Boston College Law Review

Volume 10
Issue 4 *Labor Law*

Article 2

7-1-1969

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BOSTON COLLEGE
INDUSTRIAL AND COMMERCIAL
LAW REVIEW

VOLUME X SUMMER 1969 NUMBER 4

SUGGESTIONS TO MANAGEMENT: ARBITRATION v. THE LABOR BOARD

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Messrs. Lev and Fishman compare the dispute-settling efficacy of private arbitration and Labor Board intervention, and argue vigorously for the primacy of the former process. The authors give attention to practical considerations of equity, therapy and convenience within the labor-management relationship, and interpret the institutional interests of the Board itself. A review of the statutory origins and of the doubtful consistency of the decisional growth of Board jurisdiction in arbitrable controversies reinforces their preference for the arbitration process.

I. THE LABOR BOARD

The King acts through his ministers, of course, but in that field of labor relations in which the contending parties have agreed to settle their disagreements privately, it would probably be better if the King told his ministers not to meddle. The National Labor Relations Board, whose primary function is to limit the industrial inequities and strife which prompted the Wagner Act,[1] disserves its purpose when it interferes with the arbitral process. The Board actually creates strife by prolonging disputes which the parties could happily dissipate through arbitration in one-tenth the time at one-twentieth the cost. It is prob-

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[1] National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 141-88 (1964) [hereinafter cited as the Act].

ably unfair to suggest that the Board is more concerned with its seigniory than with a prompt end to industrial bickering, but the Board's intervention in matters readily soluble by quick arbitration has precisely that effect. The Board *promotes* industrial strife when it administers its statute to enfeeble arbitration. No amount of rhetoric about the Board's jurisdiction remaining "unaffected by any other means of adjustment"[2] can obscure the fact, known to all practitioners, that the Board, albeit under color of law, is a trespasser in this area and actually protracts the disputes which it was designed to abbreviate.

The reader is entitled to the intelligence that the authors of this article write from an employer bias. The sentiments expressed in the previous paragraph could not proceed from an opposite bias. Although all but a handful of the annual thousands of arbitrations originate with unions, it must be comforting to a grievant or his representative to know that alternative forums for justice are available if arbitration is tactically inexpedient. From the employer's viewpoint, a comparison of the two forums to resolve the routine labor squabble is no comparison at all. Arbitration is prompt, inexpensive and generally even-handed. The Board proceeding embodies directly opposite qualities, including a bias against employers almost genetic in its origin, sired in the 1930s when employers simply ignored the fundamental needs of the working man.

Disciplinary cases are by far the largest source of company-union friction. They are clearly arbitrable by all labor agreements, with rare exceptions. They are also cognizable under Sections 8(a)(1) and (3) of the Act, which in substance prohibit any interference with, or employment discrimination by reason of, union or protected activities.[3] Not much imagination is required of a union officer to allege union activity as the precipitating cause of the discipline and thereby to provoke the investigative forces of the Board. It costs nothing to file a charge with the Board. No expertise is required. Forms are provided and an officer-of-the-day is continuously available to advise the griev-

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[2] Section 10(a) of the Act states that "[t]he 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. . . .*" 20 U.S.C. § 160(a) (1964) (emphasis added).

[3] Sections 8(a)(1) and (3) provide:

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 section 7;

. . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

29 U.S.C. § 158(a)(1),(3) (1964).

ant, and his more sophisticated union representative, of what documents to sign and what evidence to gather.

The burdens upon a company begin to accumulate at this point. Board investigators, having obtained the employee's version, must interview company representatives to determine the merits of the charge and whether to proceed to complaint.[4] This is a time-consuming chore, and while no obligation rests on a company to grant the interviews or cooperate with the investigators, a refusal to do so increases the odds that a complaint will issue. Since most charges are disposed of by the Board[5] without further action once the investigator hears the company's reasons for discipline, it is advisable that a company with a strong case spend cooperative time in the initial stages to avoid the greater expenditure of a complaint and hearing.[6]

Experience in this field is instructive. The Board's Regional Directors, who for unfair labor practice purposes are agents of the General Counsel and who possess the authority to issue or decline to issue a complaint, will usually refrain from resolving credibility issues. Unions are aware of this fact and phrase their charges accordingly. Charges filed when the Region is extremely busy stand a lesser chance of maturing into complaints than charges filed when the Director's attorneys and subordinates are looking for work. In other words, the human element intervenes, and while no one can impugn the Board's conduct in this regard, it is the inevitable price which one pays for an administrative system.

Suppose that there is merit to a particular charge and a complaint issues. From charge to complaint and from complaint to hearing, the time lapse is, at least in the Chicago region, about 60 days. Responsive pleadings are required. Witnesses must be prepared with a view to professional cross-examination. A hearing must be had with a degree of formality only slightly less than a full-blown trial. This requirement means the services of an attorney, with an attendant expense which only prosperous companies can bear. The legal expense does not stop at the hearing. Briefs to the Trial Examiner (who conducts the hearing, rules on evidence and credibility, and submits a recommended

[4] Labor Board investigators are usually young attorneys starting their careers. They have no power to decide whether a complaint issues. They draft a report with recommendations, and sit in on the agenda meetings where senior personnel make the "go," "no-go" decision.

[5] "Board" is used here collectively to include Region, Regional Director, General Counsel and the Board itself, unless the context makes it otherwise clear.

[6] Cooperation, however, should stop short of signing the affidavits invariably requested by the Board investigators. A poorly phrased affidavit, if a complaint issues, is grist for the impeachment mill, and while a willingness to submit affidavits may impress an investigator and his superiors, experience teaches that the Board will issue a complaint only if they foresee a reasonable chance of victory. Accordingly, a refusal to sign affidavits during the investigative process does not significantly increase the chances of a complaint.

decision to the Board) are traditional, as are briefs to the Board, except in the unusual case where all parties are satisfied with the Trial Examiner's opinion and recommendations.

In other words, routine plant discipline can precipitate an expensive trial resplendent with appeals. Moreover, the expense of litigation is not the employer's only injury. In the usual case, it is some solace to even a disappointed litigant that his opponent has suffered an equally oppressive legal bill. However, where a union succeeds in extracting a complaint from the Labor Board, it may stand aside and let the Board prosecute. While the government's least concern is the expense of trial, the respondent company bears the full brunt of legal fees and expenses absent even the satisfaction that the real opponent has suffered equally. Thus, the union can avail itself of a unique economic advantage by way of the unilateral expense to the company. Naturally, the charging parties' knowledge that the government will act as their attorney encourages the filing of charges.

