT OF JURISDICTIONAL DISPUTES

LOUIS A. CAPPADONA*

INTRODUCTION

On March 10, 1970, an article entitled *The Problem: Deciding Who "Owns" The Job* by Lindley H. Clark, Jr., appeared in the Wall Street Journal. Mr. Clark referred to the refusal of the Sheet Metal Workers Union, the smallest of the four shopcraft unions involved in a recent railroad shopcraft dispute, to accept the Railroad's offer although the other three major unions had accepted it. The refusal was based on the Sheet Metal Workers' fear of a management clause which entitled the Railroads to assign to a member of another union, work usually performed by Sheet Metal Workers in the event that a sheet metal worker was not available to do the job within a reasonable time. Mr. Clark observed:

> The continuing railroad shopcraft dispute is only one of the more conspicuous examples of the troubles that can result as workers try to assert permanent property rights to particular jobs. As usually happens in these jurisdictional arguments, the persons threatened with immediate injury are innocent bystanders, in this case, the general public.

While this writer does not concur with all the conclusions reached by Mr. Clark, nevertheless, one must agree that the "jurisdictional dispute" presents a serious type of labor dispute which threatens the general stability of the labor-management relationship today.

The problem has long been discussed, and many solutions have been proffered. Congress has attempted to deal with it via the Taft Hartley Act. The courts, including the Supreme Court of the United States, have handed down abundant law on the issue and, likewise, the National Labor Relations Board makes determinations in such disputes on a regular basis. Moreover, the use of arbitration has also assumed a significant role in attempting to alleviate the problems presented by jurisdictional disputes.

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DEFINITION

At the outset, it is necessary to identify and to clearly delineate just what is encompassed by the term "jurisdictional dispute." The Supreme Court defined it to be "a dispute between two or more groups of employees over which is entitled to do certain work for an employer."[1] Mr. Clark, in the aforementioned article, sets out the classic example of a jurisdictional dispute.

> . . . Involved in it,[2] among others, were two Oregon stevedore companies and a pair of unions, the International Longshoremen and Warehousemen and the International Union of Operating Engineers.
>
> The stevedore companies were engaged in loading logs aboard ships or barges in the port of Astoria, Ore. Astoria had been a depressed port for years, with relatively few jobs for longshoremen. Finally business began picking up, largely because of a Japanese demand for logs. To expedite loading, the stevedore companies leased floating cranes complete with operators, who were members of the Engineers.
>
> After a time, however, the Longshoremen's Union insisted that the cranes must be operated by its members. After all, the union argued, the cranes were loading cargo, which was 'traditionally' its work, and the union had a binding contract with the Pacific Maritime Association, the employer group to which both stevedore companies belonged.
>
> The stevedore companies went along with the Longshoremen, possibly because there were more of them around. The union, moreover, had used its muscle by striking the port of Astoria on the issue.
>
> One problem was that the longshoremen simply did not know how to operate the floating cranes. Several months after the work had been assigned to them, some of the cranes still were not back in operation. The pace of the port, and the total work available, was reduced while the longshoremen took training courses on crane operation. . . .[3]

While the foregoing illustrates the "classic" dispute, it must be noted that hybrid situations arise which do not fit as neatly into this pattern. The practitioner must, therefore, scrutinize the facts of a case to determine whether, in fact, he is presented with a jurisdictional dispute.

In *Safeway*[4] the Employer assigned work which had been done by

[1] NLRB v. Radio Engineers Union, 364 U.S. 573, 579, 81 S. Ct. 330, 334, 5 L. Ed.2d 302, 307 (1961).
[2] LLWU, Local 50, 181 N.L.R.B. No. 51 (1970).
[3] Wall Street Journal of March 10, 1970.
[4] Local 107 Teamsters Union (Safeway Stores), 134 N.L.R.B. 1320 (1961).

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Local 107 members, to members of Teamster Locals 639 and 660. Local 107 struck Safeway, and the latter filed charges with the NLRB, alleging a violation of Section 8(b)(4)(D) of the Act.[5]

The Board found that neither Local 639 nor 660 had made any claims to the work and that the Employer had made the assignment solely for its own business purposes. There was no competing claim between the locals, and the real dispute was between Local 107 and Safeway. The Board stated that in the absence of real competition between unions or groups of employees for the same work, there is no jurisdictional dispute within the meaning of Section 8(b)(4)(D) of the Act and dismissed the charge herein.[6]

In subsequent cases, the Board held that jurisdictional disputes need not be between unions, but can also be between unions and unorganized employees.[7] However, it would appear that if it were the unorganized group which was asserting a claim to the work by prohibited means, a violation of Section 8(b)(4)(D) would not be made out since the Act's prohibition is directed solely against labor organizations.[8] Additionally, the Board has found that the competing employees need not be working for the same employer for purposes of a jurisdictional dispute within the meaning of 8(b)(4)(D).[9]

This article will not treat as "jurisdictional disputes" those instances wherein two unions seek to represent the same group of employees. This can occur when one union attempts to steal the members of another union or when two unions are competing for unrepresented workers but one of the unions has a primary claim by way of a geographical jurisdiction or identity with the particular craft involved. This is commonly referred to as "Raiding." Such disputes are often resolved through Inter-Union agreements, such as the AFL-CIO "No Raiding Agreement" and the various Joint Boards of the Teamster's Union. When the contending parties are not privy to such settlement

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[5] National Labor Relations Act, *as amended*, 29 U.S.C. (SUPP. IV) Section 158(b)(4)(d).

