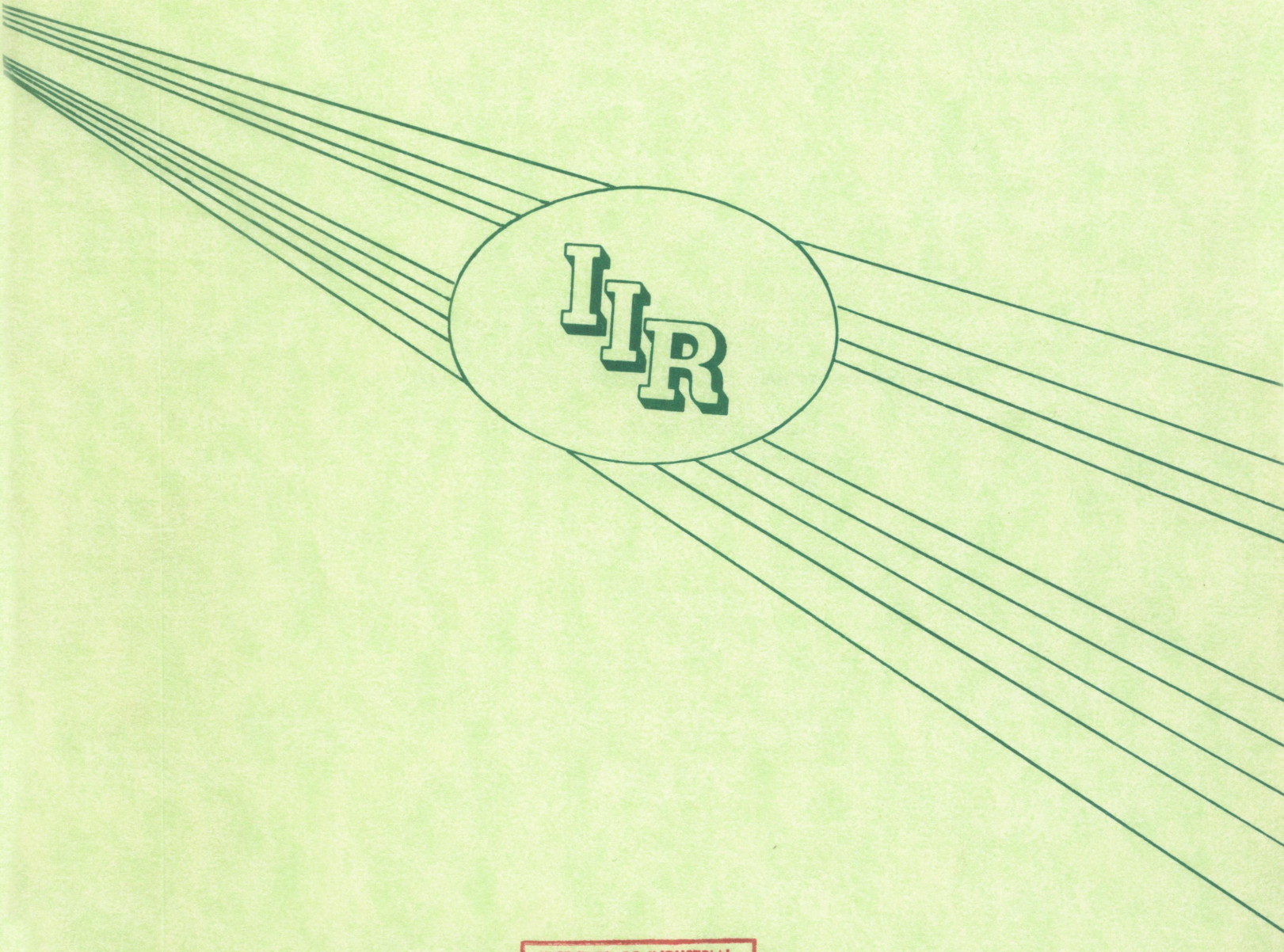
CONTRACT ADMINISTRATION
IN
PUBLIC SECTOR COLLECTIVE BARGAINING

(Training Manual



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CONTRACT ADMINISTRATION

IN

PUBLIC SECTOR COLLECTIVE BARGAINING

Prepared by and under the Supervision of

James J. Gallagher, Coordinator

INSTITUTE OF INDUSTRIAL RELATIONS, UCLA (Los Angeles)

Frederic Meyers, Acting Director

Daniel J. B. Mitchell, Associate Director

(Training manual)

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Edited by Susan Astarita

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FOREWORD

The Institute of Industrial Relations is happy to present this volume, the third in a series of training packages completed under the terms of a contract between the State of California and the University of California, Los Angeles. With funds provided to the State by the federal government, the State asked the Institutes at UCLA and Berkeley to assist in the training of state and local public managers and employees in the conduct of labor relations. A major portion of our role is to prepare and provide training materials. This manual deals with collective bargaining contract administration in the public sector.

Once ratified by the employee organization and adopted by the legislative body, the public sector collective bargaining agreement amends, supercedes, or supplements the rules and regulations governing employment. It is a bilateral undertaking which replaces the unilateral practices of the past. As a result, the administration of the contract arising from the collective bargaining process is also a bilateral undertaking placing new responsibilities on public management and public employee organizations.

In addition to the parties to the contract, contract administration may involve third parties who, in this manual, are referred to as "third-party intervenors." These would include arbitrators called upon to interpret the agreement, employees covered by the agreement, and, uniquely in the public sector, the taxpayer/voter.

The issues in contract administration originate in the ongoing collective bargaining process, which may, in fact, antedate the actual signing of the contract. Negotiations preceding and leading to the development of the collective bargaining agreement directly affect the interpretation of the contract, as does past practice. Moreover, after the contract is signed, there is a continuing obligation to bargain in order to make day-to-day adjustments to the contract and resolve problems not covered in pre-contract negotiations or in the written contract.

Effective contract administration, then, requires a thorough understanding of the contract itself, the enabling collective bargaining legislation, and the precedents used by the courts in interpreting the obligations of the parties in their collective bargaining relationships.

It is our hope that this manual will be useful to practitioners charged with the responsibilities of contract administration, and that the conceptual overview provided will aid students in better understanding the field.

June, 1976

Frederic Meyers
Acting Director

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are found under various Tabs in specially prepared
appendices.

INTRODUCTION

ELEMENTS OF COLLECTIVE BARGAINING

CONTRACT ADMINISTRATION

The process of collective bargaining contract administration can be analyzed or described in various ways. In this training manual, considerable emphasis is placed upon discussion of some of the key issues the practitioner faces in administering a contract. In addition, an overview is included of the administrative process and the techniques of its implementation.

The materials contained in the appendices following the tabbed sections of the manual provide valuable reference and background information on the topics covered in each section. This approach taken to this subject is then organized as follows:

First an overview is given of the administrative process. Contract administration is defined, and its players, tools, and processes are described.

A comprehensive discussion follows of the key issues in contract administration, dealing with the basic questions--the duty to bargain, bargaining history, past practice, and fair representation.

Finally, some practical observations are offered on preparing to administer a contract.

In all of these topics reference is made to decisions of arbitrators and to court rulings. The interpretations presented in most cases represent current opinions of authorities in the field. Where practicable, referenced cases, statutes, and awards have been included to allow the reader to make independent judgments. It is hoped that in this sense the manual will be helpful.

A

TAB A

CONTRACT ADMINISTRATION: A DEFINITION AND THE AUTHORITY TO ADMINISTER

Contract administration is the process by which the collective bargaining agreement is interpreted and translated into acts of compliance. Bilateral in nature, it develops out of the adversary relationship which is established between the parties in contract negotiations. As such it utilizes a variety of techniques and organizational forms in resolving conflicting claims over the agreement's interpretation as well as its implementation. Contract administration, then, is the means by which the objectives of the collective bargaining relationship are in large part fulfilled.