The usual period of time from charge to hearing is two months, as noted before, but from hearing to final Board action (barring appeals to court) may take years. If back pay is involved, and the employee earns at a lesser rate in the interim than his rate prior to the discipline, the employer incurs even further expense as he must make up the difference—in many cases a substantial amount.[7] The result is a delay and expense endemic to litigation, caused no less by the deliberations which lawyers and judges presume to count as wisdom than by the difficulty of the effort of five men to administer an entire nation's labor laws. In short, it is sheer nonsense to wheel up a federal agency to administer a plant discharge.

Unilateral expense and delay are the hallmarks of Board action. As a result, the employer becomes gun shy. Discipline is withheld out of simple business considerations and the net result is an increase in union power. The employer knows that the union officer can divert the grievant from the Board. But the employer also knows that the price of intercession would be concession, psychological or otherwise, in another area of company-union relations.

The deliberative process of the Board offers no comfort to an employer. The safeguards of common law evidence, the presence of a court reporter, the assistance of trained counsel, and the protective supervision of conservative courts, are no match for Trial Examiners and Board members who *know* that employers are hostile to the concept of unionism. The knowledge is based on fact. Employers would much prefer to exercise unrestricted the economic powers which

[7] In J.H. Rutter-Rex Mfg. Co. v. NLRB, 399 F.2d 356, 68 L.R.R.M. 2916 (5th Cir. 1968), the court refused, because of the inordinate delay by the Board in issuing a back-pay specification, to enforce more than *5 years* back pay.

fortuity has placed in their hands. Unions, by the threat of concerted activities, force employers to pay more to employees than the company accountant would prefer and to accord greater weight than would the efficiency expert to seniority, working conditions and simple employee dignity. This awareness of employer attitude is the premise of Board action which over the years has contributed to the enormous increase of union leverage over all but the largest of employers. The premise is inarticulate, of course. The flaw in its formulation is that the "hostility" towards unionism which Board members employ as a subconscious rationalization against employers is not the hostility which the law prohibits. Most employers, at least those who have emerged from the stone age, acknowledge and work with unions much as they acknowledge and work with the Internal Revenue Service. They do not like it but they live with it. The Board should penalize cheating but not presume its existence. The Board does not properly distinguish between kinds of hostility, and thereby it converts its courtrooms into arenas in which one of the gladiators has the advantage.

As a basic proposition, all other considerations aside, it is an economic waste to employ the ponderous machinery of a federal agency to settle union disputes which the parties thereto are perfectly capable of handling themselves.[8] Let no one think that divesting the Board of jurisdiction over arbitral matters leaves the employer with free rein. The grievant is represented by a union generally far more powerful than the company which employs its members. Nor is there any suggestion that the Board's powers be diminished where employees are unrepresented. Rather, it is assumed for these purposes that a labor agreement offers the ordinary protections enforceable by arbitration and Section 301 of the Labor-Management Relations Act.[9] The proposition may be stated, for the reasons herein argued, that whenever an enforceable labor agreement provides for machinery to terminate disputes between an employer and a labor organization, the Board should have no power to act.

II. THE ARBITRATION TRIBUNAL

The purpose of the Labor Board is to administer and vindicate a statute enacted by Congress which has chosen to impose certain standards of conduct, usually and otherwise referred to as justice. But this is *not* the purpose of arbitration. If justice emerges from the informality of arbitration the parties may count themselves the fortunate recipients of an unintended windfall. The fact is that the idea

[8] See Sarnoff, Arbitration, Not NLRB Intervention, 18 Lab. L.J. 602 (1967).

[9] 29 U.S.C. § 185 (1964). Section 301 opens the federal courts to suits for violations of contracts between employers and unions representing employees in industries affecting commerce. This access permits enforcement of agreements to arbitrate. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

behind arbitration is to end labor squabbles in the conference room, and avoid their spilling into the street. Even an unjust solution to plant grievances is nevertheless a solution and far better than none at all. It is this insight, known to every farmer in the labor field, which has escaped the Board and which if understood by it would protect untold generations of flies from the onslaught of triphammers.

Once the arbitration purpose is understood, and once some of the ground rules are known, the prompt and inexpensive nature of arbitration becomes explicable. The system is not ideal and there are pitfalls for the unwary employer, but for the routine plant dispute no better method exists. The distinguishing hallmark is finality at moderate expense, attributes which are, in context, of greater importance than correctness of result.

From grievance to final judgment, a discipline case in arbitration is ended in about two to three months, much of which time is consumed by the parties' pre-arbitration grievance procedure. Hearings of more than one day are uncommon. Pleadings are unheard of. Evidentiary rules are generally ignored and all but the most egregious testimony is admitted. Lawyers, briefs and transcripts of proceedings appear in less than half of all arbitrations. The company's personnel director and the union's international representative are the usual protagonists, in a confrontation between friendly enemies. The hearings are adversary but in a sense different from formal litigation. The representatives know each other intimately and are reluctant to inflict wounds which will fester and infect their relationship for the future. Perjury abounds, but no more than in formal proceedings and perhaps less because the spectators and principals are friends who *know*.

The average cost to each party of an uncomplicated arbitration is about 500 dollars. The cost is great enough to deter a frivolous resort to the forum but is hardly onerous. Compared with the cost of a Board proceeding, the amount is paltry. Where lawyers and court reporters are used, and briefs are composed, the expense escalates dramatically, but even then the cost to each side is usually under an additional 1000 to 1500 dollars. There are no appeals save in those cases where the principle at stake is crucial or where feelings run deep. The courts' aversion to any intrusion upon an arbitrator's judgment explains the paucity of appeals,[10] an aversion grounded in the good sense which recognizes that prompt finality is a goal of greater substance in this area than any other. Indeed, unless an award is patently fraudulent, or the vital interests of either party are at stake, arbitration appeals are clearly unwarranted.

