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Labor Law—Labor-Management Relations Act—Remedial Power of the National Labor Relations Board—Award of Fringe Benefits.—NLRB v. Strong

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exception to section 7. The problem arises primarily from Congress' vague allusion to *International Shoe*. The Congress, then, should act to resolve this issue of its own making. The courts and Commission should not engraft an exception to the present section 7 on the infirm ground of either an aging decision under the pre-1950 section 7, or of meager congressional reference to that decision.

JOSEPH C. TANSKI

Labor Law—Labor-Management Relations Act—Remedial Power of the National Labor Relations Board—Award of Fringe Benefits.—*NLRB v. Strong*.[1]—Defendant Strong was a member of a multi-employer bargaining association which negotiated a collective bargaining agreement with the Roofers Union of Southern California. Strong attempted to withdraw from the association after the agreement became effective, and refused to sign the agreement. The union filed unfair labor practice charges with the National Labor Relations Board, and the Board found that Strong's refusal to sign the agreement constituted an unfair labor practice under sections 8(a)(5) and (1) of the Labor-Management Relations Act.[2] The Board issued an order requiring the defendant to cease and desist from unfair labor practices, to sign the agreement, to post notices and to "pay to the appropriate source any fringe benefits provided for in the . . . contract."[3] The order did *not* provide for any back pay payments.[4] The Ninth Circuit Court of Appeals enforced the Board's order except for the provision requiring the payment of fringe benefits. The court stated that

> [t]he order of the Board requiring the payment of fringe benefits to the appropriate source is an order to respondent to carry out provisions of the contract and is beyond the power of the Board.[5]

Although the court did not elaborate, it impliedly held that the Board had no power to award fringe benefits under Section 10(c) of the Labor-Management Relations Act.[6] That section provides in part that the Board

> shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

The Supreme Court granted certiorari[7] to consider whether the Board was empowered under section 10(c) to award fringe benefits to remedy an unfair labor practice. The Court reversed and HELD: The Board is empowered by

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1 393 U.S. 357 (1969).

2 29 U.S.C. §§ 158(a)(5), (1) (1964).

3 152 N.L.R.B. 9, 14 (1965).

4 The employees apparently continued working during the unfair labor practice. This possibility is more fully discussed infra at p. 1023.

5 NLRB v. Strong, 386 F.2d 929, 933 (9th Cir. 1968).

6 29 U.S.C. § 160(c) (1964).

7 391 U.S. 933 (1968).

section 10(c) to order the retroactive payment of fringe benefits to remedy an unfair labor practice.

The majority, speaking through Mr. Justice White, had little trouble in viewing the award of fringe benefits as sanctioned by section 10(c) even though the contract provided for arbitration.[8] This conclusion rested on a three-step argument. The Court first pointed out that the policy of the Act underlying a remedial order is to make the worker whole.[9] Secondly, the majority reasoned that although the Board does not have plenary authority to interpret the collective bargaining agreement, the Board is empowered to find an unfair labor practice even though the same act constitutes a breach of the contract which would give rise to a section 301 suit.[10] The majority further noted that the Board is empowered to reinstate an employee with back pay, and that to award back pay the Board must of necessity construe the contract. Therefore, the Court concluded that the award of fringe benefits, because it is a logical supplement to back pay, is within the remedial power of the Board.

Mr. Justice Black, though concurring in the reversal of the court of appeals decision, felt that the case should be remanded to the Board for a determination whether the issue of fringe benefits should be submitted to arbitration. Mr. Justice Douglas dissented. Relying on his prior opinions in support of arbitration,[11] he viewed the decision as a renunciation of the Court's policy favoring that method of resolving disputes. According to Justice Douglas, "fringe benefits are not products of a computer but of an arbitral process to which Congress has given strong support."[12] He argued that a fair solution would most probably result from reliance on the arbitrator's knowledge of the "common law of the shop."[13]

The majority in *Strong* reached the result on the strength of an argument grounded on the Board's power to interpret collective bargaining agreements in certain situations. This result, furthermore, would clearly appear to be a proper one. However, it is arguable that the Court should have reviewed the Board's discretionary power to remedy unfair labor practices. The ma-

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[8] "The appropriate method for the settlement of this contractual dispute is the grievance-arbitration procedure set out clearly in the agreement itself." Brief for Respondent at 4-5.