The authority to administer a collective bargaining agreement in California's public sector arises from two sources. The first is found in the state's collective bargaining enabling legislation, which sets forth the underlying rights, obligations, and authorities of public management and public employee labor organizations in their collective bargaining relationship. The second source applies these same rights, obligations, and authorities to the terms and conditions of employment. It is the contract itself.

It is apparent from the interrelationship of these two sources of authority that any difference in statutory authority may substantially affect contractual authority. Given this and the fact that California's

public sector is governed by a number of collective bargaining laws, it is important to review this legislation. In doing so, insight is gained in determining the limits and the thrust of the statutory authority in each segment of the public sector.

I. CALIFORNIA PUBLIC SECTOR LABOR LEGISLATION

At the present time--in the absence of comprehensive legislation--the majority of California's public employees are covered under three separate collective bargaining acts: Employees of state government and higher education are covered by the George Brown Act.[1/] County, city and special district employees are covered by the Meyers-Milias-Brown Act (MMBA). Teachers and classified personnel in K-14 school districts are covered by the Educational Employment Relations (Rodda) Act (EERA).[2/]

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[1]The weakest of the state's bargaining laws, the Brown Act, explicitly does little more than allow for organizations to represent their members and to meet and confer in good faith. (See *Arthur Lipow v. Regents of the University of California 1st CA 1975*). It does not require the parties to enter into written agreements, although such agreements would be binding. (See *Glendale City Employees Assn. v. City of Glendale* in appendix). Also, as the act does not provide for exclusive representation of bargaining units, no organization has succeeded in negotiating a comprehensive contract. For this reason attention is not concentrated on the Brown Act in this work, although theoretically the discussion here is applicable to the Act.

[2]See Appendix: Meyers-Milias-Brown Act; George Brown Act; Labor Code Section 1960 et seq (Fire Fighters), Senate Bill 160 (EERA).

In addition to these three major pieces of legislation, certain transit district employees are covered under separate sections of the Public Utilities Code.[3] Furthermore, local government fire fighters who are covered by the MMBA are also covered under special sections of the California Labor Code.[4]

The differences between and among these various pieces of legislation seem to defy logic or any apparent reason. Transit district employees under the PUC, for example, have been found by the courts to enjoy collective bargaining rights". . . comparable to that existing between a privately owned public utility and its employees."[5]

As a result, a labor organization representing transit district employees has the right to negotiate a union shop agreement and the right to strike. Both of these rights would be denied the same organization representing bus drivers of a municipality or of a school district. In a school district, that organization could negotiate an agency shop agreement under the EERA, whereas in the municipality, under the MMBA it could not.[6]

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[3]See *California Public Utilities Code*, Chapter 10.

[4]See *Supra*, note 2.

[5]*Alameda-Contra Costa Transit District v. Amalgamated Transit Union* 1st CA 1972.

[6]See appendix: *City of Hayward, et al vs. United Public Employees* Local 390, SEIU, AFL-CIO 1st CA 1976.

Provisions for union security and the right to strike will have an effect upon the union's ability to assume the financial burdens of contract administration, and may also influence the manner in which it resolves conflicts in the administrative process. The differences in the existing legislation in this regard are not, however, limited to these areas.

For example, in terms of their direct impact on contract administration, PUC transit employees have the rights of private sector employees, but the law has not established an administering agency similar to the National Labor Relations Board. Such an agency is provided, however, under the EERA in the form of the state-funded Educational Employment Relations Board (EERB). The board's activities are guided by detailed recognition procedures and specific unfair labor practices spelled out in the EERA, statutory language which is not included in the PUC, the Brown Act, or the MMBA. The board also has authority to determine appropriate bargaining units, modify them, hold elections and decertification elections, and its orders, are enforceable in the courts.

Under the MMBA, a local agency can establish an administrative body to perform functions similar to those of the EERB. However, since only four counties have done so, it would appear that local option is not an effective means of obtaining this type of administrative regulation. Without such a board and absent arbitration agreement, matters which would normally be dealt with administratively can only be resolved

through the more costly and time-consuming process of court action. (In a recent ruling of the 1st Appellate Court, it was also held that MMBA agencies could not delegate authority to binding arbitration where the matter in question was governed by City or County Charter provisions. The case is now on appeal to the California Supreme Court. See San Francisco Fire Fighters Local 798 IAF, AFL-CIO v. City and County of San Francisco 1st CA 1976.)

Differences affecting contract administration also exist in the areas of scope of bargaining and impasse resolution. In respect of the latter, the EERA contains detailed provisions for a state-financed fact finding procedure, a feature which is not mentioned in either the PUC or MMBA provisions. As to the scope of bargaining, court interpretation of PUC provisions and the MMBA language follow the language of the Labor-Management Relations Act governing the private sector. The LMRA defines scope of bargaining as including "wages, hours, and other terms and conditions of employment." This broad definition would appear to be to be limited to certain specific issues under the EERA.[7/] Thus, while the EERB and the courts may rule otherwise, scope of bargaining would appear to be an area clouding contract administration in school districts until definitive rulings are handed down.

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[7]See Appendix: Section 3543.2 EERA (SB 160). The reader is also invited to draw further comparisons with the MMBA, the Brown Act, and Firefighter Labor Code provisions also included in the appendix.

II. SIGNIFICANCE OF STATUTORY DIFFERENCES

The points mentioned above do not cover all of the differences which exist between these various pieces of public sector labor legislation. Some of them, such as the public hearings on proposals for negotiation required under the EERA, are discussed later on. From what has been explored so far, however, it is clear that there will be significant differences in the process of contract administration as applied in the various sections of California's public sector.

While speaking of the "significant differences" among these various laws, it must be remembered that the overriding purpose of all these statutes is to apply the collective bargaining process to the public sector. Thus, although there may be differences in approach and in substance, the problems and types of issues to be dealt with will be similar. Accordingly, we can then speak of concerns which are common to all the various segments of the public sector in contract administration.

III. THE "RELIABLE IF ANALOGOUS AUTHORITY"

The assumption that there is a "common concern" in contract administration based upon the shared purpose of the various public sector statutes has been supported by the courts. In *Lipow v. Regents*, the First Appellate Court said it would "look for guidance" to the MMBA in interpreting the limited provisions of the George Brown Act as the MMBA was a

"... companion chapter." In terms of developing guidelines for the administrative function itself, however, the California Supreme Court decision in the now famous Vallejo[8] case is of much greater importance.

In the Vallejo case, the key problem was what constituted bargainable issues under the Vallejo City Charter, which the Court viewed as patterned after the Meyers-Milias-Brown Act. But the most significant point of its ruling was not how it finally decided on the issues. It was, rather, that it was guided by the decisions of the National Labor Relations Act in reaching its conclusions.

The Court said ". . . because the federal decisions effectively reflect the same interests . . . the federal precedents provide reliable if analogous authority on the issue." (emphasis added) It then went on to say that, "Although we recognize that there are certain basic differences between employment in the public employment negotiation on wages, hours and working conditions just as in the private sector demonstrates that the Legislature found public sector employment relations sufficiently similar to warrant similar bargaining provisions."[9]

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[8]See appendix: *Fire Fighter Union Local 1186 v. City of Vallejo*, Cal. Supreme 1975.

[9]See Appendix: Labor Management Relations Act of 1947.

The net effect of this decision was to attach to the MMBA, in the words of the Court, "a whole body of federal law" which is to be used in interpreting the state statute. It is, then, from these federal precedents that contract administrators should draw guidance. They should draw further guidance from the federal precedents involving union security, the "federal model" which the First Appellate Court invoked in this area subsequent to Vallejo.[10/]

How the State Supreme Court will rule on the ERRA remains to be seen. However, given its ruling in Vallejo and the Appellate Court rulings in regard to PUC Transit workers--the *Lipow v. Regents* case and the Hayward case--it appears that to the extent there is similar language and similar purpose, the EERA will also be governed by these federal precedents.