[10] See the arbitration trilogy: United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

The emphasis given here to convenience of arbitration should not suggest that a flip of a coin would be an acceptable substitute. Of course, enough justice must emerge else companies and unions would have foregone the remedy long ago. The fact is that most arbitration awards, like most jury cases, are adequate. The reputation of an arbitrator, if his livelihood depends largely on that activity, is greater in respective importance than that of the robed jurist whose tenure is assured until the next election or appointment. The measurable advantage is that the arbitrator cannot offend either litigant by a patently improper decision because his future employment is placed in immediate jeopardy. The arbitrator has an economic interest in a just award, and on the roster of comparative priorities men usually place that interest first. The losing litigant confronted with an equitable award instinctively knows that his disappointment proceeds from a deflated pride. He will select the same arbitrator again either out of respect for his wisdom or because of a cynical prospect that the arbitrator owes him one. In either event, and because the winner thinks him favorably biased, the arbitrator is reappointed. The arbitrator who ignores the merits, or who lacks the competence to define the real issues, will see his business dwindle as the losing party spreads the word. Hence, arbitration is a self-regulating system which has evolved, in this country at least, as a more than satisfactory means to calm labor turbulence.

Unexpected dividends arise from arbitration which the Labor Board cannot pay. Unless the labor agreement is unduly restrictive, an arbitrator can tailor his award to suit what he detects are the intentions of the parties. Discipline may be reduced; reinstatement may be ordered without back pay; a "warning" can be given, tantamount to probation, which is usually respected by the relieved grievant; both parties may be praised in writing for their good faith; and wholesome admonitions can be incorporated into an award and can thereafter be relied upon by the parties to circumscribe exaggerated positions. Even the loser is given something by the talented arbitrator and prideful feathers can be smoothed. The Labor Board, hobbled by a statute, and politically concerned with sensitive superiors, has neither the expertise nor the understanding to play Solomon in what is, after all, a contest between humans.

Another advantage of arbitration, which the Labor Board cannot meet, is that the forum itself is an extension of the collective bargaining process. The parties meet across the table and air grievances unhindered by the doctrine of relevance. The immediate issue which the arbitrator is called upon to decide may be merely the tip of the iceberg. But its exposure permits both sides to consider solutions to difficulties more sensitive than the reason for the hearing. The arbi-

trator knows as much. Testimony which would be laughingly irrelevant in a court of law is admitted with all the solemnity of critical documents. The parties have unburdened themselves, insults are avenged, and tensions reduced by the psychological benefits which flow from cathartic disgorgement.

But the Labor Board is bound by a law. Settlements can be effected, but the rigors of a statute and the fear of critical superiors in Washington make the settlement process difficult. Apart from the higher cost of settlements which employers must pay to avoid the stranglehold of extended litigation, the humiliation of a *mea culpa* notice is usually exacted by the Board. The net effect is an angry employer, angry with the union for precipitating the charge, angry with a grievant who may have received an unwarranted windfall, and angry with the Board who seemed to have acted as a union partisan. This result hardly improves labor relations, unless the Board defines improvement to include a lessening of employer status.

Concededly, some discoloration exists in the arbitration picture. The number of competent arbitrators is gradually declining. Employers and unions are reluctant to use younger, unknown aspirants who are in turn unable to acquire the experience and reputation which parties demand. The costs are gradually increasing as inflationary pressures grow, and there appears to be a growing tendency, perhaps caused by an influx of academics as arbitrators, to formalize the process in order to make it appear more difficult and mysterious. But the genius of the system lies in its ability to heal itself for no reason other than that it is to the economic benefit of the principals that it do so. The alternative, recourse to the Labor Board and the courts, is appalling.

The gradual commitment of full-time arbitrators to the industrial field will assure a continuing effort to ameliorate injustices as they occur. There is no room for doubt, after a balancing of all considerations, that the impartial arbitration of labor disputes dealing with the construction of collective bargaining agreements is far superior to Labor Board involvement. Only a tenacious interest in the vested benefits of a bureaucratic agency can explain the tolerance granted by Congress to its maintenance. Equally surprising is the attitude of the judiciary which is usually ingenious enough, when it so desires, to manipulate statutory language to uncover an intent corresponding to social needs.

III. Section 10(a)

But the courts have a mountain to climb. Section 10(a) of the Act[11] provides that the power of the Board to prevent any person from

[11] 29 U.S.C. § 160(a) (1964).

engaging in an unfair labor practice "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . ." At first glance it is hard to see how a court can overcome the clear language of the statute. The casual reader is mesmerized by the term "agreement," for labor arbitration proceeds from, and cannot exist in the absence of, agreement between a company and a union. The fact is, however, that Congress in 1935 did not necessarily intend "agreement" to mean "labor agreement." Indeed, a valid argument can be made that Congress had in mind a completely different kind of agreement.

This fact finds support in the congressional debates attendant to the passage of the Wagner Act. Time has mercifully shadowed the events of the Depression years, but the National Industrial Recovery Act was much alive in those days.[12] The NIRA, which was ultimately consigned for constitutional reasons to a legislative graveyard, authorized the creation of industrial codes among government, industry and labor. The intent, whatever the euphemism, was to fix wages and prices. Agreements were to be reached in tripartite fashion which would govern the wage, price and distribution practices of the particular industry. As part of the agreements, or codes, machinery would be established to settle the inevitable labor disputes. The principle of the NIRA was the self-regulation of industry and labor. It was contemplated that labor organizations would represent their membership in matters affecting them.

The problem confronting Congress in the Wagner Act was whether to grant paramount authority to the Labor Board in those areas overlapping with the respective industrial codes drawn up under the NIRA. It was advocated, on the one hand, that the jurisdiction of the NLRB should be carefully insulated from encroachment by any agencies established by codes or *agreements pursuant to the NIRA*. It was argued that the motive behind the first sentence of section 10(a) was to dispel any doubts as to the intent of Congress regarding the superiority of the Board over the NIRA agreements.[13] "[T]hese special

[12] Act of June 13, 1933, ch. 90, 48 Stat. 195. The Act was invalidated in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Section 4(a) of the NIRA authorized the President "to enter into agreements with, and to approve voluntary agreements between and among, persons engaged in a trade or industry, labor organizations, and trade or industrial organizations, associations, or groups, relating to any trade or industry, if in his judgment such agreements will aid in effectuating the policy of this chapter . . . ."