[6] Members McColloch, Fanning and Brown constituted the majority in the above case and relied on the language which the Supreme Court used in *Radio Engineers*, 364 U.S. 573, 81 S. Ct. 330, 5 L. Ed.2d 302 (1960), to define a jurisdictional dispute. Ironically, Members Rodgers and Liedman cited the same language as authority for their dissenting opinion in which they held that it was immaterial whether or not the union or group to whom the work has been assigned actually asserts a right to the work and opposes the claim of the other group.

[7] Biago Fruit Co., 107 N.L.R.B. 223 (1953); Electrical Workers, IBEW Bendix Corp., 138 N.L.R.B. 689 (1962).

[8] NLRB v. Radio Engineers Union, 364 U.S. 573, 81 S. Ct. 330, 5 L. Ed.2d 302 (1960); *see also* Section 2(5) of the Act for the definition of a labor organization.

[9] Local 862, 137 N.L.R.B. 738 (1962); Local 3, Electrical Workers, 141 N.L.R.B. 888 (1963).

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machinery, as when a Teamster's local and an affiliate of the AFL-CIO seek to represent the same workers, the matter is often settled by a Board-conducted election wherein both unions are on the ballot.

The objective of this paper is to acquaint the practitioner with the problems inherent in jurisdictional disputes and the use of Arbitration in resolving them. I will concentrate on the advantages and disadvantages the practitioner can expect to find in Arbitration. It is not my intent to instruct or suggest to the reader how to present his client's case to an arbitrator nor to set out how arbitrators have awarded disputed work in particular fact situations.

Inasmuch as any atttorney's tactical decision to arbitrate a jurisdictional dispute will depend in large measure on the implications of the primary alternative remedy available, namely the NLRB, Sections 8 (b)(4)(D) and 10(k) of the National Labor Relations Act, they will be treated at considerable length. Before analyzing the problems a party may encounter if his case should proceed directly to arbitration and the board one must understand the general criteria employed by the NLRB in resolving jurisdictional disputes under Section 8(b)(4)(D).

Jurisdictional Disputes and the National Labor Relations Board

The NLRB provides the alternative method of resolving jurisdictional disputes. Section 8(b)(4)(D) and 10(k) of the National Labor Relations Act, as amended, grants to the Board its authority to determine such matters.[10]

Section 8(b)(4)(D) makes it an unfair labor practice for a labor organization to strike, picket, or threaten an employer, or to encourage or induce an employee where the object is to force the Employer to assign work to a particular group of employees.[11] It must be noted that the Section specifically excludes from the prohibited activity such striking or picketing when the Employer has violated a certification of

[10] National Labor Relations Act, Section 10(k), *as amended*, 29 U.S.C. Section 160(k).

[11] "It shall be an unfair labor practice for a labor organization or its agents—(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work."

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the Board by assigning the disputed work to employees outside the unit certified. This is actually a representation question rather than a jurisdictional dispute within the meaning of Section 8(b)(4)(D).[12]

Once the Regional Director determines that a "jurisdictional dispute," as proscribed by Section 8(b)(4)(D), does exist, Section 10(K) of the Act requires the Board to determine the underlying dispute unless the parties indicate that they have resolved the dispute or have agreed upon a voluntary method of adjustment.[13] In the absence of such evidence, the Board will schedule a 10(k) hearing where all parties are required to submit evidence in support of their respective positions. The Board will then issue a decision awarding the work to one of the competing groups.[14]

Although the Board initially based its findings on the narrow issue of whether the Employer, in awarding the work, had violated an order or certification of the Board or a collective bargaining agreement, the Supreme Court mandated the Board to expand its criteria.[15] In complying with the direction of the Court, the Board fashioned a formula which requires in every case that consideration be given to the skills and works involved, certification by the Board, employer and industry practice, agreements between unions, agreements between employers and unions, awards of arbitrators or determinations of joint boards in the same or related cases, the assignment made by the Employer, and the sufficient operation of the Employer's business.[16]

Once a 10(k) determination has been made, the matter is considered resolved upon timely notice by the Respondent union to the Regional Director that it will comply with the Board's order. In the event the union fails to comply, the original unfair labor practice alleged in the

[12] Carey v. Westinghouse, 375 U.S. 261, 84 S. Ct. 401, 11 L. Ed.2d 320 (1964); National Assn. of Broadcast Engineers, 105 N.L.R.B. 355 (1953); General Box Co., 82 N.L.R.B. 678 (1949).

[13] 29 U.S.C. 160(k):

Section 10(k) provides: Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 15(8)(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

[14] Although the charge is filed in the appropriate Regional Office and it is the Regional Director who orders the 10(k) Hearing, the Region makes no finding but merely compiles the record which is thereafter forwarded to the Board, which actually awards the work.

[15] NLRB v. Radio Engineers Union, 364 U.S. 573, 81 S. Ct. 330, 5 L. Ed.2d 302 (1961).

[16] Lodge 1743, Machinists, 135 N.L.R.B. 1402 (1962). *See also* Local 1622, Carpenters, 139 N.L.R.B. 591 (1962); Local 1, Bricklayers, 141 N.L.R.B. 119 (1963); Local 2, Philadelphia Typographical Union, 142 N.L.R.B. 36 (1963); Local 68, Lathers, 142 N.L.R.B. 1073 (1963).

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8(b)(4)(D) charge is "revived" and a complaint will issue thereon. Of great significance is the fact that the 10(k) orders standing alone are not enforceable by the courts of appeal since they are not final orders within the meaning of Section 10(e), (f) of the Act. It then becomes necessary to try the case as an unfair labor practice proceeding before a trial examiner in order to obtain the "final order" which is enforceable by the courts.