IV. CONTRACTURAL AUTHORITY TO ADMINISTER

As indicated earlier, the contract itself serves as one of the two sources of authority to administer a contract. For the labor organization, it is the immediate source of recognition in the work place. For both management and labor, it delineates their respective rights and obligations under its provisions.

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[10]See Supra Note 6.

The authority extended by the contract has its legal basis in the fact that it is a binding agreement. Enforceable in the courts, it grants to the respective parties the authority to exercise their rights and it demands specific acts of compliance with regard to the contract terms.

The right to enter into a binding contract is affirmed statutorily in the EERA. This right is not mentioned in the MMBA, and was not confirmed by the California Supreme Court until the recent decision in *Glendale City Employees Assn. v. City of Glendale.*[11/]

In the Glendale decision the Court held that "a memorandum of understanding, once adopted by the governing body of a public agency becomes a binding agreement." It went on to say that the courts should "... treat labor-management agreements whether in public employment or private as enforceable contracts which should be interpreted to execute the mutual intent and purpose of the parties."

This latter statement touches on an extremely important point with regard to the authority of the contract. That is, in stating that it is the role of the court to enforce the "mutual intent" of the contract, the court uses the contract itself as the authority in interpreting the actions of the parties. Furthermore, the statement

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[11] See Appendix: *Glendale City Employees Assn. v. City of Glendale et al,* Cal. Supreme 1976.

acknowledges that it is the duty of the court to uphold the agreement, unless it is precluded from doing so by law.

V. STATUTORY LIMITS ON CONTRACTURAL AUTHORITY

As can be inferred from the above comments, the contractural authority of the parties is limited not only by enabling collective bargaining legislation, but it is subject to control by other sources of law as well. An important case in point is the Appellate Court decision in *Henry Grier et al v. Alameda-Contra Costa Transit District.*[12/]

In the Grier case the court was asked to rule on a contract provision which allowed employees to be fined for tardiness in excess of what is permitted by the California Labor Code. Since the Labor Code made no mention of this provision applying to public agencies, the court was also asked to rule on the application of state statutes to public agencies when this is not specifically stated.

In its ruling the court upheld the plaintiff in no uncertain terms. On the applicability of the statute is stated: "Governmental agencies are excluded from the operation of general statutory provisions only if their inclusion would result in an infringement upon sovereign governmental powers." (emphasis added) As it did not find this

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[12]See Appendix. *Henry Grier et al v. Alameda-Contra Costa Transit Dist.* 3d CA 1976.

instance to be a case of such infringement, it then ruled that the parties were "without authority to agree to any provision in violation of Labor Code Section 2928 prohibiting the deduction from wages of an employee coming late to work in excess of the proportionate wage that would have been earned during the time actually lost."

It appears this is the first time that a higher California court has ruled on this question of the primacy of general statutes over the statutory right of contract in the public sector. The implications are quite broad. If this approach were to be extended to the rulings of the courts in constitutional matters, then any contract that does not include the due process provisions which the California Supreme Court ruled as mandatory in its Skelly decision[13/] would be held to be invalid in the area of disciplinary procedures. Moreover, to the extent that the absence of due process represents a deprivation of constitutional rights brought about by a bilateral contract, both management and the labor organization could be named in suits challenging this denial.

SUMMARY

In this section we have defined the process of contract administration and discussed the statutory and contractural authority of the

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[13] See Appendix: *John F. Skelly v. State Personnel Board.* Also, the reader is referred to the section of this manual dealing with fair representation.

parties to administer their agreement. In doing so we have stressed the differences in the enabling collective bargaining legislation and the complications of applying any single standard to the various segments of the public sector. Even so, we have pointed to the rulings of the higher California courts who have drawn their guidance in interpreting California's laws from the federal laws governing private sector labor relations. We suggest that public sector contract administrators draw their guidance from that source as well.

APPENDIX TO TAB A

Meyers-Milias-Brown Act; Brown Act
Labor Code Section 1960 (Firefighters)
Senate Bill 160 (EERA-Rodda)
City of Hayward v. United Public
Employee Local 390, SEIU
Firefighters Union Local 1186
v. City of Vallejo
Labor Management Relations Act, 1947
Glendale City Employees Assn.
v. City of Glendale
Henry Grier, et. al.
v. Alameda-Contra Costa Transit Dist.
John F. Skelly v. State Personnel Board

Revised Employment Relations Laws: Local Government, Schools, State

(Editor's note: The Meyers-Milias-Brown (local government) and Winton (public schools) Acts and Government Code Sections 3525-3536 (state employees) were changed in 1972. Printed below are the three laws, with all amendments as of March 7, 1973, the date the 1972 session changes become effective. Also included for the reader's convenience are the unchanged Labor Code Sections 1960-63, which prohibit strikes of firefighters in state and local government employment.)

LOCAL GOVERNMENT EMPLOYEES

Meyers-Milias-Brown Act (1968), as amended in 1968, 1969, 1970, 1971, and 1972. Effective January 1, 1969. California *Government Code Sections 3500-3510.* The MMB Act is the amended (1968) version of the former George Brown Act (1961).

3500. It is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by such organizations in their employment relationships with public agencies. Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations nor is it intended that this chapter be binding upon those public agencies which provide procedures for the administration of employer-employee relations in accordance with the provisions of this chapter. This chapter is intended, instead, to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the public agencies by which they are employed. (Amended 1972.)

3501. As used in this chapter:

(a) "Employee organization" means any organization which includes employees of a public agency and which has as one of its primary purposes representing such employees in their relations with that public agency.

(b) "Recognized employee organization" means an employee organization which has been formally acknowledged by the public agency as an employee organization that represents employees of the public agency. (Added 1968.)

(c) Except as otherwise provided in this subdivision, "public agency" means every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not. As used in this chapter, "public agency" does not mean a school district

or a county board of education or a county superintendent of schools or a personnel commission in a school district having a merit system as provided in Chapter 3 (commencing with Sec. 13580) of Division 10 of the Education Code or the State of California. (Amended 1971.)

(d) "Public employee" means any person employed by any public agency, including employees of the fire departments and fire services of counties, cities, cities and counties, districts, and other political subdivisions of the state, excepting those persons elected by popular vote or appointed to office by the Governor of this State. (Amended 1971.)

(e) "Mediation" means effort by an impartial third party to assist in reconciling a dispute regarding wages, hours and other terms and conditions of employment between representatives of the public agency and the recognized employee organization or recognized employee organizations through interpretation, suggestion and advice. (Added 1968.)

3502. Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public agency.

3503. Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership. Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the public agency. (Amended 1968.)

3504. The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order. (Amended 1968.)

3504.5. Except in cases of emergency as provided in this section, the governing body of a public agency, and boards and commissions designated by law or by such governing body, shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body or such boards and commissions and shall give such recognized employee organization the opportunity to meet with the governing body or such boards and commissions.

In cases of emergency when the governing body or such boards and commissions determine that an ordinance, rule, resolution or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the governing body or such boards and commissions shall provide such notice and opportunity to meet at the earliest practicable time following the adoption of such ordinance, rule, resolution, or regulation. (Added 1968.)

3505. The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action. (Amended 1968.)

"Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation or ordinance, or when such procedures are utilized by mutual consent. (Amended 1971.)

3505.1. If agreement is reached by the representatives of the public agency and a recognized employee organization or recognized employee organizations, they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to the governing body or its statutory representative for determination. (Added 1968.)

3505.2. If after a reasonable period of time, representatives of the public agency and the recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together may agree upon the appointment of a mediator mutually agreeable to the parties. Costs of mediation shall be divided one-half to the public agency and one-half to the recognized employee organization or recognized employee organizations. (Added 1968.)