[13] The motive for writing in this section can best be understood by reference to the President's letter to Mr. Biddle in regard to the case of *Jennings v. The San Francisco Call Bulletin*. In that case it will be remembered that although the National Labor Relations Board thought it could decide a case in the newspaper industry, the President suggested that the Board should not take jurisdiction over any such case, since there had been provided by code a labor

industrial relations boards in the several industries would be mediation boards and not law-enforcement boards. It is a further carrying forward of the idea of dividing these two functions."[14]

The historical context illuminating the meaning of the term "agreement" is put into even sharper focus by reference to the arguments against granting the Board sovereignty over the NIRA agreements. One opponent declared that section 10 was an attempt "to supersede all of the machinery heretofore established under the [NIRA] . . . for the settlement of labor disputes. It is at variance with the fundamental principle of the NIRA—Government-supervised self-regulation of industry and labor."[15]

Eventually, history informs us, the decision was in favor of the Labor Board. What emerges from this debate, however, is that the word "agreement" in Section 10(a) of the Act need not, and probably did not, mean "labor agreement."[16] Congress seemed to have had in mind those agreements among industry, labor and the government which were to govern not only labor matters but prices, production and distribution. As between the industry boards, which arose out of trilateral agreements, and the Labor Board, Congress allocated to the Labor Board paramount authority in the overlapping areas. There is nothing in the legislative history of the Act which suggests that Congress included within the meaning of "agreement," as used in section 10(a), those private agreements reached by a particular employer and the union which represented its employees. There is nothing in the legislative history of section 10(a) to suggest that the Labor Board was to possess the power to disregard the award of an arbitrator appointed under a labor agreement and to substitute its own judgment in purported pursuit of statutory purposes.

It cannot be gainsaid that Congress, at least after 1947, favored arbitration as a dispute-settling procedure. Section 203(d) of the Labor-Management Relations Act (Taft-Hartley) Act[17] is explicit. It provides:

> (d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The [Mediation and Conciliation] Service is directed to make its concilation and mediation services available in the

board supposedly competent to hear labor disputes in the newspaper industry. 2 Legislative History of the National Labor Relations Act 1323 (1949).

[14] Id. at 2097.

[15] Id. at 1750.

[16] For a complete resume of the legislative history of § 10(a), see Legislative History of the National Labor Relations Act (2 vols.) (1949).

[17] 29 U.S.C. § 173(d) (1964).

settlement of such grievance disputes only as a last resort and in exceptional cases.

Section 201(c) of the Act is to the same effect.[18] Citation of these provisions may prove too much, of course, because if Congress were determined to displace Board action by arbitration it could have done so in 1947 by amending section 10(a) itself. Congress was aware that the Board had assumed jurisdiction of matters otherwise arbitrable before the Taft-Hartley Act was passed.[19] Arguments of congressional intent in this regard are make-weight, however. Perhaps Congress intended the Board to withdraw gracefully from deciding arbitrable matters and enacted section 203(d) as a courteous face-saving push in that direction.

In any event, the fact remains that the Board, as well as the courts, have repeatedly cited section 10(a) whenever a respondent has challenged its power to act in a matter of arbitral cognizance. Surprisingly, in the many years since section 10(a) was adopted, neither the Board nor the courts have stopped to inquire into the legislative history of the term "agreement."[20] This oversight, calculated or otherwise, has permitted a body of law to grow to a size now insurmountable. It has become an axiom of labor law, a proposition assumed without proof, that the Board by virtue of section 10(a) can assume jurisdiction of an arbitrable dispute irrespective of the parties' agreement and irrespective, further, of the award itself. It is doubtful, despite the obvious advantage to industrial relations, whether even the courts can be persuaded to peel away the encrusted decisions and re-examine basic congressional purpose.

IV. The Board Precedents

The first challenge to the Board's power to decide matters within the competence of arbitrators occurred in 1939. The reaction of the Board was bluntly antagonistic. In *J. Klotz & Co.*,[21] an employer had been charged with moving its plant and discharging and locking out union members at the new location. Eventually, both the employer and the union agreed to arbitrate and to be bound by the final award. The neutral directed that the discharged and locked out employees be reinstated. A Trial Examiner recommended dismissal of the com-

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18 29 U.S.C. § 171(c) (1964).

19 See J. Klotz & Co., 13 N.L.R.B. 746, 4 L.R.R.M. 344 (1939).

20 See NLRB v. Hershey Chocolate Corp., 297 F.2d 286, 49 L.R.R.M. 2173 (3d Cir. 1961); NLRB v. Bell Aircraft Corp., 206 F.2d 235, 32 L.R.R.M. 2550 (2d Cir. 1953); NLRB v. Local 291, UAW, 194 F.2d 698, 29 L.R.R.M. 2433 (7th Cir. 1952); NLRB v. Walt Disney Prods., 146 F.2d 44, 15 L.R.R.M. 691 (9th Cir. 1944), cert. denied, 324 U.S. 877 (1945); NLRB v. Newark Morning Ledger Co., 120 F.2d 262, 7 L.R.R.M. 379 (3d Cir.), cert. denied, 314 U.S. 693 (1941); Annot., 137 A.L.R. 867 (1942).

21 13 N.L.R.B. 746, 4 L.R.R.M. 344 (1939).

plaint on the ground that the arbitrator's award had satisfied the Act's remedial demands. The Board ruled otherwise, footnoting and relying on Section 10(a) of the Act.

> This recommendation is hereby rejected. The . . . award did not purport to settle any disputes under the Act, nor was the question of violation of the Act as such before the parties or the Impartial Chairman. Moreover, a settlement of disputes between the parties involved cannot oust the Board of jurisdiction in regard to those disputes where they involve unfair labor practices. In prior cases, the Board had stated that
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> > The Board itself, representing the United States, is a party in interest in proceedings relating to unfair labor practices under the Act. No private party can sanction an employer's interference, restraint or coercion in the exercise of rights guaranteed by Section 7 of the Act . . .[22]

In other words, the Board did not intend to abdicate its work to anyone else. This is a Schopenhauerian demonstration of the will to power syndrome common to all administrators. It is the territorial imperative revealing itself far from the primate jungle, and it was entirely predictable.

At least one court experienced trouble with this proposition. In *NLRB v. Newark Morning Ledger Co.*,[23] the Third Circuit refused to enforce a reinstatement order because the company and union had signed a labor agreement covering disciplinary matters. The court stressed that the function of the Board under the Act was to "pave the way" for collective bargaining on an equal basis by the protection of employees from employer interference, intimidation and coercion, so that voluntary agreements as to wages, hours and other conditions of employment could be reached. Thus, the ultimate goal of diminution of industrial strife could be attained. The Third Circuit also emphasized the exclusively private nature of the collective bargaining agreement.

> [T]his [violation of the terms of a bargaining contract] is a breach of a *private* right which may be redressed in the manner stipulated in the agreement or by recourse to the courts. The National Labor Relations Act contemplates no more than the protection of the *public* rights which it creates and defines. . . . [I]t is no part of [the Board's] duty to police the relations between an employer and his employee

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[22] Id. at 758-59, 4 L.R.R.M. at 347 (footnotes omitted).