The foregoing reveals that there are certain tactical disadvantages in resorting to the Board. The party who desires a quick resolution of the dispute will find that the process can move slowly. In *Typographical Union v. NLRB*,[17] it took the Board a full year to make the initial 10(k) award and another six months to determine that the union had committed an unfair labor practice in violation of Section 8(b)(4)-(D) by refusing to comply with the 10(k) determination. In certain cases, when the disputed work is of a temporary nature, as in the construction industry, the work may often be completed by the time the Board decides the issue.

Another drawback to the Board's remedy is that it cannot be sought until the dispute has reached the critical stage and a strike or picketing is imminent or in progress. Thus, the party who desires to head off the dispute before it reaches the breaking point will find no relief since the Board cannot render an advisory opinion.

Of course, the party who will desire a quick solution is the party who is not satisfied with the present situation. Generally, this is the Employer who is being struck or picketed and whose business is now either being impaired or shut down entirely. If he capitulates to the union, he may then face similar action from the other competing union, or he may find that assigning the work to the first union is detrimental to his business interests. One can see how Sections 8(b)(4)(D) and 10(k) would not provide the speedy remedy the Employer is seeking.

However, Section 10(l) of the Act must also be considered. It empowers the Regional Director to seek injunctive relief in the federal district court. The injunction would enjoin the union from picketing or striking and maintain the *status quo* regarding the work until a 10(k) determination is reached.

Since the seeking of a 10(l) injunction is discretionary with the Regional Director the party will need to present sufficient evidence to warrant the injunction. However, often times, if picketing or a strike is in progress and is not likely to cease absent an injunction, the

17 368 F.2d 755 (5th Cir. 1966).

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Regional Director will petition the federal district court. Since all the parties have a right to be heard by the court, the injunction is usually not issued for at least ten days. Accordingly, the party, in evaluating his position, must not only consider the Board, but also the calendar of the federal courts.

Of course, if the Employer is successful, he then has the luxury of presenting his case to the Board in the 10(k) hearing, but yet keeps his original work assignment unchanged.[18]

It is interesting to note that in spite of the machinery available to the Board to resolve jurisdictional disputes, the Board, nevertheless, encourages the parties to arbitrate rather than resort to the Board. Section 10(k) expressly eliminates the necessity for a 10(k) hearing and determination if the parties indicate that they have agreed upon a "voluntary means of adjustment." Of course, what is contemplated is some form of arbitration. However, all the parties must agree to submit to the arbitration and to be bound by the arbitrator's decision. In the absence of such agreement by all the parties, the Board will find that no "agreed upon method" exists and will proceed with the 10(k) hearing.[19]

The AFL-CIO National Joint Board for the Construction Industry is the most prominent permanent body established to resolve jurisdictional disputes. The NLRB was a powerful behind-the-scenes promoter of this body. In fact, one can note with a degree of humor that the Wall Street Journal, which usually finds itself editorially at odds with the NLRB, concurred in this respect:

> . . . Of course the best possible solution would be for unions to show so much common sense that disputes would not reach an impasse. Since any such development is highly unlikely, to say the least, some sort of labor-management adjudication is desirable.
>
> The major alternative, after all, is to let disputes go to the National Labor Relations Board and the courts, which have no special expertise in this area and can take years to settle seemingly simple cases. Surely the National Joint Board, whatever its faults, is a better approach.[20]

The Joint Board, which dates back to 1949, was revamped on April 7, 1970. Membership was doubled to eight regular members, half from

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18 Since the injunction preserves the Employer's original work assignment, a particular advantage inures to the Employer when the job is of short duration. For the work may be completed and the issue moot by the time the injunction is vacated.

19 Plumbers Local 219, 174 N.L.R.B. No. 93 (1969); Local 1622, Carpenters, 139 N.L.R.B. 591 (1962); Retail Clerks Union Intl., 125 N.L.R.B. 984 (1959); *see also* Pittsburgh Glass Co., 125 N.L.R.B. 1035 (1959).

20 Wall Street Journal, April 8, 1970.

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management and half from labor. If the Joint Board is presented with an issue that has already been adjudicated between the same parties, it will apply the former ruling. Rulings on new issues are limited to the particular parties and situation, but a union or employer can request that the ruling have national application. In this instance the Board refers it to an impartial chairman who attempts to get the two union presidents together with the Employer. If unsuccessful, he refers it to a hearing panel composed of two disinterested union presidents, two disinterested contractors, and the umpire.

Under the former set-up, it often took the Joint Board as long as two weeks to make an award. It is hoped that the new organization will speed up that time for the approximately 800 cases the Joint Board hears per year.

The main drawback to the Board is that not all contractors are a party to it. The current agreement includes thirteen contractor associations; but the large and powerful Associated General Contractors with about 9000 member construction companies refused to participate in the new plan, thereby detracting from its potential effectiveness.[21]

ARBITRATION OF JURISDICTIONAL DISPUTES

Arbitration is considered by many sectors to be the best way to expeditiously resolve jurisdictional disputes. The obvious question, then, is why doesn't everybody use it? The fact is that many parties confronted with a jurisdictional dispute do attempt to employ arbitration. However, the practitioner must be aware of the peculiar obstacle to arbitration of jurisdictional disputes.