[9] See Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941).

[10] 29 U.S.C. § 185 (1964). In Smith v. Evening News Ass'n, 371 U.S. 195, 197 (1962), the Court stated, "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301."

[11] Mr. Justice Douglas wrote the majority opinion in four of the most significant cases dealing with arbitration. See United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-69 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-83 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596-99 (1960); Textile Workers v. Lincoln Mills, 353 U.S. 448, 455-59 (1957).

[12] 393 U.S. at 363.

[13] For a discussion of the "common law of the shop" and its role in the interpretation of collective bargaining agreements see United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960); Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1493-98 (1959).

jority would then have been in a position to address itself to Justice Douglas' contention that the result impinges on arbitration. This case note will first examine the Board's discretionary power bearing on the award of fringe benefits. In the light of such a review, the question whether the decision abrogates the Court's policy of fostering arbitration is more readily resolved.

The policy underlying the Board's discretionary power to remedy unfair labor practices is briefly mentioned by the majority as "making the worker whole." That policy is explicitly stated in *Phelps Dodge Corp. v. NLRB*,[14] where the Court upheld the Board's power under section 10(c) to reinstate a worker with back pay. The Court stated that

> [m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred.[15]

This passage limits the Board's remedial power by putting any punitive award beyond its power.[16] In order to determine whether the award of fringe benefits is punitive, the actual nature of the fringe benefits in *Strong* must be examined. Although the Court did not specify the nature of the fringe benefits, the contract apparently required the employer to make payments to the union's health and welfare trust fund, vacation benefits trust fund, and an apprenticeship and training fund. A portion of these payments was deductible from the employees' wages and the remainder, based on the number of hours worked by the employee,[17] was contributed by the employer. It can be assumed that the Board would have little trouble in computing the benefits because the employees apparently continued to work after the employer's refusal to sign the contract.[18] Thus the number of hours worked, a figure needed to compute the benefits, was available to the Board.

Since the benefits were explicitly provided for in the contract and easily

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[14] 313 U.S. 177 (1941).

[15] Id. at 197-98. Cf. Nathanson v. Trustee in Bankruptcy v. NLRB, 344 U.S. 25, 27 (1952).

[16] See Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938). In that case the Court refused to enforce the Board's order requiring the employer to cancel certain contracts with the union, stating that

> [t]he power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act.

305 U.S. at 236. See also Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940), where the Court denied enforcement of the Board's order requiring the employer to pay to certain governmental agencies amounts which the reinstated employees had received for work upon "work relief projects" on the basis that the Board's "power to command affirmative action is remedial, not punitive." 311 U.S. at 12.

[17] Brief for Petitioner at 3.

[18] There is no indication in the Board's decision, the circuit court decision, or the Supreme Court decision that the employees stopped working at any time during the unfair labor practice.

computable, it is highly unlikely that the award could be considered punitive.[19] The fact that the benefits were explicit in the contract also provides a possible rebuttal to Justice Douglas' contention. If the thrust of his argument is that an arbitrator's determination of the fringe benefits payable under the contract would be different from the Board's computation,[20] it is arguable that the arbitrator could not have reached a different result.[21] Furthermore, in *United Steelworkers v. Enterprise Wheel & Car Corp.*,[22] Justice Douglas stated that an arbitrator's award of back pay "is legitimate only so long as it draws its essence from the collective bargaining agreement."[23] The primary function of the arbitrator, then, according to Justice Douglas, is to interpret the collective bargaining agreement. In *Strong* the fringe benefits were explicit on the face of the agreement. Consequently, it is arguable that "past practices" or the "common law of the shop" were not relevant to the determination of the fringe benefits payable in *Strong*.