3505.3. Public agencies shall allow a reasonable number of public agency employee representatives of recognized employee organizations reasonable time off without loss of compensation or other benefits when formally meeting and conferring with representatives of the public agency on matters within the scope of representation. (Added 1968.)

3506. Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502.

3507. A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations for the administration of employer-employee relations under this chapter (commencing with Section 3500). (Amended 1968.)

Such rules and regulations may include provisions for (a) verifying that an organization does in fact represent employees of the public agency (b) verifying the official status of employee organization officers and representatives (c) recognition of employee organizations (d) exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees of the agency or an appropriate unit thereof, subject to the right of an employee to represent himself as provided in Section 3502 (e) additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment (f) access of employee organization officers and representatives to work locations (g) use of official bulletin boards and other means of communication by employee organizations (h) furnishing nonconfidential information pertaining to employment relations to employee organizations (i) such other matters as are necessary to carry out the purposes of this chapter. (Amended 1971.)

Exclusive recognition of employee organizations formally recognized as majority representatives pursuant to a vote of the employees may be revoked by a majority vote of the

employees only after a period of not less than 12 months following the date of such recognition. (Amended 1971.)

No public agency shall unreasonably withhold recognition of employee organizations. (Amended 1970.)

3507.1. In the absence of local procedures for resolving disputes on the appropriateness of a unit of representation, upon the request of any of the parties, the dispute shall be submitted to the Department of Conciliation of the Department of Industrial Relations for mediation or for recommendation for resolving the dispute. (Added 1971.)

3507.3. Professional employees shall not be denied the right to be represented separately from nonprofessional employees by a professional employee organization consisting of such professional employees. In the event of a dispute on the appropriateness of a unit of representation for professional employees, upon request of any of the parties, the dispute shall be submitted to the Division of Conciliation of the Department of Industrial Relations for mediation or for recommendation for resolving the dispute.

"Professional employees," for the purposes of this section, means employees engaged in work requiring specialized knowledge and skills attained through completion of a recognized course of instruction, including, but not limited to, attorneys, physicians, registered nurses, engineers, architects, teachers, and the various types of physical, chemical, and biological scientists. (Amended 1972.)

3507.5. In addition to those rules and regulations a public agency may adopt pursuant to and in the same manner as in Section 3507, any such agency may adopt reasonable rules and regulations providing for designation of the management and confidential employees of the public agency and restricting such employees from representing any employee organization, which represents other employees of the public agency, on matters within the scope of representation. Except as specifically provided otherwise in this chapter, this section does not otherwise limit the right of employees to be members of and to hold office in an employee organization. (Amended 1969.)

3508. The governing body of a public agency may, in accordance with reasonable standards, designate positions or classes of positions which have duties consisting primarily of the enforcement of state laws or local ordinances, and may by resolution or ordinance adopted after a public hearing, limit or prohibit the right of employees in such positions or classes of positions to form, join or participate in employee organizations where it is in the public interest to do so; however, the governing body may not prohibit the right of its employees who are full-time "peace officers" as that term is defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, to join or participate in employee organizations which are composed solely of such peace officers, which concern themselves solely and exclusively with the wages, hours, working conditions, welfare programs, and advancement of the academic and vocational training in furtherance of the police profession, and which are not subordinate to any other organization. (Amended 1971.)

The right of employees to form, join and participate in the activities of employee organizations shall not be restricted by a public agency on any grounds other than those set forth in this section. (Amended 1968.)

3509. The enactment of this chapter shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public employees.

3510. This chapter shall be known and may be cited as the "Meyers-Milias-Brown Act." (Amended 1971.)

STATE EMPLOYEES

California *Government Code Sections 3525-3536* (commonly referred to as the "George Brown Act"). Added July 1, 1971, as part of a recodification of former G.C. Secs. 3500-3511, to make separate provision for state employees. Amended in 1972.

3525. It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations between the State of California and its employees by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by such organizations in their employment relationships with the state. Nothing contained herein shall be deemed to supersede the provisions of existing state law which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations. This chapter is intended, instead, to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the state.

3526. As used in this chapter:

(a) "Employee organization" means any organization

which includes employees of the state and which has as one of its primary purposes representing its members in employer-employee relations.

(b) The provisions of this chapter apply only to the State of California. The "State of California" as used in this chapter means such state agencies, boards, commissions, administrative officers, or other representatives as may be designated by law.

(c) "Public employee" means any person employed by the state, including employees of fire departments or fire services of the state, excepting those persons elected by popular vote or appointed to office by the Governor of this state.

3527. Except as otherwise provided by the Legislature, state employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. State employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the state.

3528. Employee organizations shall have the right to represent their members in their employment relations, including grievances, with the state. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership. Nothing in this section shall prohibit any employee from appearing in his own behalf or through his chosen representative in his employment relations and grievances with the state. (Amended 1972.)

3529. The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment.

3530. The state by means of such boards, commissions, administrative officers or other representatives as may be properly designated by law, shall meet and confer with representatives of employee organizations upon request, and shall consider as fully as such representatives deem reasonable such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

3531. The state and employee organizations shall not interfere with, intimidate, restrain, coerce, or discriminate against state employees because of their exercise of their rights under Section 3527.

3532. The state may adopt reasonable rules and regulations for the administration of employer-employee relations under this chapter.

Such rules and regulations may include provisions for (a) verifying that an organization does in fact represent employees of the state (b) verifying the official status of employee organization officers and representatives (c) access of employee organization officers and representatives to work locations (d) use of official bulletin boards and other means of communication by employee organizations (e) furnishing nonconfidential information pertaining to employment relations to employee organizations (f) such other matters as are necessary to carry out the purposes of this chapter.

For employees in the state civil service, rules and regulations in accordance with this section may be adopted by the State Personnel Board.

3533. Professional employees shall not be denied the right to be represented separately from nonprofessional employees by a professional employee organization consisting of such professional employees.

"Professional employees," for the purposes of this section, means employees engaged in work requiring specialized knowledge and skills attained through completion of a recognized course of instruction, including, but not limited to, attorneys, physicians, registered nurses, engineers, architects, teachers, and the various types of physical, chemical, and biological scientists.

3534. In addition to those rules and regulations the state may adopt pursuant to and in the same manner as in Section 3532, the state may adopt reasonable rules and regulations providing for designation of the management and confidential employees of the state and restricting such employees from representing any employee organization, which represents other employees of the state, on matters within the scope of representation. Except as specifically provided otherwise in this chapter, this section does not otherwise limit the right of employees to be members of and to hold office in an employee organization.

3535. The state may, in accordance with reasonable standards, designate positions or classes of positions which have duties consisting primarily of the enforcement of state laws, and may be resolution adopted after a public hearing, limit or prohibit the right of employees in such positions or classes of positions to form, join or participate in employee organizations where it is in the public interest to do so; however, the state may not prohibit the right of its employees who are full-time "peace officers," as that term is defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, to join or participate in employee organizations which are composed solely of such peace officers, which concern themselves solely and exclusively with the wages, hours, working conditions, welfare programs, and advancement of the academic and vocational training in furtherance of the police profession, and which are not subordinate to any other organization.

The right of employees to form, join and participate in the activities of employee organizations shall not be restricted by the state on any grounds other than those set forth in this section.

3536. The enactment of this chapter shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public employees.

FIREFIGHTERS

California *Labor Code Sections 1960-1963* (1959) apply to all firefighters. In addition, firefighters employed in local government are covered by the Meyers-Milias-Brown Act and firefighters employed by the state are covered by Government Code Sections 3525-3536 as they relate to state employees (see above).

1960. Neither the State nor any county, political subdivision, incorporated city, town, nor any other municipal corporation shall prohibit, deny or obstruct the right of firefighters to join any bona fide labor organization of their own choice.