This problem results from the very quintessence of arbitration being the creature of an agreement, usually a collective bargaining agreement, between an employer and a union. Thus, while Employer A may have a contract with Union B providing for arbitration of disputes and also a similar contract with Union C, the scope of each contract is usually not broad enough to permit arbitration of a jurisdictional dispute between the three parties. For example, if the Employer assigns work to Union B which Union C feels is rightfully theirs, Union C can seek arbitration with the Employer under their contract. However,

21 *Id.* However, the thirteen party associations represent some 25,000 employers who employ the bulk of the 3.5 million unionized construction workers. Therefore, with this substantial power base, it only remains to be seen whether the Joint Board can speed up its decision-making process. In commenting on the new plan, former Labor Secretary Schultz said, "By not only continuing but revitalizing the 22-year-old National Joint Board, the parties have strengthened the construction industry's machinery for dealing with these troublesome and costly disputes."

that contract in no way can compel Union B to be a party to that arbitration since Union B is not a party to the contract. Thus, an award in favor of Union C would not be binding on Union B since the latter was not a party to the arbitration proceeding.[22]

In an address to the National Academy of Arbitrators in Chicago on February 1, 1963, former Board Chariman Frank McCulloch spoke of this dilemma and its impact on the NLRB. At the time, *Raytheon* was pending before the Supreme Court. Each union represented a different bargaining unit at a Raytheon plant. The Machinists filed a grievance claiming that Raytheon had assigned its work to members of the IBEW. Raytheon refused to arbitrate, and the Machinists filed a Section 301 suit.[23] The IBEW intervened in the suit.

The federal district court found, *inter alia,* that the NLRB did not have exclusive jurisdiction over such controversies, and therefore the grievance was arbitrable. However, the court found that the IBEW had no standing in the arbitration because it was not a party to the contract between Raytheon and the Machinists and the court could not create new rights in third parties who are strangers to the contract.[24]

The case was appealed to the First Circuit. In argument, the IBEW argued they could see no harm in tripartite arbitration, but nevertheless admitted that arbitration was strictly a matter of contract, and the IBEW had a contract to arbitrate only with Raytheon. The court commented that under such a situation arbitration would not be a "true instrument for industrial peace."[25] In commenting on the case to the arbitrators in Chicago, Chairman McCulloch added that this dilemma also presented the Board with a problem. Because any such arbitration award clearly evidenced that one of the parties had not been afforded any rights or remedies, the Board could not honor the award and had to proceed with its own processes.

Thus, at that point in time, the First Circuit was holding that arbitration was not even available in a jurisdictional dispute since the Board had exclusive jurisdiction. The Board, which desired to divest itself of any such exclusive jurisdiction, was, nevertheless, forced to

22 *See,* M.C. Bernstein, PRIVATE DISPUTE SETTLEMENT 463 (1968).

23 Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed.2d 972 (1957), enables a party to a collective bargaining agreement which contains an arbitration clause, to file suit in a federal district court to compel arbitration.

24 Local Lodge No. 1836 of Dist. 38, etc. v. Raytheon Mfg. Co., 201 F. Supp. 334, 337 (D. Mass. 1962), *rev'd,* 304 F.2d 365 (1st Cir. 1962).

25 Local No. 1505 Int. Bro. of Elec. Wkrs. v. Local Lodge No. 1836, 304 F.2d 365, 367 (1st Cir. 1962).

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hold that the usual two-party arbitration award would have no binding effect because of the absence of the third party.

It was obvious that the Board's desire to defer its 10(k) provision to the "agreed upon method" previously discussed, was being thwarted because in the absence of the third party, there could be no "agreed upon method." Court watchers, who were hoping for a definitive word from the Supreme Court in *Raytheon,* found themselves denied because the parties settled their differences, thereby rendering the case moot.

Carey v. Westinghouse Corp.[26] again raised the issue. The Court held that the Board did not pre-empt the field and that arbitration could be compelled by the courts on the motion of a party. The Court reasoned that the 10(k) remedy became available only when a strike was imminent or in progress and that such a situation did not contribute to industrial peace.

The Court recognized the problem of a two-party arbitration but stated that arbitration might still contribute something to an eventual resolution of the dispute.

> So unless the other union intervenes, an adjudication of the arbiter might not put an end to the dispute. Yet the arbitration may as a practical matter end the controversy or put into movement forces that will resolve it.[27]

While the Court gave arbitration an encouraging pat on the head in *Carey* and resolved the issue of exclusive jurisdiction, it failed to address itself to the overlying problem, namely fashioning a process to make arbitration a tripartite proceeding in jurisdictional disputes.

One may ask at this point, if an employer and two unions have such a dispute, why shouldn't they all be eager to resolve it by arbitration. The answer is that most often the group that has been awarded the work has nothing to gain by going to arbitration since it already has the work, and everything to lose if the award should go against them. Thus, it is evident that they would not volunteer to submit to such a forum when they are under no contractual compulsion to do so.

The grieving union will often resist arbitration with the other union. Since it already has the burden of proving that the Employer's assignment of the work violated the contract, it is also unwilling to take on the other union. Participation of the other union permits the union to

[26] 375 U.S. 261, 84 S. Ct. 401, 11 L. Ed.2d 320 (1964).
[27] *Id.* at 265, 84 S. Ct. 406, 11 L. Ed.2d 324.

present its case in support of the Employer's award, and thereby increase the grievant's burden. The arbitrators can also consider the other contract which may weaken the grievant's position.

This problem must be resolved if arbitration is to have any real universal application in such disputes. If arbitration is a consensual creature, can a party be ordered to arbitrate without his consent? Several arbitrators have been confronted with this issue.

One arbitrator actually fashioned a remedy. Edgar A. Jones was called upon to arbitrate the grievance of Local 627, International Association of Bridge, Structural and Ornamental Iron Workers.[28] The Iron Workers complained that their employer, National Steel and Shipbuilding Co., was assigning some of their work to members of the IAM. Realizing the futility of arbitrating without the Machinists, Jones decided to join them. Noting that the federal district judge "was on sound ground" in refusing to order trilateral arbitration in *Raytheon*, Jones went on to explain why he was not restricted and could do so.