With the policy of making the worker whole without including punitive amounts as the basic guideline for the Board's discretion, an examination of the substantive remedial power embodied in section 10(c) is required to determine whether the award of the specific fringe benefits in *Strong* falls within the Board's power. It is unclear from a reading of the majority opinion whether the Court considered the fringe benefits as "back pay," thus bringing the award within the express authorization of section 10(c).[24] The specific authorization of "reinstatement with or without back pay," however, does not constitute an implied limitation on the type of affirmative action which the Board may take. In *Virginia Elec. & Power Co. v. NLRB*[25] the Court upheld the Board's order requiring the disestablishment of a union organized by the employer in violation of Section 8 of the Labor-Management Relations Act. In conjunction with this order the Board required the company to return to the employees any "check-off"[26] dues paid to the union. In sustaining this order, the Court observed that

> [t]he Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without back pay. The particular means by which the effects of unfair labor

[19] Cf. Exchange Parts Co. v. NLRB, 339 F.2d 829 (5th Cir. 1965), enforcing the Board's award of a unilaterally terminated Christmas bonus.

[20] This interpretation is suggested by Justice Douglas' statement in *Strong* that "what 'past practices' might reflect on the amount of an award . . . in an arbitration frame of reference, no one knows." 393 U.S. at 366.

[21] On the arbitrator's duty to apply the terms of the contract, see generally B. Meltzer, Ruminations About Ideology, Law, and Labor Arbitration, 34 U. Chi. L. Rev. 545 (1967).

[22] 363 U.S. 593 (1960).

[23] Id. at 597.

[24] For a complete discussion of the "back pay" remedy see R. Fuchs & H. Kelleher, The Back-Pay Remedy of the National Labor Relations Board, 9 B.C. Ind. & Com. L. Rev. 829 (1968).

[25] 319 U.S. 533 (1943).

[26] "Check-off" dues are deducted from the employees' pay by the employer and paid to the union directly by the employer.

> practices are to be expunged are matters "for the Board not the courts to determine."[27] (Citations omitted.)

This discretionary power to remedy an unfair labor practice was reaffirmed in *NLRB v. Seven-Up Bottling Co.*[28] In that case the Court upheld the Board's computation of a back pay award by the "quarterly method,"[29] and reasoned that

> [i]n fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience. When the Board, "in the exercise of its informed discretion," makes an order of restoration by way of back pay, the order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."[30]

It is apparent from the Court's reasoning in these two cases that if the fringe benefits in *Strong* were necessary to make the worker whole, then the Board acted within its discretionary power by including them in the order. Fringe benefits, as a part of the consideration given for the employees' services, should certainly be appropriate in making the worker whole. An examination of the decisions of the circuit courts reveals that the Board's awards of fringe benefits have been upheld as either "back pay"[31] or "affirmative action"[32] necessary to compensate the worker fully. However, all the circuit decisions uncovered involved payments directly to the worker. In *Strong* the Board's order required payment to the "appropriate source." By implication it would appear that the Board contemplated that the employer would pay the trustees or administrators of the various plans. If such were the case, it might be inappropriate to term the order a "back pay" order, for that phrase connotes payments made directly to the worker in the form of wages.

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[27] 319 U.S. at 539.

[28] 344 U.S. 344 (1953).

[29] This method was first employed and explained by the Board in F.W. Woolworth Co., 90 N.L.R.B. 289 (1950).

[30] 344 U.S. at 346-47. Cf. Consolo v. Federal Maritime Comm'n, 383 U.S. 607 (1966), where the Court recognized the limited scope of review of an agency's discretionary remedial order under § 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009(e) (1964).

[31] E.g., in W.C. Nabors v. NLRB, 323 F.2d 686 (5th Cir. 1963), cert. denied, 376 U.S. 911 (1964), the court upheld the Board's order to pay the employee his share of a profit sharing plan. The court reasoned that

> "[b]ack pay" as used in section 10(c) includes the moneys, whether gratuitous or not, which it is reasonably found [by the Board] that the employee would actually have received in the absence of unlawful discrimination.

323 F.2d at 690. In NLRB v. Miami Coca-Cola Bottling Co., 360 F.2d 569 (5th Cir. 1966), the court held that "[a] safe-driving award which an employee would have earned absent unlawful discrimination is includible in backpay." Id. at 572.

[32] E.g., in NLRB v. Exchange Parts Co., 339 F.2d 829 (5th Cir. 1965), the court enforced the Board's order requiring the employer to pay a unilaterally terminated Christmas bonus. The court reasoned that § 10(c) "warranted an order requiring payment of the bonus in a case such as this, as 'such affirmative action * * * as will effectuate the policies of this subchapter.'" Id. at 831.