1961. As used in this chapter, the term "employees" means the employees of the fire departments and fire services of the State, counties, cities, cities and counties, districts, and other political subdivisions of the State.

1962. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to present grievances and recommendations regarding wages, salaries, hours, and working conditions to the governing body, and to discuss the same with such governing body, through such an organization, but shall not have the right to strike, or to recognize a picket line of a labor organization while in the course of the performance of their official duties.

1963. The enactment of this chapter shall not be construed as making the provisions of Section 923 of this Code applicable to public employees.

Documents

New Negotiations Act for Public Schools

Senate Bill No. 160 (Rodda)

CHAPTER 961

[Approved by Governor September 22, 1975. Filed with Secretary of State September 22, 1975.]

The people of the State of California do enact as follows:

SECTION 1. Article 5 (commencing with Section 13080) of Chapter 1 of Division 10 of the Education Code is repealed.

SEC. 2. Chapter 10.7 (commencing with Section 3540) is added to Division 4 of Title 1 of the Government Code, to read:

CHAPTER 10.7. MEETING AND NEGOTIATING IN PUBLIC EDUCATIONAL EMPLOYMENT

Article 1. General Provisions

3540. It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy. Nothing contained herein shall be deemed to supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements.

It is the further intention of the Legislature that nothing contained in this chapter shall be construed to restrict, limit, or prohibit the full exercise of the functions of any academic senate or faculty council established by a school district in a community college to represent the faculty in making recommendations to the administration and governing board of such school district with respect to district policies on academic and professional matters, so long as the exercise of such functions do not conflict with lawful collective agreements.

It is the further intention of the Legislature that any legislation enacted by the Legislature governing employer-employee relations of other public employees shall be incorporated into this chapter to the extent possible. The Legislature also finds and declares that it is an advantageous and desirable state policy to expand the jurisdiction of the board created pursuant to this chapter to cover other public employers and their employees, in the event that such legislation is enacted, and if this policy is carried out, the name of the Educational Employment Relations Board shall be changed to the "Public Employment Relations Board."

3540.1. As used in this chapter:

(a) "Board" means the Educational Employment Relations Board created pursuant to Section 3541.

(b) "Certified organization" or "certified employee organization" means an organization which has been certified by the board as the exclusive representative of the public school employees in an appropriate unit after a proceeding under Article 5 (commencing with Section 3544).

(c) "Confidential employee" means any employee who, in the regular course of his duties, has access to, or possesses information relating to, his employer's employer-employee relations.

(d) "Employee organization" means any organization which includes employees of a public school employer and which has as one of its primary purposes representing such employees in their relations with that public school employer. "Employee organization" shall also include any person such an organization authorizes to act on its behalf.

(e) "Exclusive representative" means the employee organization recognized or certified as the exclusive negotiating representative of certificated or classified employees in an appropriate unit of a public school employer.

(f) "Impasse" means that the parties to a dispute over matters within the scope of representation have reached a point in meeting and negotiating at which their differences in positions are so substantial or prolonged that future meetings would be futile.

(g) "Management employee" means any employee in a position having significant responsibilities for formulating district policies or administering district programs. Management positions shall be designated by the public school employer subject to review by the Educational Employment Relations Board.

(h) "Meeting and negotiating" means meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached, which document shall, when accepted by the exclusive representative and the public school employer, become binding upon both parties and, notwithstanding Section 3543.7, shall not be subject to subdivision 2 of Section 1667 of the Civil Code. The agreement may be for a period of not to exceed three years.

(i) "Organizational security" means either:

(1) An arrangement pursuant to which a public school employee may decide whether or not to join an employee organization, but which requires him, as a condition of continued employment, if he does join, to maintain his membership in good standing for the duration of the written agreement. However, no such arrangement shall deprive the em-

ployee of the right to terminate his obligation to the employee organization within a period of 30 days following the expiration of a written agreement; or

(2) An arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of such organization for the duration of the agreement, or a period of three years from the effective date of such agreement, whichever comes first.

(j) "Public school employee" or "employee" means any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees.

(k) "Public school employer" or "employer" means the governing board of a school district, a school district, a county board of education, or a county superintendent of schools.

(l) "Recognized organization" or "recognized employee organization" means an employee organization which has been recognized by an employer as the exclusive representative pursuant to Article 5 (commencing with Section 3544).

(m) "Supervisory employee" means any employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively recommend such action, if, in connection with the foregoing functions, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Article 2. Administration

3541. (a) There is in state government the Educational Employment Relations Board which shall be independent of any state agency and shall consist of three members. The members of the board shall be appointed by the Governor by and with the advice and consent of the Senate. One of the original members shall be chosen for a term of one year, one for a term of three years, and one for a term of five years. Thereafter terms shall be for a period of five years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he succeeds. Members of the board shall be eligible for reappointment. The Governor shall select one member to serve as chairperson. A member of the board may be removed by the Governor upon notice and hearing for neglect of duty or malfeasance in office, but for no other cause.

(b) A vacancy in the board shall not impair the right of the remaining members to exercise all the powers of the commission, and two members of the board shall at all times constitute a quorum.

(c) Members of the board shall hold no other public office in the state, and shall not receive any other compensation for services rendered.

(d) Each member of the board shall be paid an annual salary of thirty-six thousand dollars ($36,000). In addition to his salary, each member of the board shall be reimbursed for all actual and necessary expenses incurred by him in the performance of his duties, subject to the rules of the State Board of Control relative to the payment of such expenses to state officers generally.

(e) The board shall appoint an executive director and such other persons as it may from time to time deem necessary for the performance of its functions, prescribe their duties, fix their compensation and provide for reimbursement of their expenses in the amounts made available therefor by appropriation. The executive director shall be a person familiar with employer-employee relations. He shall be subject to removal at the pleasure of the board. The board may employ a general counsel to assist it in the performance of its functions under this chapter. A person so employed may, independently of the Attorney General, represent the board in any litigation or other matter pending in a court of law to which the board is a party or in which it is otherwise interested.

3541.3. The board shall have all of the following powers and duties:

(a) To determine in disputed cases, or otherwise approve, appropriate units.

(b) To determine in disputed cases whether a particular item is within or without the scope of representation.

(c) To arrange for and supervise representation elections which shall be conducted by means of secret ballot elections, and certify the results of the elections.

(d) To establish lists of persons broadly representative of the public and qualified by experience to be available to serve as mediators, arbitrators, or factfinders. In no case shall such lists include persons who are on the staff of the board.

(e) To establish by regulation appropriate procedures for review of proposals to change unit determinations.

(f) Within its discretion, to conduct studies relating to employee-employer relations, including the collection, analyses, and making available of data relating to wages, benefits, and employment practices in public and private employment, and, when it appears necessary in its judgment to the accomplishment of the purposes of this chapter, recommend legislation. The board shall report to the Legislature by February 15th of each year on its activities during the immediately preceding calendar year. The board may enter into contracts to develop and maintain research and training programs designed to assist public employers and employee organizations in the discharge of their mutual responsibilities under this chapter.

(g) To adopt, pursuant to Chapter 4.5 (commencing with Section 11371) of Part 1 of Division 3 of Title 2, rules and regulations to carry out the provisions and effectuate the purposes and policies of this chapter.

(h) To hold hearings, subpoena witnesses, administer oaths, take the testimony or deposition of any person, and, in connection therewith, to issue subpoenas duces tecum to require the production and examination of any employer's or

employee organization's records, books, or papers relating to any matter within its jurisdiction.

(i) To investigate unfair practice charges or alleged violations of this chapter, and take such action and make such determinations in respect of such charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.

(j) To bring an action in a court of competent jurisdiction to enforce any of its orders decisions or rulings or to enforce the refusal to obey a subpoena. Upon issuance of a complaint charging that any person has engaged in or is engaging in an unfair practice, the board may petition the court for appropriate temporary relief or restraining order.