[23] 120 F.2d 262, 7 L.R.R.M. 379 (3d Cir.), cert. denied, 314 U.S. 693 (1941).

> under a collective bargaining agreement. To construe the Act otherwise would be to impose upon the Board the Herculean task of supervising the day to day relations of employers and employees in that vast and ever growing segment of commerce and industry in which successful collective bargaining has well nigh eliminated industrial strife.[24] (Emphasis added.)

However, on rehearing, the court reversed itself, citing Section 10(a) of the Act,[25] as conferring upon the Board a discretion to exercise its "very broad" jurisdiction. Although "the mere fact that a private right . . . has been infringed . . . is it not of itself sufficient to bring the Board's powers into play,"[26] the court declined to interfere with the Board's power to determine whether the public interest required it to act.[27]

In *Rieke Metal Prods. Corp.*,[28] the employer had discharged several employees during an organizing campaign but later entered into an arbitration agreement settling the strike. The discharges were submitted to the arbitrator. The award found all but one of the discharges illegal and directed reinstatement with back pay. The company complied with the award and moved to dismiss the section 8(a)(3) allegations. The Board, limiting its interest to a cease and desist order, found the contention without merit.[29] "This proceeding is concerned not with private rights, but rather with enforcement of a public policy over which the Board, pursuant to Section 10(a) of the Act, has exclusive jurisdiction, 'not affected by any other means of adjustment.' "[30]

The first case in which the Board was willing to pay some respect to the value of arbitration machinery, *Consolidated Aircraft Corp.*,[31] arose in a defense plant which had made extensive operational changes, including third shift and classification changes, without prior consultation with the union representing its employees. The company also terminated a union committeeman. Unfair labor practice charges were dismissed on the theory that the union could have resorted, but did not, to grievance and arbitration procedures.

The Board noted that the union was, in effect, asking it to intervene in a situation where contractual arbitration machinery was avail-

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[24] Id. at 265-66, 7 L.R.R.M. at 381-82.

[25] Id. at 266, 8 L.R.R.M. 571.

[26] Id. at 268, 8 L.R.R.M. at 574.

[27] Id., 8 L.R.R.M. at 574.

[28] 40 N.L.R.B. 867, 10 L.R.R.M. 82 (1942).

[29] See also North American Aviation, Inc., 44 N.L.R.B. 604, 11 L.R.R.M. 63 (1942), enforcement denied, 136 F.2d 898, 12 L.R.R.M. 806 (9th Cir. 1943).

[30] 40 N.L.R.B. at 874.

[31] 47 N.L.R.B. 694, 12 L.R.R.M. 44 (1943), modified on other grounds, 141 F.2d 785, 14 L.R.R.M. 553 (9th Cir. 1944).

able which the union had not even attempted to utilize. The Board also pointed out that the execution of a collective bargaining contract does not terminate the process of bargaining which includes the interpretation and administration of the contract as well as the settlement of disputes arising under it. It was said that intervention by the Board would impair collective bargaining by encouraging the parties to abandon the settlement procedures upon which they had agreed.[32]

Thus the Board held that "[w]e . . . do not deem it wise to exercise our jurisdiction in such a case, where the parties have not exhausted their rights and remedies under the contract as to which the dispute has arisen."[33]

The employer in *Consolidated* was not accused of anti-union discrimination in its failure to bargain. Although the principle of Board deference to arbitration would presumably cover such a case, no arbitrator, unless burdened by extraordinary language in the agreement, will uphold a discharge based on union activity. However, in *S. K. Wellman Co.*,[34] where an employee was discharged for seeking to organize a union as a rival to the incumbent, the Board declined to apply *Consolidated* because the interest of the employee's union was adverse to the employee. The Board's ruling was clearly proper, as it would be too much to expect from an incumbent union that it zealously represent an employee dedicated to the incumbent's destruction. *Wellman* is comparable to the cases in which no arbitration machinery was available.[35] Similarly, in *Aluminum Co. of America*,[36] the Board refused to respect an award which upheld the discharge of an employee under the union security provisions of the labor agreement. The employee was deprived of effective representation by a union whose conflict of interest was patent.[37]

Consolidated was followed by the Board in *Timken Roller Bearing Co.*,[38] where the employer was charged with refusal to bargain after

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[32] Id. at 706, 12 L.R.R.M. at 45.

[33] Id.

[34] 53 N.L.R.B. 214, 13 L.R.R.M. 97 (1943).

[35] In the absence of grievance machinery, *Consolidated* was held not to govern. United States Plywood Corp., 49 N.L.R.B. 1106, 12 L.R.R.M. 187 (1943). See also Marlboro Cotton Mills, 53 N.L.R.B. 965, 13 L.R.R.M. 142 (1943) (employer did not cooperate in union's effort to arbitrate discharge of union president and thus was not allowed to argue the availability of arbitration machinery).

[36] 68 N.L.R.B. 750, 18 L.R.R.M. 1169, enforcement denied, 159 F.2d 523, 19 L.R.R.M. 2164 (7th Cir. 1946).

[37] Accord, Local 291, UAW, 92 N.L.R.B. 968, 27 L.R.R.M. 1188 (1950), enforced, 194 F.2d 698, 29 L.R.R.M. 2433 (7th Cir. 1952); Hamilton-Scheu & Walsh Shoe Co., 80 N.L.R.B. 1496, 23 L.R.R.M. 1263 (1948). But see Paramount Pictures, Inc., 79 N.L.R.B. 557, 22 L.R.R.M. 1428 (1948), where the Board dismissed maintenance-of-membership discharges by deferring to an arbitration award in favor of the employer.