The Supreme Court, however, has also stated that the Board's order, in making the worker whole, should bring a "restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination."[33] This "return to the status quo" reasoning establishes a "but for" test to determine the affirmative action required to make the worker whole. The restoration theory would certainly encompass fringe benefit payments to the various plans, for these would have been made but for the employers unfair labor practice of refusal to sign the contract.

An illustration of this theory of restoration is found in *NLRB v. Rice Lake Creamery Co.*[34] In that case, as a result of an unfair labor practice and a subsequent strike, the Board ordered reinstatement with back pay. In addition the order required the employer to pay the premiums for a pension insurance plan directly to the employees because on the facts of the case they could be considered wages. Although the back pay order was remanded,[35] the award of the pension insurance premiums was upheld.[36] A third part of the order, concerning a group medical and hospital plan, illustrates not only the wide area encompassed by the restoration theory of making the worker whole but also the breadth of the Board's discretion. The employer had discontinued paying the premiums on the group medical plan during the strike. Three employees had incurred medical and hospital expenses during the strike, and the Board's order required the employer to reimburse them for these expenses. The court sustained this part of the order, reasoning that

> since they would have received the expenses except for the unfair labor practice, the loss is one which the Board validly included in the amounts required to make them whole.[37]

The court modified the award, however, by allowing the employer to deduct from the individual back pay awards the health and medical premiums that each employee would have paid. It reasoned that, if the Board decides to treat the employer as an insurer because of his unfair labor practice, the risk should be spread among all the workers as it was under the discontinued plan.[38]

In light of the Supreme Court's previous endorsement of the Board's discretion in remedying unfair labor practices, and of the circuit court decisions passing on the question of fringe benefits, the Board clearly has the power under section 10(c) to award fringe benefits. Mr. Justice Douglas, however, is not willing to sanction the Board's exercise of its discretionary remedial power when arbitration presents an alternative method for resolving the dispute. He holds the position that the policy of fostering arbitration

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[33] Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).

[34] 365 F.2d 888 (D.C. Cir. 1966).

[35] Id. at 896.

[36] Id. at 892.

[37] Id. at 893.

[38] Id. It should be noted that this reasoning would require the employees in *Strong* to pay their portion of the fringe benefits or would reduce the employer's liability to only the amount which he was required to contribute.

requires that arbitration take precedence over the Board's power to interpret the contract to remedy an unfair labor practice.

The case reader is thus left in a quandry, for the majority opinion fails to answer the two probing questions implicit in Justice Douglas' dissent: (1) why arbitration is not the proper method of resolving the fringe benefits issue; and (2) whether the decision abrogates the Court's continued support of arbitration. A response to these two questions begins with the inquiry whether the arbitration clause covers the fringe benefits issue.[39] Neither the majority nor the dissenter, however, discuss the nature of the arbitration clause. In reliance upon the dissent, it will be assumed that the arbitration clause would apply.[40]

The logic implicit in Justice Douglas' opinion is that, once the Board orders the employer to sign the contract, the arbitration clause embodied in the contract becomes effective. Since the arbitration clause represents the method adopted by the parties for resolving contractual disputes, the Board should have no power to interpret the contract because, under the contract, that function is delegated to the arbitrator.[41] If the Board had simply ordered the contract signed, for example, it is likely that a section 301 suit by the union to recover the fringe benefits would not lie until the union fulfilled its obligation to arbitrate.[42]

The argument that the fringe benefits question should be decided by arbitration is, of course, strengthened by the policy of the Supreme Court to favor arbitration as an important method of resolving grievances. That policy is based on Section 1 of the Labor-Management Relations Act,[43] which states that the purpose of the Act is to promote the free flow of commerce "by encouraging the practice and procedure of collective bargaining." Furthermore, in *United Steelworkers v. Warrior & Gulf Navigation Co.*,[44] the Supreme Court stated that "arbitration of labor disputes under collective bar-

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39 If the arbitration clause did not cover the fringe benefits issue, then NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967), would appear to support the proposition that the decision does not impinge on arbitration. In upholding the Board's ability to interpret the contract in *C & C Plywood*, the Court stated:

> [I]t is important to first point out that the collective bargaining agreement contained no arbitration clause. The contract did provide grievance procedures, but the end result of those procedures, if differences between the parties remained unresolved, was economic warfare, not "the therapy of arbitration." Thus, the Board's action in this case was in no way inconsistent with its previous recognition of arbitration as "an instrument of national labor policy for composing contractual differences."