(k) To delegate its powers to any member of the board or to any person appointed by the board for the performance of its functions, except that no fewer than two board members may participate in the determination of any ruling or decision on the merits of any dispute coming before it and except that a decision to refuse to issue a complaint shall require the approval of two board members.

(l) To decide contested matters involving recognition, certification, or decertification of employee organizations.

(m) To consider and decide issues relating to rights, privileges, and duties of an employee organization in the event of a merger, amalgamation, or transfer of jurisdiction between two or more employee organizations.

(n) To take such other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of this chapter.

3541.4. Any person who shall willfully resist, prevent, impede or interfere with any member of the board, or any of its agents, in the performance of duties pursuant to this chapter, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not more than one thousand dollars ($1,000).

3541.5. The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. Procedures for investigating, hearing, and deciding these cases shall be devised and promulgated by the board and shall include all of the following:

(a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following: (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary. The board shall have discretionary jurisdiction to review such settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that such settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits; otherwise, it shall dismiss the charge. The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery.

(b) The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based of [on] alleged violation of such a [an] agreement that would not also constitute an unfair practice under this chapter.

(c) The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

Article 3. Judicial Review

3542. (a) No employer or employee organization shall have the right to judicial review of a unit determination except: (1) when the board in response to a petition from an employer or employee organization, agrees that the case is one of special importance and joins in the request for such review; or (2) when the issue is raised as a defense to an unfair practice complaint.

(b) Any charging party, respondent, or intervenor aggrieved by a decision or order of the board in an unfair practice case, except a decision of the board not to issue a complaint in such a case, shall have the right to seek review in a court of competent jurisdiction. Additionally, the board shall have the right to seek enforcement of any decision or order in a court of competent jurisdiction. The findings of the board on questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. Once the record of the case has been filed with the court of competent jurisdiction, its jurisdiction shall be exclusive and its judgment final, except that it shall be subject to appeal to higher courts in this state.

Article 4. Rights, Obligations, Prohibitions, And Unfair Practices

3543. Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.

Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

3543.1. (a) Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

(b) Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.

(c) A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances.

(d) All employee organizations shall have the right to have membership dues deducted pursuant to Sections 13532 and 13604.2 of the Education Code, until such time as an employee organization is recognized as the exclusive representative for any of the employees in an appropriate unit, and then such deduction as to any employee in the negotiating unit shall not be permissible except to the exclusive representative.

3543.2. The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave and transfer policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, and procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

3543.3. A public school employer or such representatives as it may designate who may, but need not be, subject to either certification requirements or requirements for classified employees set forth in the Education Code, shall meet and negotiate with and only with representatives of employee organizations selected as exclusive representatives of appropriate units upon request with regard to matters within the scope of representation.

3543.4. No person serving in a management position or a confidential position shall be represented by an exclusive representative. Any person serving in such a position shall have the right to represent himself individually or by an employee organization whose membership is composed entirely of employees designated as holding such positions, in his employment relationship with the public school employee, but, in no case, shall such an organization meet and negotiate with the public school employer. No representative shall be permitted by a public school employer to meet and negotiate on any benefit or compensation paid to persons serving in a management position or a confidential position.

3543.5. It shall be unlawful for a public school employer to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

(e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

3543.6. It shall be unlawful for an employee organization to:

(a) Cause or attempt to cause a public school employer to violate Section 3543.5.

(b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

(d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

3543.7. The duty to meet and negotiate in good faith requires the parties to begin negotiations prior to the adoption of the final budget for the ensuing year sufficiently in advance of such adoption date so that there is adequate time for agreement to be reached, or for the resolution of an impasse.

Article 5. Employee Organizations: Representation, Recognition, Certification, and Decertification.

3544. An employee organization may become the exclusive representative for the employees of an appropriate unit for purposes of meeting and negotiating by filing a request with a public school employer alleging that a majority of the employees in an appropriate unit wish to be represented by such organization and asking the public school employer to recognize it as the exclusive representative. The request shall describe the grouping of jobs or positions which constitute the unit claimed to be appropriate and shall include proof of majority support on the basis of current dues deduction authorizations or other evidence such as notarized membership lists, or membership cards, or petitions designating the organization as the exclusive representative of the employees. Notice of any such request shall immediately be posted conspicuously on all employee bulletin boards in each facility of the public school employer in which members of the unit claimed to be appropriate are employed.

3544.1 The public school employer shall grant a request for recognition filed pursuant to Section 3544 unless:

(a) The public school employer desires that representation election be conducted or doubts the appropriateness of a unit. If the public school employer desires a representation election, the question of representation shall be deemed to exist and the public school employer shall notify the board, which shall conduct a representation election pursuant to Section 3544.7, unless subdivision (c) or (d) apply; or

(b) Another employee organization either files with the public school employer a challenge to the appropriateness of the unit or submits a competing claim of representation within 15 workdays of the posting of notice of the written request. The claim shall be evidenced by current dues deductions authorizations or other evidence such as notarized membership lists, or membership cards, or petitions signed by employees in the unit indicating their desire to be represented by the organization. If the claim is evidenced by the support of at least 30 percent of the members of an appropriate unit, a question of representation shall be deemed to exist and the public school employer shall notify the board which shall conduct a representation election pursuant to Section 3544.7, unless subdivisions (c) or (d) of this section apply; or

(c) There is currently in effect a lawful written agreement negotiated by the public school employer and another employee organization covering any employees included in the unit described in the request for recognition, unless the request for recognition is filed less than 120 days, but more than 90 days, prior to the expiration date of the agreement; or

(d) The public school employer has, within the previous 12 months, lawfully recognized another employee organization as the exclusive representative of any employees included in the unit described in the request for recognition.

3544.3. If, by January 1 of any school year, no employee organization has made a claim of majority support in an appropriate unit pursuant to Section 3544, a majority of employees of an appropriate unit may submit to a public school employer a petition signed by at least a majority of the employees in the appropriate unit requesting a representation election. An employee may sign such a petition though not a member of any employee organization.

Upon the filing of such a petition, the public school employer shall immediately post a notice of such request upon all employee bulletin boards at each school or other facility in which members of the unit claimed to be appropriate are employed.

Any employee organization shall have the right to appear on the ballot if, within 15 workdays after the posting of such notice, it makes the showing of interest required by subdivision (b) of Section 3544.1.

Immediately upon expiration of the15-workday period following the posting of the notice, the public school employer shall transmit to the board the petition and the names of all employee organizations that have the right to appear on the ballot.

3544.5. A petition may be filed with the board, in accordance with its rules and regulations, requesting it to investigate and decide the question of whether employees have selected or wish to select an exclusive representative or to determine the appropriateness of a unit, by:

(a) A public school employer alleging that it doubts the appropriateness of the claimed unit; or

(b) An employee organization alleging that it has filed a request for recognition as an exclusive representative with a public school employer and that the request has been denied or has not been acted upon within 30 days after the filing of the request: or

(c) An employee organization alleging that it has filed a competing claim of representation pursuant to subdivision (b) of Section 3544.1; or

(d) An employee organization alleging that the employees in an appropriate unit no longer desire a particular employee organization as their exclusive representative, provided that such petition is supported by current dues deduction authorizations or other evidence such as notarized membership lists, cards, or petitions from 30 percent of the employees in the negotiating unit indicating support for another organization or lack of support for the incumbent exclusive representative

3544.7. (a) Upon receipt of a petition filed pursuant to Section 3544.3 or 3544.5, the board shall conduct such inquiries and investigations or hold such hearings as it shall deem necessary in order to decide the questions raised by the petition. The determination of that board may be based upon the evidence adduced in the inquiries, investigations, or hearing; provided that, if the board finds on the basis of the evidence that a question of representation exists, or a question of representation is deemed to exist pursuant to subdivision (a) or (b) of Section 3544.1, it shall order that an election shall be conducted by secret ballot and it shall certify the results of the election on the basis of which ballot choice received a majority of the valid votes cast. There shall be printed on each ballot the statement: "no representation." No voter shall record more than one choice on his ballot. Any ballot upon which there is recorded more than one

choice shall be void and shall not be counted for any purpose. If at any election no choice on the ballot receives a majority of the votes cast, a runoff election shall be conducted. The ballot for the runoff election shall provide for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(b) No election shall be held and the petition shall be dismissed whenever:

(1) There is currently in effect a lawful written agreement negotiated by the public school employer and another employee organization covering any employees included in the unit described in the request for recognition, or unless the request for recognition is filed less than 120 days, but more than 90 days, prior to the expiration date of the agreement; or

(2) The public school employer has, within the previous 12 months, lawfully recognized an employee organization other than the petitioner as the exclusive representative of any employees included in the unit described in the petition.