[38] 70 N.L.R.B. 500, 18 L.R.R.M. 1370 (1946), enforcement denied on other grounds, 161 F.2d 949, 20 L.R.R.M. 2204 (6th Cir. 1947).

unilateral publication of plant rules. Both sides submitted the controversy to a neutral who ultimately ruled that the employer had acted properly. Pending the neutral's decision the union invoked the processes of the Board. The Board stated:

> It is evident that the Union had concurrently utilized two forums for the purpose of litigating the matter here in dispute. . . . [I]t would not comport with the sound exercise of our administrative discretion to permit the Union to seek redress under the Act after having initiated arbitration proceedings which, at the Union's request, resulted in a determination upon the merits. In the interest of ending litigation and otherwise effectuating the policies of the Act, we shall dismiss that portion of the complaint relating to the respondent's refusal to bargain as to the Employees' Manual.[39]

As in *Consolidated* the Board was careful to admonish observers that its deference to arbitration in the case before it did not mean to "imply that the determination of an arbitrator is binding upon the Board."[40] Section 10(a) was again invoked.[41]

The Board did not follow *Consolidated*, however, in *General Motors Corp.*,[42] and *John W. Bolton & Sons, Inc.*[43] In *General Motors* the employer unilaterally promulgated a group insurance program and in *Bolton* the employer installed, without discussion, a wage incentive plan. In both cases arbitration was available and in both cases the Board rejected the employers' arguments that the unions should be required to exhaust their preliminary remedies before resorting to the Board.[44]

Yet the progeny of Consolidated includes *Crown Zellerbach Corp.*,[45] another refusal to bargain case, in which the union could have, but did not, invoke arbitration. The reasons given by the Board for deferring to arbitration are persuasive.

> In view of this background of a peaceful and what appears to be a wholly salutary employer-employee relationship, we are reluctant to issue a remedial collective bargaining

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39 Id. at 501, 18 L.R.R.M. at 1371 (footnotes omitted).

40 Id. at 501 n.2, 18 L.R.R.M. at 1371.

41 See also Todd Shipyards Corp., 98 N.L.R.B. 814, 29 L.R.R.M. 1422 (1952) (grievance filed but not processed to arbitration).

42 81 N.L.R.B. 779, 23 L.R.R.M. 1422 (1949), enforced, 179 F.2d 221, 25 L.R.R.M. 2281 (2d Cir. 1950).

43 91 N.L.R.B. 989, 26 L.R.R.M. 1598 (1950).

44 See also Standard Oil Co., 92 N.L.R.B. 227, 27 L.R.R.M. 1073 (1950), modified on other grounds, 196 F.2d 892, 30 L.R.R.M. 2276 (6th Cir. 1952) (unilateral amendment of group life insurance; defense that union failed to exhaust grievance and arbitration machinery rejected).

45 95 N.L.R.B. 753, 28 L.R.R.M. 1357 (1951).

> order as a result of the Respondent's isolated unilateral action. Particularly is this so since the parties have failed to utilize the contractual procedures established for bargaining concerning the interpretation and administration of their contract, and where there is apparently no serious obstacle to an amicable settlement of the issue through bargaining within the framework provided in that contract. Indeed, the Board has frequently stated that the stability of labor relations which the statute seeks to accomplish through the encouragement of the collective bargaining process ultimately depends upon the channelization of the collective bargaining relationship within the procedures of a collective bargaining agreement. By encouraging the utilization of such procedures in this case, we believe that statutory policy will best be effectuated. Affirmative Board action would on the other hand put the Board in the position of policing collective bargaining agreements, a role we are unwilling to assume.[46]

Consolidated was the first instance of Board deference to arbitration as an alternative means for resolving labor disputes. Decisions following it used language exhibiting a real awareness by the Board of the desirability of a prompt end to contract disputes. Perhaps the exigencies of war production contributed to the result. In any event, *Consolidated*'s vogue was a short one for it became clear from later decisions that the Board felt itself perfectly capable of handling all labor matters which either party brought to its attention. In 1947, however, the Board membership was increased from three to five, and the Board became solidly positioned as a respected, albeit controversial, government agency. Thus, by the 1950s, with the confidence born of assured security, the Board could again entertain some diminution of its monopoly.[47]

It did so in *Spielberg Mfg. Co.*,[48] where as part of a strike settlement, the company and union agreed to arbitrate the discharge of

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[46] Id. at 754, 28 L.R.R.M. at 1357-58 (footnotes omitted). The Board has reserved the right to ignore an arbitration award at odds with the statute. See Stibbs Transp. Lines, Inc., 98 N.L.R.B. 422, 29 L.R.R.M. 1349 (1952) (discharges alleged to violate § 8(a)(3)); Monsanto Chem. Co., 97 N.L.R.B. 517, 29 L.R.R.M. 1126 (1951), enforced, 205 F.2d 763, 32 L.R.R.M. 2435 (8th Cir. 1953) (unlawful application of maintenance-of-membership clause).

[47] In Heckman Furniture Co., 101 N.L.R.B. 631, 31 L.R.R.M. 1116 (1952), enforced, 207 F.2d 561, 32 L.R.R.M. 2759 (6th Cir. 1953), the Board found that the company had violated § 8(a)(5) by declining to furnish the union with information regarding individual wage rates, wage ranges and individual job classifications. It rejected the company's contention that the union's request for such information should have been processed through the contract grievance procedure covering any "complaints or charges upon matters which have not been made the subject of collective bargaining."

[48] 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955).

four employees for picket line misconduct. The arbitrator ruled for the company and the four filed charges under section 8(a)(3). The Board deferred to the award.

> [T]he arbitration award is not . . . at odds with the statute. This does not mean that the Board would necessarily decide the issue of the alleged strike misconduct as the arbitration panel did. We do not pass upon that issue. . . . [A]ll parties had acquiesced in the arbitration proceeding. In summary, the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. In these circumstances we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrators' award. Accordingly, we find that the Respondent did not violate the Act when, in accordance with the award, it refused to reinstate the four strikers. We shall therefore dismiss the complaint in its entirety.[49]

The *Spielberg* guidelines required, for deference purposes, a fair and regular arbitration proceeding, a unanimous agreement that all parties were to be bound, and an award not inconsistent with the policies and purposes of the Act. The Board had elevated itself to an appeals court, presiding over arbitrations to insure technical and substantive compliance with due process under the labor laws.[50] If the Board adhered to the *Spielberg* guidelines, which cannot be faulted, the root problems of the Board's intrusion into plant matters would have been obviated. However, the Board, after *Spielberg*, assumed jurisdiction of arbitral matters as much on an ad hoc basis as before.

Spielberg dealt with an existing arbitration award. Consistency would require, if awards are to be respected under the conditions laid down in *Spielberg*, that before resorting to the Board a party should show some effort to exhaust the contract remedy. But this rationale was not adopted. In *Beacon Piece Dyeing & Finishing Co.*,[51] an employer was found guilty of an unlawful refusal to bargain when it

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[49] Id. at 1082, 36 L.R.R.M. at 1153. Cf. Lodge 1021, IAM, 116 N.L.R.B. 645, 38 L.R.R.M. 1305 (1956), remanded, 247 F.2d 414, 40 L.R.R.M. 2497 (2d Cir. 1957).