Id. at 426 (citations omitted).

40 See also Brief for Respondent at 4-5.

41 See H. R. Rep. No. 510, 80th Cong., 1st Sess. 42 (1947), which states:

> Once parties have made a collective bargaining contract, the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.

See also Charles Dowd Box Co. v. Courtney, 386 U.S. 502, 510-13 (1962).

42 Cf. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960).

43 29 U.S.C. § 151 (1964).

44 363 U.S. 574 (1960).

gaining agreements is part and parcel of the collective bargaining process itself."[45] Thus the Court has placed arbitration directly within the stated purpose of the Act.[46]

The majority opinion does not adequately cope with the arbitration argument raised by Justice Douglas' dissent. The cases cited by the majority provide precedent for the position that the Board has discretionary power to interpret the contract, but the cases do not support a theory that the Board's discretionary power takes precedence over arbitration.[47] Although it is not cited by the majority, the only prior case decided by the Court dealing with the conflict between arbitration and the power of the Board is *NLRB v. Acme Indus. Co.*[48] In that case the Board ordered the employer to disclose information sought by the union, even though arbitration of the dispute over disclosure was pending. The Court upheld the order and noted that more overlap exists in the relationship of the Board to arbitration than in the relationship between the courts and arbitration.[49] However, it upheld the Board's order only on the basis that it "decided nothing about the merits of the union's contractual claims."[50] In *Strong* the award of fringe benefits conclusively determined the merits of the union's contractual claim. The decision in *Strong*, therefore, goes a step beyond *Acme*.

The Sixth Circuit, in *Beacon Journal Publishing Co. v. NLRB*,[51] refused to allow the Board to take this additional step. The court rejected the Board's attempt to change the amount of a Christmas bonus when the contract contained grievance procedures.[52] It recognized that the Board has broad discretionary powers to remedy unfair labor practices but reasoned that the Board's

> broad powers were originally given to the Board to aid in effectuating a national legislative policy of encouraging collective bargaining, rather than to assist in adjudicating relatively minor disputes between parties with a settled and amicable collective bargaining relationship.[53]

This language provides the key to resolution of the questions implicit in Justice Douglas' dissent. It is important to note that in *Beacon* the court

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[45] Id. at 578.

[46] See John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 549 (1964), where the Court recognized "the central role of arbitration in effectuating national labor policy." See also cases cited at note 11 supra.

[47] E.g., NLRB v. C & C Plywood Corp., 385 U.S. 421, 423 (1967) (no arbitration clause); Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 272 (1964) (authorizing a court order compelling arbitration though the dispute was arguably a representational one within the jurisdiction of the Board); Smith v. Evening News Ass'n, 371 U.S. 195, 196 n.1 (1962) (no arbitration clause); Local 174, Teamsters v. Lucas Flour Corp., 369 U.S. 95 (1962) (affirming damage award for business losses incident to a strike called by the union in violation of its contractual obligation to arbitrate the dispute).

[48] 385 U.S. 432 (1967).

[49] Id. at 436-37.

[50] Id. at 437.

[51] 401 F.2d 366 (6th Cir. 1968).

[52] It is not clear whether the contract provided for arbitration.

[53] 401 F.2d at 368.

relied on the fact that the dispute was minor and an amicable collective bargaining relationship existed. When an amicable bargaining relationship exists, arbitration may settle the dispute quickly and promote a healthier relationship between the parties than would an order imposing that settlement.[54] If an amicable collective bargaining relationship is a criterion for refusal to enforce the Board's order,[55] then the facts in *Strong* must be examined to determine whether the nature of the dispute and the relationship of the parties warranted the Board's order requiring the payment of fringe benefits.