3544.9. The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

Article 6. Unit Determinations

3545. (a) In each case where the appropriateness of the unit is an issue, the board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.

(b) In all cases:

(1) A negotiating unit that includes classroom teachers shall not be appropriate unless it at least includes all of the classroom teachers employed by the public school employer, except management employees, supervisory employees, and confidential employees.

(2) A negotiating unit of supervisory employees shall not be appropriate unless it includes all supervisory employees employed by the district and shall not be represented by the same employee organization as employees whom the supervisory employees supervise.

(3) Classified employees and certificated employees shall not be included in the same negotiating unit.

Article 7. Organizational Security

3546. Subject to the limitations set forth in this section, organizational security, as defined, shall be within the scope of representation.

(a) An organizational security arrangement, in order to be effective, must be agreed upon by both parties to the agreement. At the time the issue is being negotiated, the public school employer may require that the organizational security provision be severed from the remainder of the proposed agreement and cause the organizational security provision to be voted upon separately by all members in the appropriate negotiating unit, in accordance with rules and regulations promulgated by the board. Upon such a vote, the organizational security provision will become effective only if a majority of those members of the negotiating unit voting approve the agreement. Such vote shall not be deemed to either ratify or defeat the remaining provisions of the proposed agreement.

(b) An organizational security arrangement which is in effect may be rescinded by majority vote of the employees in the negotiating unit covered by such arrangement in accordance with rules and regulations promulgated by the board.

3546.5. Every recognized or certified employee organization shall keep an adequate itemized record of its financial transactions and shall make available annually, to the board and to the employees who are members of the organization, within 60 days after the end of its fiscal year, a detailed written financial report thereof in the form of a balance sheet and an operating statement, certified as to accuracy by a certified public accountant. In the event of failure of compliance with this section, any employee within the organization may petition the board for an order compelling such compliance, or the board may issue such compliance order on its motion. An employee organization required to file financial reports under the Labor-Management Disclosure Act of 1959 covering employees governed by this chapter shall be exempt from the requirements of this section.

Article 8. Public Notice

3547. (a) All initial proposals of exclusive representatives and of public school employers, which relate to matters within the scope of representation, shall be presented at a public meeting of the public school employer and thereafter shall be public records.

(b) Meeting and negotiating shall not take place on any proposal until a reasonable time has elapsed after the submission of the proposal to enable the public to become informed and the public has the opportunity to express itself regarding the proposal at a meeting of the public school employer.

(c) After the public has had the opportunity to express itself, the public school employer shall, at a meeting which is open to the public, adopt its initial proposal.

(d) New subjects of meeting and negotiating arising after the presentation of initial proposals shall be made public within 24 hours. If a vote is taken on such subject by the public school employer, the vote thereon by each member voting shall also be made public within 24 hours.

(e) The board may adopt regulations for the purpose of implementing this section, which are consistent with the intent of the section; namely that the public be informed of the issues that are being negotiated upon and have full opportunity to express their views on the issues to the public school employer, and to know of the positions of their elected representatives.

Article 9. Impasse Procedures

3548. Either a public school employer or the exclusive representative may declare that an impasse has been reached

between the parties in negotiations over matters within the scope of representation and may request the board to appoint a mediator for the purpose of assisting them in reconciling their differences and resolving the controversy on terms which are mutually acceptable. If the board determines that an impasse exists, it shall, in no event later than five working days after the receipt of a request, appoint a mediator in accordance with such rules as it shall prescribe. The mediator shall meet forthwith with the parties or their representatives, either jointly or separately, and shall take such other steps as he may deem appropriate in order to persuade the parties to resolve their differences and effect a mutually acceptable agreement. The services of the mediator, including any per diem fees, and actual and necessary travel and subsistence expenses, shall be provided by the board without cost to the parties. Nothing in this section shall be construed to prevent the parties from mutually agreeing upon their own mediation procedure and in the event of such agreement, the board shall not appoint its own mediator, unless failure to do so would be inconsistent with the policies of this chapter. If the parties agree upon their own mediation procedure, the cost of the services of any appointed mediator, unless appointed by the board, including any per diem fees, and actual and necessary travel and subsistence expenses, shall be borne equally by the parties.

3548.1. If the mediator is unable to effect settlement of the controversy within 15 days after his appointment and the mediator declares that factfinding is appropriate to the resolution of the impasse, either party may, by written notification to the other, request that their differences be submitted to a factfinding panel. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The board shall, within five days after such selection, select a chairman of the factfinding panel. The chairman designated by the board shall not, without the consent of both parties, be the same person who served as mediator pursuant to Section 3548.

3548.2. The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take such other steps as it may deem appropriate. For the purpose of such hearings, investigations, and inquiries, the panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. The several departments, commissions, divisions, authorities, boards, bureaus, agencies, and officers of the state, or any political subdivision or agency thereof, including any board of education, shall furnish the panel, upon its request, with all records, papers and information in their possession relating to any matter under investigation by or in issue before the panel.

In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

(1) State and federal laws that are applicable to the employer.

(2) Stipulations of the parties.

(3) The interests and welfare of the public and the financial ability of the public school employee-employer.

(4) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services and with other employees generally in public school employment in comparable communities.

(5) The consumer price index for goods and services, commonly known as the cost of living.

(6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits; the continuity and stability of employment; and all other benefits received.

(7) Such other facts, not confined to those specified in paragraphs (1) to (6), inclusive, which are normally or traditionally taken into consideration in making such findings and recommendations.

3548.3. If the dispute is not settled within 30 days after the appointment of the panel, or, upon agreement by both parties, within a longer period, the panel shall make findings of fact and recommend terms of settlement, which recommendations shall be advisory only. Any findings of fact and recommended terms of settlement shall be submitted in writing to the parties privately before they are made public. The public school employer shall make such findings and recommendations public within 10 days after their receipt. The costs for the services of the panel chairman, including per diem fees, if any, and actual and necessary travel and subsistence expenses shall be borne by the board. Any other mutually incurred costs shall be borne equally by the public school employer and the exclusive representative. Any separately incurred costs for the panel member selected by each party, shall be borne by such party.

3548.4. Nothing in this article shall be construed to prohibit the mediator appointed pursuant to Section 3548 from continuing mediation efforts on the basis of the findings of fact and recommended terms of settlement made pursuant to Section 3548.3.

3548.5. A public school employer and an exclusive representative who enter into a written agreement covering matters within the scope of representation may include in the agreement procedures for final and binding arbitration of such disputes as may arise involving the interpretation, application, or violation of the agreement.

3548.6. If the written agreement does not include procedures authorized by Section 3548.5, both parties to the agreement may agree to submit any disputes involving the interpretation, application, or violation of the agreement to final and binding arbitration pursuant to the rules of the board.