Referring to the high degree in which arbitrators were held by the Supreme Court, Jones said, "The Supreme Court has identified the Arbitrator as an expert in this area, the most appropriate one to determine rights and shape remedies under the collective bargaining agreement," and thereafter cited the Supreme Court: "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."[29] Jones then went on to find that the California Code of Civil Procedure empowers an arbitrator in California to join the Machinists as a party to the arbitration, either on their own motion, the motion of either the Employer or the Ironworkers, or on his own motion.[30] Jones inferred that the Supreme Court had mandated arbitrators to look to state law in Section 301 situations as well as federal rulings and cited the Supreme Court in *Lincoln Mills*.

> The range of judicial inventiveness will be determined by the nature of the problem. . . . Federal interpretation of the federal law will govern, not state law. . . . But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state

28 National Steel and Shipbuilding Co., 40 L.A. 625 (1961).

29 Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 582, 80 S. Ct. 1347, 1353, 4 L. Ed.2d 1409, 1417 (1960).

30 CAL. CODE CIV. PROC. § 1280(e)(3) (Deering 1967).

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law applied, however, will be absorbed as federal law and will not be an independent source of private rights.[31]

Having decided the basic issue of his power to interplead the Machinists, Jones then turned to whether it would be prudent to exercise this power. He concluded that it would not be, because he would thereby be running a substantial risk of poking an order into a situation, which was not part of his knowledge. Jones then issued an intriguing Award designed to affect his new concept. He stated that in the absence of one of the parties making a motion to interplead the Machinists, his jurisdiction would terminate and the grievance would be dismissed.[32]

Following the Arbitrator's lead, the Ironworkers made a motion to interplead the Machinists. The Machinists filed notice that they would not join in the arbitration. Jones then put the second part of his plan into operation. He issued a supplemental decision and award wherein he ordered the Machinists to appear as a party. He further provided that in the event the Machinists refused to comply, he would postpone the hearing to afford the Employer opportunity to take action under Section 301 in order to enforce his award.

In his decision, Jones pointed out that his award was fashioned for the benefit of the Employer. However, it is obvious that Jones was more anxious to test his "trial balloon" than to solace an employer, who in this particular case, did not appear overly concerned with "double vexations."

In fact, Jones pointedly admitted his desire to shape new law. Stating that the Supreme Court and the Board had hitherto found arbitration not to be an effective remedy of the jurisdictional dispute, Jones then noted, "This case affords the occasion for shaping that remedy." Curiously, Jones did not refer to the California arbitration statute allowing interpleader in his supplemental award. Rather, he referred to Rule 22 (Interpleader) of the Federal Rules of Civil Procedure. It may be that in the intervening time, he had discarded his own theory of assimilating the state law into Section 301. As to Rule 22, Jones was careful to point out that it only suggested the technique and was not a part of or in addition to the 301 remedy.

Pursuant to Jones' award, the Ironworkers petitioned the Superior Court for the County of San Diego to enforce the Award. This writer

[31] Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, 457, 77 S. Ct. 912, 918, 1 L. Ed.2d 972, 981 (1957).
[32] National Steel and Shipbuilding Co., 40 L.A. 625 (1961).

was unable to determine why the Ironworkers had picked the state courts rather than the federal courts to pursue this newly fashioned remedy. As fate would have it, the case never ripened into a judicial decision. The AFL-CIO stepped in and prevailed upon its two affiliates to settle their differences.

While the Jones Approach failed to reach a court test, it was "tried" in the academic forum in a series of law review articles.[33] Jones, of course, advocated his position; and Professor Merton Bernstein opposed the concept primarily on the grounds that the voluntary aspect of arbitration could not be fulfilled when one or more of the parties was being dragged into the proceeding against his will.

One certain result of Jones' probing into this area was to define the problem and to form the "battle lines" among arbitrators as the subsequent cases will indicate.

The following year, arbitrator Adolph Koven was called in to arbitrate the grievance of Local 128 of the Metal Polishers against their employer, Thorsen Manufacturing Co.[34] The Metal Polishers were grieving over the employer's assignment of disputed work to the Machinists. The company moved that the Machinists be joined in the arbitration; otherwise, the grievance would be non-arbitrable since any award would not be binding on the Machinists. Both unions opposed the motion.

Arbitrator Koven made the following findings:

(1) There was no evidence that a jurisdictional dispute would actually develop between the two unions if the arbitrator awarded the work to the Metal Polishers.
(2) There were no procedural requirements shown which would make the arbitration, as presently constituted, non-arbitrable.
(3) Since the grievance merely calls for an interpretation of the contract between the Metal Polishers and the company, it is clearly arbitrable without the Machinists.

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[33] Jones, *Autobiography of a Decision: The Function of Innovation in Labor Arbitration and the National Steel Orders of Joinder and Interpleader*, 10 U.C.L.A. L. Rev. 987 (1963). For a criticism of his proposals, *see* Bernstein, *Nudging and Shoving All Parties to a Jurisdictional Dispute into Arbitration: The Dubious Procedure of National Steel*, 78 HARV. L. REV. 784 (1965). Professor Jones replied in, *On Nudging and Shoving the National Steel Arbitration into a Dubious Procedure*, 79 HARV. L. REV. 327 (1965). The final round in the controversy came in Bernstein and Jones (severally) in, *Jurisdictional Dispute Arbitration: The Jostling Professors*, 14 U.C.L.A. L. REV. 347 (1966). See also Jones, *Power and Prudence in the Arbitration of Labor Disputes: A Venture in Some Hypotheses*, 11 U.C.L.A. L. REV. 675 (1964); Jones, *An Arbitral Answer to a Judicial Dilemma: The Carey Decision and Trilateral Arbitration of Jurisdictional Disputes*, 11 U.C.L.A. L. REV. 327 (1964); Jones, *Compulsion and the Consensual in Labor Arbitration*, 51 VA. L. REV. 369 (1965).