The defendant in *Strong* not only refused to sign the contract but litigated the issue for a period covering six years. Once the defendant was forced to sign the contract, moreover, he attempted to utilize the arbitration clause in the contract to avoid compliance with the award of fringe benefits. This conduct evidences the fact that the defendant was not inclined toward amicable collective bargaining. Other facts in the case support further speculation on the defendant's willingness to bargain in good faith with the union. It can be assumed that the employees continued to work throughout the period of the unfair labor practice, for the Board's order did not provide for reinstatement or back pay and no evidence exists to the contrary.[56] The only cash outlay required of the employer by the Board's order was the payment of fringe benefits to the appropriate source. These facts, combined with the fact that the Board appealed the issue to the Supreme Court, suggest the conclusion that the defendant's refusal to sign the contract rested directly on his objection to the benefit plans which it established. This possibility leads in turn to a conclusion that the loss of the fringe benefits was the only direct result of the employer's unfair labor practice of refusal to sign the contract.

Although these conclusions are somewhat speculative, the factual situation in its entirety negates any inference that the employer would have arbitrated in good faith or accepted an arbitration award without resorting to further litigation. This possibility brings into play a third policy and tips the balance of conflicting policy considerations toward the result reached by the majority. That third policy calls for the resolution of grievances as quickly as possible.[57] If the Board had simply required the employer to sign the agreement and arbitrate in good faith, the facts in *Strong* suggest that the order would have been ineffectual in ending the conflict, and that the union

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[54] See Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964), where the Court stated that

> [b]y allowing the dispute to go to arbitration its fragmentation is avoided to a substantial extent; and those conciliatory measures [brought about by arbitration] which Congress deemed vital to "industrial peace" and which may be dispositive of the entire dispute, are encouraged.

Id. at 272.

[55] The Board itself has refused to grant relief and relied instead on private settlement of the dispute by the parties. See, e.g., New Orleans Bd. of Trade, Ltd., 152 N.L.R.B. 1258 (1965).

[56] This result may be explained by the fact that the defendant was engaged in a relatively minor operation with most employees working only part time. See Brief for Respondent at 2.

[57] See 9 B.C. Ind. & Com. L. Rev. 497, 501 (1968).

would have confronted a significant delay in obtaining relief. The Supreme Court in *NLRB v. C & C Plywood*[58] recognized the importance of a quick resolution of grievances. The Court stated that

> [i]f the Board in a case like this had no jurisdiction to consider a collective agreement prior to an authoritative construction by the courts, labor organizations would face inordinate delays in obtaining vindication of their statutory rights.[59]

Although *C & C Plywood* did not involve an arbitration clause, the distinct likelihood of delay in *Strong* would appear to make the Court's reasoning applicable. Because the Board's order in *Strong* effectuates a policy against inordinate delay and is within the Board's discretionary power, the decision cannot properly be considered to be in derogation of arbitration. In all probability, arbitration would have extended the existing industrial strife, a result contrary to the avowed function of arbitration to expedite industrial settlements.

Strong is a significant decision because it extends the discretionary power of the Board one step beyond the decision in *Acme*. The Board is now clearly empowered to interpret the contract to remedy an unfair labor practice even though the contract provides for arbitration. This power is certainly proper and necessary in situations like *Strong*. Unfortunately, however, the case is subject to an interpretation that the Board may construe the contract to remedy an unfair labor practice in any situation, regardless of arbitration. In situations where an amicable collective bargaining relationship exists and where the fringe benefits are not clear on the face of the contract, arbitration would appear to be the preferable forum for resolving the dispute. To the extent that the opinion may be utilized by the Board or by the courts as a *carte blanche* authorization of the Board to decide all contract issues incidental to an unfair labor practice, the policy of fostering arbitration could be significantly weakened. To avoid this possibility, the majority should have set forth more clearly the guidelines and considerations which the Board must follow in cases where its power to remedy unfair labor practices and arbitration present alternative methods of resolving the dispute. These considerations, as discussed above, revolve around the ease of interpreting the contract, the likelihood of inordinate delay, and especially the relationship of the parties.

KURT M. SWENSON

Securities Regulation — Insurance — McCarran-Ferguson Act — State Statute Regulating Merger Does Not Preclude Operation of Federal Securities Law.—*SEC v. National Sec., Inc.*[1]—The Securities and Exchange

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[58] 385 U.S. 421 (1967).
[59] Id. at 429.

[1] 393 U.S. 453 (1969). The majority opinion was written by Mr. Justice Marshall.