[50] See NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967) (Board has jurisdiction to remedy unfair labor practice (§ 8(a)(5)) arising out of alleged breach of agreement containing grievance procedure but lacking arbitration clause); NLRB v. Acme Indus. Co., 385 U.S. 432 (1967) (Board may compel employer to furnish to union data necessary to implement arbitration remedy); Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964) (approval of doctrine of Board deferral to arbitration in dispute under § 10(k) of the Act).

[51] 121 N.L.R.B. 953, 42 L.R.R.M. 1489 (1958).

unilaterally increased its workloads and granted an unbargained-for wage increase. The Board stated:

> [T]he Board has consistently held that the collective-bargaining requirement of the Act is not satisfied by a substitution of the grievance procedure of a contract, unless the grievance provisions of the contract contain a waiver of the statutory right "expressed in clear and unmistakable terms." And the Board has held further that there is no such unequivocal waiver where, as here, the grievance provisions make no mention of such a waiver. We therefore find, contrary to the Trial Examiner, that the existence of the grievance procedure in the contract constitutes no basis for dismissing the complaint.[52]

Spielberg was followed in *I. Oscherwitz & Sons*,[53] and deference was paid to an arbitrator's award sustaining a discharge. But in *Monsanto Chem. Co.*,[54] also a discharge case, the Board rejected an award in which the arbitrator had declined to pass on an allegation that union activities had played a part in the discharge and had reached a decision on other grounds. The Board reached a similar result in *Ford Motor Co.*,[55] when it rejected an arbitration award which had not passed on certain issues. But in *General Motors Corp.*,[56] a settlement reached in the grievance procedure reducing the discipline of a committeeman was rejected by the Board because it had not proceeded to arbitration.[57]

In *Hercules Motor Corp.*,[58] however, the Board took a significant step forward in allowing arbitrators a broader scope in labor matters. A union demanded time-study data to contest newly established rates. The company denied the request and proposed arbitration. The union sought relief at the Board, filing charges under section 8(a)(5). The complaint was dismissed. Carefully reserving its option under section 10(a), the Board nevertheless chose to emphasize the favored role assigned to arbitration by section 203(d). The stated policy of the Act, the Board declared, is to encourage the practice and procedure of collective bargaining which can best be accomplished by requiring the parties to exhaust the remedies which they have co-authored for the settlement of disputes. In a welcome display of common sense,

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[52] Id. at 961-62, 42 L.R.R.M. at 1491 (footnotes omitted). Accord, Geo. Myrmo & Sons, 122 N.L.R.B. 256, 43 L.R.R.M. 1105 (1958) (reinstatement).

[53] 130 N.L.R.B. 1078, 47 L.R.R.M. 1415 (1961).

[54] 130 N.L.R.B. 1097, 47 L.R.R.M. 1451 (1961).

[55] 131 N.L.R.B. 1462, 48 L.R.R.M. 1280 (1961).

[56] 132 N.L.R.B. 413, 48 L.R.R.M. 1368 (1961).

[57] See also Operating Eng'rs Local 18, 145 N.L.R.B. 1492, 55 L.R.R.M. 1188 (1964).

[58] 136 N.L.R.B. 1648, 50 L.R.R.M. 1021 (1962).

the Board announced its reluctance to "permit [its] facilities . . . to be used in avoidance of the bargaining agreement."[59]

In *Montgomery Ward & Co.*,[60] the *Hercules* recognition of the arbitrator's role was extended to cover the application of a labor agreement at new plant facilities. The employer suggested arbitration. The union chose the Board, which ruled for the employer.

> [D]espite the collective bargaining agreement devised by the parties themselves for settling such a dispute, the Union chose instead to file the instant charges—thus asking the Board, in effect, to intervene and resolve the dispute. In these circumstances, the Board would be frustrating the Act's policy of promoting industrial stabilization through collective bargaining if we were to intervene in this dispute, instead of requiring the Union in this case to give "full play" to the established grievance procedure.[61]

In *International Harvester Co.*,[62] the restrictions on arbitration awards were further relaxed. It was concluded that an award is not repugnant to the Act, one of the *Spielberg* criteria for acceptance, if the award is not "palpably wrong."[63] Less attention was given to section 10(a) and substantially more given to section 203(d). The union demanded the discharge of an employee under a union security clause. The parties agreed to arbitrate and the employer, without notice to the employee, vigorously defended the employee's interests.

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[59] Id. at 1652, 50 L.R.R.M. at 1023. *Hercules* was held inapplicable in Acme Indus. Co., 150 N.L.R.B. 1463, 58 L.R.R.M. 1277, enforcement denied, 351 F.2d 258, 60 L.R.R.M. 2220 (7th Cir. 1965), rev'd, 385 U.S. 432 (1967); Puerto Rico Tel. Co., 149 N.L.R.B. 950, 57 L.R.R.M. 1397 (1964), modified, 359 F.2d 983, 61 L.R.R.M. 2516 (1st Cir. 1966); Fafnir Bearing Co., 146 N.L.R.B. 1582, 56 L.R.R.M. 1108 (1964), rev'd on other grounds sub nom. Local 283, UAW v. Scofield, 382 U.S. 205 (1965), enforced, 362 F.2d 716, 62 L.R.R.M. 2415 (2d Cir. 1966); Sinclair Ref. Co., 145 N.L.R.B. 732, 55 L.R.R.M. 1029 (1963); Timken Roller Bearing Co., 138 N.L.R.B. 15, 50 L.R.R.M. 1508 (1962), enforced, 325 F.2d 746, 54 L.R.R.M. 2785 (6th Cir. 1963), cert. denied, 376 U.S. 971 (1964).

[60] 137 N.L.R.B. 418, 50 L.R.R.M. 1162 (1962).

[61] Id. at 423, 50 L.R.R.M. at 1164 (footnotes omitted). Even if the arbitration panel has no neutral member its decisions will be honored if the parties agree to be bound and the award is not repugnant to the Act. Denver-Chicago Trucking Co., 132 N.L.R.B. 1416, 48 L.R.R.M. 1524 (1961). Cf. Gateway Transp. Co., 137 N.L.R.B. 1763, 50 L.R.R.M. 1495 (1962). For a general review of Board deference, see Coachman's Inn, 147 N.L.R.B. 278, 306 n.96, 56 L.R.R.M. 1206 (1964), aff'd, 357 F.2d 134, 61 L.R.R.M. 2445 (8th Cir. 1966).