[34] Thorsen Mfg. Co., 44 L.A. 1049 (1965).

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(4) Since the Machinists do not desire to participate in the arbitration, the Arbitrator has no authority to join them as a party.[35]

Obviously, Koven was not ready to apply the "Jones persuasion," and this is readily evidenced in statement of No. 4. It would appear that this is the real thrust of Koven's reasoning, and not numbers 1-3, which illustrate "good footwork" but are essentially designed to duck the issue.

Shortly thereafter, Arbitrator I. Robert Feinberg received *Carey v. Westinghouse* with orders from the Supreme Court to arbitrate the grievance filed by the IUE concerning disputed work. The Company made motion to interplead the second union (Federation). Feinberg was much more candid in his denial of the Company's motion. "There is no statutory or other basis for interpleading a second union over the first union's objection and in the face of the second union's apparent unwillingness to participate."[36]

The action returned to Jones' home state of California, but Arbitrator Howard S. Block was similarly unmoved by Jones. In this case, it was the Machinists who were grieving about Lockheed's assignment of work to the Welders. The Company sought the arbitrator to interplead the Welders over the objection of the Machinists and the apparent unwillingness of the Welders.[37]

The Company proposed essentially a Jones approach except that it omitted any 301 enforcement remedy. The only penalty to be suffered by the Welders should they fail to appear would be the loss of an opportunity to present their case. However, should the Machinists refuse to appear if the Welders did participate, then the Machinists' grievance would be dismissed with prejudice. The Company contended that this would preserve the consensual atmosphere of arbitration.

Arbitrator Block initially established that he was aware of the Jones-Bernstein dialogue on this issue. He then wrote a rather lengthy decision to justify his refusal of the Company's Motion. He first dealt with the California arbitration statute, which Jones had relied on in *National Steel.*

With reference to subsection (3) it would appear that the "party" who may be made a party to the arbitration proceeding must already be a "party" to the arbitration agreement. Otherwise it is difficult to see how the arbitration, or the court, can obtain jurisdiction over the "party."[38]

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[35] *Id.*
[36] Westinghouse Electric Corp., 45 L.A. 161 (1965).
[37] Lockheed California Co., 46 L.A. 865 (1966).
[38] National Steel and Shipbuilding Co., 40 L.A. 625 (1961).

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Turning to federal law, Block considered the Company's contention that the Supreme Court had given such power to arbitrators.

> Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.[39]

Block, however, did not consider interpleading a third party to be the type of mere procedural question contemplated by the Supreme Court. Relying on the views of Professor Russell A. Smith and Professor Dallas L. Jones,[40] Block determined that the whole issue of interpleader was much more than a procedural step to be interpreted from a labor contract. It involves the fundamental question of the propriety of such a remedy and is a basic question of federal law and policy. Block then turned to *Carey*, and found that the Supreme Court, by sanctioning bilateral arbitration, had implicitly ruled that interpleader, over the objections of a party, was not to be the law.

Lockheed and the Machinists provided the opportunity for the next test of trilateral arbitration.[41] The Machinists had grieved over the assignment of work to the Engineers and Scientists Guild. Arbitrator Francis E. Jones (no relation to Professor Edgar Jones) was appointed to hear the grievance. Lockheed again sought to interplead the third party Guild. They agreed to participate but the Machinists objected. In the tradition of his namesake, F. Jones decided that trilateral arbitration was appropriate and endeavored to apply it. However, he confronted the basic problem of "consensual" arbitration from a different approach. At the outset, Jones stated the legal issue to be "Whether the Company-Union collective bargaining agreement authorizes me to consent for the parties to their accepting the Guild's consent to intervene."

Formulating the issue in such terms reveals a fundamental difference between F. Jones' approach and that of Edgar Jones. The latter has expressed a philosophy of subordinating the desires of one or more of the parties, where the necessities of the situation require trilateral arbitration. F. Jones, however, still pays homage to the concept of "conceptual" arbitration by resorting to a doctrine that *implies* the parties have consented. Of course, this is largely fictional, but so are

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[39] John Wiley & Son v. Livingston, 376 U.S. 543, 557, 84 S. Ct. 909, 918, 11 L. Ed.2d 898, 909 (1964).

[40] Smith and Jones, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 MICH. L. REV. 751 (1965).

[41] Lockheed California Co., 49 L.A. 981 (1967).

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many other doctrines of law wherein the "form" is satisfied although the "substance" is not. F. Jones rationalized in this fashion.

> I have been consensually chosen to arbitrate the Company-Union contract. I believe that it is well within the expectations of large companies and unions that labor arbitrators will fashion meaningful and effective remedies to achieve pragmatic solutions to the problems encountered by the parties. . . . Bilateral arbitration of trilateral disputes is not satisfying and does not achieve the goals of labor peace and finality of decision which I think the parties to the Company-Union contract had in mind when they wrote their contract. . . . I think the parties meant *effective* arbitration.[42]

Noting that the contract between Lockheed and the Machinists neither implicitly nor explicitly forbids or mandates trilateral arbitration, F. Jones determined that "as part of his power and duty to fashion meaningful and effective remedies, to implement the substantive clause of the contract," he could accept the Guild's offer to arbitrate on behalf of Lockheed and the Machinists. He did not discuss the obvious inconsistency in his *implying* that the Machinists had agreed to let him agree on their behalf when those same Machinists were stating their opposition in most *explicit* terms. Rather than contest those authorities who opposed trilateral arbitration, F. Jones distinguished this case on the Guild's willingness to participate.

F. Jones contemplated that a new contract to arbitrate was formed once the third party consented to participate, and the new contract was to reconcile the other two contracts. "The *new contract,* to be formed by my ruling herein and the Guild's consent, is the bridge between the two collective bargaining agreements and will prevail in case of any conflict with the terms of either."[43]

The next case arose in the unlikely surroundings of the Stardust Hotel in Las Vegas.[44] The Teamsters had grieved over the Hotel's assignment of window washing to the Culinary Workers. The parties decided to put their money on a gambling man, Professor Edgar A. Jones. Perhaps buoyed by F. Jones' support or driven by the diffidence of Arbitrators Koven, Feinberg, and Block, Professor Jones decided not to engage in any further niceties. He simply announced to the Teamsters and Management that the grievance was not arbitrable unless they consented to the participation of the Culinary Workers. The straightforward approach succeeded in the high-roller atmosphere of Vegas, and all three parties agreed to tripartite arbitration.

42 *Id.*
43 *Id.*
44 Stardust Hotel, 50 L.A. 1186 (1968).

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Of course, this writer does not interpret the case as standing for the proposition that a strong-willed arbitrator can whip the parties into line. The parties herein, with knowledge of Jones' philosophy in these matters, called him in from California. Accordingly, it can be reasonably inferred that they were predisposed to this type of remedy.

RECENT CASE LAW

The Supreme Court's most recent pronouncement in this area came in the decision of *Union Pacific.*[45] The Telegraphers filed a grievance with the National Railroad Adjustment Board, pursuant to the provisions of the Railway Labor Act, protesting the assignment of work to the Clerks. The Clerks refused to participate and the National Adjustment Board awarded the work to the Telegraphers. The latter filed suit in federal district court under Section 3(p) of the Railway Labor Act, to enforce the award. The district court dismissed the suit because the Clerks had not been a party.

The Supreme Court upheld the dismissal on the grounds that the National Adjustment Board had *exclusive jurisdiction* to settle disputes of this kind and, accordingly, it must consider the position of all the parties.

> . . . it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage, and custom pertaining to all such agreements. This is particularly true when the agreement is resorted to for the purpose of settling a jurisdictional dispute over work assignments.[46]

Although the language of the Court was broad, it must be remembered that it was referring to a railroad case, which is governed by the Railway Labor Act. Here the Court found that the National Adjustment Board had *exclusive jurisdiction* to decide jurisdictional disputes. However, in *Carey* the Court found that in industries subject to the National Labor Relations Act, which constitute the vast majority of cases, there is no exclusive jurisdiction. Thus, the parties can seek arbitration and if it does not result in a real trilateral settlement, resort can be had to the NLRB where all the parties in interest will be joined. However, under the Railway Labor Act, the railroads and airlines can only submit their disputes to the Adjustment Board. There is no alternative remedy, and a complete disposition must be made by that arbitral body.

45 Transportation Union v. U.P.R. Co., 385 U.S. 157, 87 S. Ct. 369, 17 L. Ed.2d 264 (1966), *rehearing denied*, 385 U.S. 1032, 87 S. Ct. 737, 17 L. Ed.2d 680 (1967).
46 *Id.* at 161, 87 S. Ct. at 371, 17 L. Ed.2d at 268.

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Therefore, it appears to this writer that the Supreme Court's strong language in favor of trilateral arbitration in Railway disputes may not be applicable in non-Railway cases. The test may soon be made because the lower courts are being confronted with the problem and several have cited the *Union Pacific* case when ruling in favor of non-consensual tripartite arbitration in non-Railway cases.

Most recently, the Second Circuit was squarely confronted with the dilemma of trilateral arbitration. CBS had assigned the disputed work to members of the IBEW. The Recording Engineers, who are represented by the American Recording and Broadcasting Association, demanded arbitration. CBS proposed that the IBEW be joined in the arbitration, but both unions objected. Then CBS filed suit under Section 301 to enjoin its arbitration with the Engineers and to convene a new arbitration with both unions participating. The federal district court granted the motion.[47]

The case was appealed to the Second Circuit. The appellate court upheld the district court. It held that the district court had jurisdiction under Section 301 even though CBS had not alleged a violation of contract.[48] The court reasoned that even if CBS was not claiming a contract violation, each labor union was claiming a violation. Moreover, it argued that the federal courts have taken jurisdiction over labor disputes even where no formal contract is in existence and that "taking jurisdiction is in line with the policy of furthering industrial peace by resort to agreed upon arbitration procedures."

The Engineers had argued to the court that its contract with CBS only provided for two-party arbitration and that it was a violation of the common law principles of Contracts to go beyond that and join a third party. The circuit court concluded that a collective bargaining agreement is not restricted by the rules of contract law. The Supreme Court has made it clear that a collective bargaining agreement is more than an ordinary contract.

> . . . it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.[49]

[47] Columbia Broad. Sys. v. American Recording & Broad. Ass'n., 293 F. Supp. 1400 (S.D. N.Y. 1968), *aff'd,* 414 F.2d 1326 (2d Cir. 1969).

[48] *Id.* at 1328; *See* Textile Workers v. Lincoln Mills, 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed.2d 972 (1957).

[49] United Steelworkers v. Warrior & G. Nav. Co., 363 U.S. 574, 578, 80 S. Ct. 1347, 1351, 4 L. Ed.2d 1409, 1415 (1960).