[62] 138 N.L.R.B. 923, 51 L.R.R.M. 1155 (1962), aff'd sub nom. Ramsey v. NLRB, 327 F.2d 784, 55 L.R.R.M. 2441 (7th Cir.), cert. denied, 377 U.S. 1003 (1964).

[63] 138 N.L.R.B. at 928, 51 L.R.R.M. at 1158. See Edward Axel Roffman Associates, 147 N.L.R.B. 717, 56 L.R.R.M. 1268 (1964); Roadway Express, Inc., 145 N.L.R.B. 513, 54 L.R.R.M. 1419 (1963); Gateway Transp. Co., 137 N.L.R.B. 1763, 50 L.R.R.M. 1495 (1962); Honolulu Star-Bulletin, Ltd., 123 N.L.R.B. 395, 43 L.R.R.M. 1449, enforcement denied on other grounds, 274 F.2d 567, 45 L.R.R.M. 2184 (D.C. Cir. 1959) (arbitration procedures need not meet "Board standards" for recognition).

The Board deferred to the arbitration award. It not only acknowledged that arbitration had become "an effective and expeditious means of resolving labor disputes," but conceded to the arbitrator a superiority of judgment. The Board accepted the award

> since it plainly appears . . . that the award is not palpably wrong. To require more of the Board would mean substituting the Board's judgment for that of the arbitrator, thereby defeating the purposes of the Act and the common goal of national labor policy of encouraging the final adjustment of disputes "as part and parcel of the collective bargaining process."[64]

This is the point. If the congressional blueprint for labor peace was to place the employees on an equal economic plane with their employer, there is no need for Board intervention once a labor agreement, containing machinery for its own administration, is achieved because of that equality.[65]

CONCLUSION

The Board itself has noted, with some deference, a distinction between the "application or interpretation of collective bargaining agreements" and "unfair labor practices." This distinction justifies insulation of one forum from intrusion by the other. The Board's statutory duty to administer the labor laws as expressed in the Wagner Act and its amendments is no more consequential because it is cloaked in

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[64] 138 N.L.R.B. at 928-29, 51 L.R.R.M. at 1158.

[65] See generally Wisconsin S. Gas Co., 173 N.L.R.B. No. 79, 69 L.R.R.M. 1374 (1968); Producers Grain Corp., 169 N.L.R.B. No. 68, 67 L.R.R.M. 1247 (1968); Univis, Inc., 169 N.L.R.B. No. 18, 67 L.R.R.M. 1090 (1968); Flasco Mfg. Co., 162 N.L.R.B. No. 56, 64 L.R.R.M. 1077 (1967); Anaconda Aluminum Co., 160 N.L.R.B. 35, 62 L.R.R.M. 1370 (1966); Auburn Rubber Co., 156 N.L.R.B. 301, 61 L.R.R.M. 1033 (1965), enforced in part & enforcement denied in part, 384 F.2d 1, 66 L.R.R.M. 2129 (10th Cir. 1967); Flintkote Co., 149 N.L.R.B. 1561, 57 L.R.R.M. 1477 (1964); Thor Power Tool Co., 148 N.L.R.B. 1379, 57 L.R.R.M. 1161 (1964), enforced, 351 F.2d 584, 60 L.R.R.M. 2237 (7th Cir. 1965); LeRoy Mach. Co., 147 N.L.R.B. 1431, 56 L.R.R.M. 1369 (1964); Adams Dairy Co., 147 N.L.R.B. 1410, 56 L.R.R.M. 1321 (1964).

Where the parties are progressing towards arbitration, but no award has been rendered, the Board will stay its processes pending the award. Dubo Mfg. Corp., 142 N.L.R.B. 431, 53 L.R.R.M. 1070 (1963). The Board subsequently ruled that the award was too ambiguous to be controlling. 148 N.L.R.B. 1114, 57 L.R.R.M. 1111, enforced, 353 F.2d 157, 60 L.R.R.M. 2373 (6th Cir. 1965). The principle is applicable as well to representation cases. Raley's Supermarkets, 143 N.L.R.B. 256, 53 L.R.R.M. 1347 (1963). See also Coachman's Inn, 147 N.L.R.B. 278, 56 L.R.R.M. 1206 (1964), aff'd, 357 F.2d 134, 61 L.R.R.M. 2445 (8th Cir. 1966) (no step taken toward arbitration); Insulation & Specialties, Inc., 144 N.L.R.B. 1540, 1543, 54 L.R.R.M. 1306, 1307 (1963). Cf. Edward Axel Roffman Associates, 147 N.L.R.B. 717, 56 L.R.R.M. 1268 (1964).

If nothing has been done by either party to institute arbitration, the Board is less hospitable. Plumbers Local 469, 149 N.L.R.B. 39, 45, 57 L.R.R.M. 1257, 1258 (1964). See also Smith Cabinet Mfg. Co., 147 N.L.R.B. 1506, 56 L.R.R.M. 1418 (1964); Adams Dairy Co., 147 N.L.R.B. 1410, 56 L.R.R.M. 1321 (1964).

the trappings of law than the duty of an arbitrator acting pursuant to appointment by private parties. Both are designed to end disputes affecting interstate commerce; both are quasi-judicial in their search for facts; and both are approved and encouraged by law. Moreover, arbitration awards, like cease and desist orders, are enforceable by the courts. The Board's congressional birthplace does not necessarily confer upon it a greater stature and dignity, and as a practical solvent of labor quarrels, arbitration is by far the more efficient.

The Board precedents continue to distinguish among cases (a) where arbitration has not begun, (b) where it is in progress, and (c) where the award is rendered for a leisurely scrutiny by the Board. The general doctrine of *Spielberg* is good law, as is *International Harvester* which requires that an award be honored if not "palpably wrong." The problem is that it is practically impossible to predict the Board's course of action. If a thread of consistency does exist, the Board has kept it remarkably concealed. The language from the pertinent cases reveals the qualms and misgivings of an agency obviously wanting to let routine plant matters be settled by a quicker process and yet deeply unwilling to let slip some of its power and prestige. There is more backfilling and sidestepping in this area of Board law than in any other. Perhaps the courts should put a merciful end to the Board's agony by considering a favored nations clause which would allocate the respective labor disputes to that tribunal most peculiarly fitted to resolve them. This much the courts may do by a resurrection of the congressional purpose beneath Section 10(a) of the Act.

BOSTON COLLEGE
INDUSTRIAL AND COMMERCIAL
LAW REVIEW

VOLUME X | SUMMER 1969 | NUMBER 4