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The appellate court also relied heavily on what it considered to be *very broad* arbitration clauses in both contracts, and quoted Justice Black in *Union Pacific.*[50] The court concluded that tripartite arbitration "is practicable, economic and convenient" for all concerned.[51]

As indicated, the Second Circuit grounded its decision on *Union Pacific.* However, it is questionable whether the Supreme Court intended that it be applied to non-Railway cases. Obviously, the Second Circuit feels that it should. Only time and future decisions by other circuits and the Supreme Court will indicate the correctness of that position.

ARBITRATION AND THE NLRB—A DUAL REMEDY

While the foregoing has dealt with Arbitration and the Board on an "either-or" basis, a recent case illustrates what the practitioner may expect if both remedies are pursued simultaneously.

In *New Orleans Typographical Union No. 17 v. NLRB*[52] the Fifth Circuit found itself in the quandary of having to decide whether to enforce a Board 10(k) determination or a conflicting arbitration award. The problem arose when the employer, E. P. Rivis Company, assigned a new printing operation to the Amalgamated Lithographers Association. The International Typographical Union protested and demanded bilateral arbitration. When the Employer refused to arbitrate, the Typographers went on strike.

Immediately thereafter, on June 26, 1963, the Employer filed charges with the Board. On June 29, 1963, the Typographers filed a Section 301 suit in the federal district court in New Orleans. The Employer defended on the grounds that the NLRB had exclusive jurisdiction *because proceedings were already pending there.* Obviously, this was an attempt to distinguish the case from *Carey,* in which the Supreme Court held that the NLRB *did not have exclusive jurisdiction.* While the court was considering this argument, the Board obtained an injunction against the strike. Thereafter, the court denied the Employer's defense and ordered arbitration. The Employer did not appeal the decision of the court.

The 10(k) hearing opened on August 29, 1963. The arbitration convened on October 1, 1963; and an award in favor of the Typographers was handed down on November 14, 1963. The Employer refused to

[50] Transportation Union v. U.P.R. Co., 385 U.S. 157, 87 S. Ct. 369, 17 L. Ed.2d 264 (1966), *rehearing denied,* 385 U.S. 1032, 87 S. Ct. 737, 17 L. Ed.2d 680 (1967).

[51] CBS v. American Recording and Broadcasting Ass'n., 414 F.2d 1326, 1329 (2d Cir. 1969).

[52] 368 F.2d 755 (5th Cir. 1966).

comply with the award, and the district court granted enforcement on December 9, 1963. The Employer appealed that judgment, but the appeal was denied by the Court of Appeals for the Fifth Circuit on December 24, 1963.

On June 1, 1964, *nine months after the 10(k) hearing*, the Board awarded the work to the Lithographers. On September 30, 1964, the Fifth Circuit, because of the 10(k) Award, granted a stay of the order of the district court enforcing the arbitration. The Typographers then informed the Board that they would not comply with the award. The Board issued complaint; and on November 16, 1964, seventeen months after the dispute began, it found that the Typographers had violated Section 8(b)(4)(D) of the Act. When the Typographers refused to comply with the Board Order, the Board sought enforcement in the Fifth Circuit. And now the whole dispute, including the conflicting awards, was before that court.

The court made the following findings:

1. The NLRB was warranted in finding that the Typographers violated Section 8(b)(4)(D) of the Act.
2. The 10(k) Award was correct.
3. The district court had jurisdiction under Section 301 to order arbitration even though the Employer had previously filed charges with the Board because the mere pendency of such a charge *may only possibly* lead to a 10(k) hearing. Thus, unless the collective bargaining agreement expressly provides that the duty to arbitrate will terminate in the event of a 10(k) hearing, the district court is not deprived of jurisdiction.
4. The Board order takes precedence over the district court's order enforcing the arbitration award even though the Board order was issued after the court's order. Although the Board does not have exclusive jurisdiction, Congress intended that a 10(k) determination was to be the final settlement of jurisdictional disputes. Therefore, the Board's determination is entitled to precedence once it has been made.[53]

The judgment was handed down on November 22, 1966, forty-one months after the dispute first arose.

The first lesson to be learned is that pursuit of the dual remedy will not speed up a settlement; and, more than likely, it will prolong it. The second is that an arbitration award in conflict with a Board determination will not be honored by the courts. This is true even if the arbitration award is made prior to the Board's determination.

[53] *Id.*

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Thus, it would appear that there is no tactical advantage in pursuing bilateral arbitration when the same matter is also before the Board.[54]

CONCLUSIONS

Because arbitration provides a more speedy remedy in jurisdictional disputes, it is preferable to the processes of the NLRB. The pitfall to arbitration in this area is the involuntary inclusion of a third party who is not privy to the arbitration procedure. While the concept of interpleader has gained acceptance among a few arbitrators and courts, its acceptance is not widespread. Moreover, resort to the courts, even if successful, results in delay and diminishes the effectiveness of the remedy.

Because the benefits of trilateral arbitration are obvious, an employer should therefore take affirmative steps to provide for it. He can secure arbitration clauses from each contracting union which provide that each union will agree to arbitrate any jurisdictional dispute with any other union with which the employer has a contract. Accordingly, the arbitrator will have no doubts as to his jurisdiction and the courts could similarly compel arbitration pursuant to Section 301 of the Act. In the absence of such a procedure, jurisdictional disputes will continue to drag out over intolerable periods of time and in many cases will impose a severe economic burden on the employer.

[54] American Sterilizer Co. v. Local 832, 278 F. Supp. 637 (W.D. Penn. 1968); the federal district court considered the problem of dual arbitration.