3548.7. Where a party to a written agreement is aggrieved by the failure, neglect, or refusal of the other party to proceed to arbitration pursuant to the procedures provided therefor in the agreement or pursuant to an agreement made pursuant to Section 3548.6, the aggrieved party may bring proceedings pursuant to Title 9 (commencing with Section 1280)

of Part 3 of the Code of Civil Procedure for a court order directing that the arbitration proceed pursuant to the procedures provided therefor in such agreement or pursuant to Section 3548.6.

3548.8. An arbitration award made pursuant to Section 3548.5, 3848.6, or 3848.7 [3548.6, or 3548.7] shall be final and binding upon the parties and may be enforced by a court pursuant to Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure.

Article 10. Miscellaneous

3549. The enactment of this chapter shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public school employees and shall not be construed as prohibiting a public school employer from making the final decision with regard to all matters specified in Section 3543.2.

Nothing in this section shall cause any court or the board to hold invalid any negotiated agreement between public school employers and the exclusive representative entered into in accordance with the provisions of this chapter.

3549.1. All the proceedings set forth in subdivisions (a) to (d), inclusive, shall be exempt from the provisions of Sections 965 and 966 of the Education Code, the Bagley Act (Article 9 (commencing with Section 11120) of Chapter 1 of Part 1 of Division 3) and the Ralph M. Brown Act (Chapter 9 commencing with Section 54950) of Part 1 of Division 2 of Title 5, unless the parties mutually agree otherwise:

(a) Any meeting and negotiating discussion between a public school employer and a recognized or certified employee organization.

(b) Any meeting of a mediator with either party or both parties to the meeting and conferring process.

(c) Any hearing, meeting, or investigation conducted by a factfinder or arbitrator.

(d) Any executive session of the public school employer or between the public school employer and its designated representative for the purpose of discussing its position regarding any matter within the scope of representation and instructing its designated representatives.

3549.3. If any provisions of this chapter or the application of such provision to any person or circumstances shall be held invalid, the remainder of this chapter or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

SEC. 3. There is hereby appropriated from the General Fund to the Educational Employment Relations Board the sum of three hundred thousand dollars ($300,000) for the support of the board.

SEC. 4. Sections 3541 and 3541.3 of the Government Code, as added by Section 2 of this act, and Section 3 of this act, shall become operative on January 1, 1976. Sections 3543, 3543.1, 3544, 3544.1, 3544.3, 3544.5, 3544.7, and 3545 of the Government Code, as added by Section 2 of this act, shall become operative on April 1, 1976. Section 1 of this act and all other provisions of Section 2 of this act shall become operative on July 1, 1976.

SEC. 5. There are no state-mandated local costs in this act that require reimbursement under Section 2231 of the Revenue and Taxation Code because there are no duties, obligations or responsibilities imposed on local government by this act.

Documents

Supreme Court Rules on Vallejo Arbitrability Case

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, IN BANK

FIRE FIGHTERS UNION, LOCAL 1186, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, Plaintiff and Appellant,

v.

CITY OF VALLEJO, et al., Defendants and Appellants.

S.F. 23098
Super Ct. No. 53187
Filed: Oct. 2, 1974

In this case of first impression we must delineate the function of the court in interpreting a provision for arbitration in a city charter affecting public employees. Specifically we are asked, prior to the arbitration proceeding itself, to reconcile clauses which substantively overlap: a provision that grants city employees the right to bargain on "wages, hours and working conditions" but withholds that right as to matters involving the "merits, necessity or organization of any governmental service." As we shall explain, our attempt now to define the issues of arbitration so that they assume the shape of rigid categories would be to reach premature judgments without benefit of the factual foundations of an arbitral record and to impede the arbitration process itself. We therefore largely leave to the arbitrators the moulding and resolution of the issues, subject to the proviso that neither party may be bound by a decision in excess of the arbitrators' jurisdiction.

In 1971, during negotiations between representatives of the City of Vallejo and the Fire Fighters Union as to the terms of a new contract, the parties failed to agree on 28 issues. Pursuant to the process prescribed in the city charter, they submitted the disputed matters to mediation and fact finding. When these procedures failed to effect a resolution, the city agreed to submit 24 of the issues to arbitration but contended that four other issues, namely, "Personnel Reduction," "Vacancies and Promotions," "Schedule of Hours," and "Constant Manning Procedure," involved the "merits, necessity or organization" of the fire fighting service and did not come under the arbitrable provisions. The city refused to accept the recommendations of the fact finding panel with respect to these issues or to submit them to arbitration.

On December 22, 1971, prior to the scheduled hearing before the board of arbitrators, the Fire Fighters Union filed a complaint in the Solano Superior Court seeking mandate to compel the city to submit the four disputed issues to arbitration. The court found for the union on all the issues, stating: "[T]he evidence introduced here supports findings that the issues 'Reduction of Personnel,' 'Vacancies and Promotions,' 'Schedule of Hours' and 'Constant Manning Procedures,' are related to 'wages, hours and conditions of employment' . . . . [W]hile the issues might also apply to the exclusionary language 'but not on matters involving the merits, necessity or organization of any service or activity provided by law,' to so hold would be to defeat the overriding purpose of the Meyers-Milias-Brown Act and section 809 of the Vallejo charter, namely to provide peace and harmony with the city's public safety employees. The court cannot engage in judicial legislation and write into the Vallejo charter words or meaning that are not there." The court therefore ordered that a peremptory writ of mandate issue directing the city to proceed to arbitration on the disputed issues.[1] The city appeals.

The present controversy therefore involves an interpretation of the Vallejo City Charter provisions which govern public employee contract negotiations. The provisions for multilevel resolution of disputes at issue were drafted by a board of freeholders for incorporation in a new city charter in response to a strike by city police and fire fighters in July of 1969. These proposals, with the exception of a provision for final binding arbitration, were accepted by the city council and embodied in section 809 of the city charter. Section 809 sets up a "system of collective negotiating" and provides that city employees shall have the right to "negotiate on matters of wages, hours and working conditions, but not on matters involving the merits, necessity, or organization of any service or activity provided by law. . . ." The section further provides that if the parties cannot reach agreement, they must submit successively to mediation and fact finding.[2]

The arbitration provisions rejected by the city council were submitted to the citizens of Vallejo in a referendum in 1970 and approved. The electorate added to the city charter section 810 which provides that if representatives of the city and its employees do not reach agreement after the report of the fact finding committee under section 809, the issues upon which they fail to agree shall be submitted to binding arbitration.[3]

The scope of bargaining provision in the Vallejo City Charter in large measure parallels that set out in the Meyers-Milias-Brown Act (Gov. Code, §§ 3500-3510).[4] Government Code section 3504 reads: "The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." Therefore, interpretation of the scope of bargaining language in the Vallejo charter necessarily bears upon the meaning of the same language in the Meyers-Milias-Brown Act.[5]

In the instant case, as we have stated, we are called upon to render a preliminary decision as to the scope of the arbitration. The arbitration process, however, is an ongoing one in which normally an arbitrator, rather than a court, will narrow and define the issues, rejecting those matters over which he cannot properly exercise jurisdiction because they fall exclusively within the rights of management. As Professor Grodin has observed: ". . . collective bargaining and issues arbitration are together a dynamic process, in which the positions of the parties and their interaction with the arbitrator is in a state of constant flux. Proposals get modified and non-

negotiable positions become negotiable as the parties sort out their priorities, develop understanding of the implications of their positions, and perceive alternative solutions which they may not previously have considered. To determine what is arbitrable and what is not against this changing context is a bit like trying a balancing act in the middle of a rushing torrent." (Grodin, *California Public Employee Bargaining Revisited: The MMB Act in the Appellate Courts* (1974) Cal. Pub. Employee Rel. No. 21, p. 17.)

To a large extent the rendition of the definitions involved in this case will be welded by the facts developed in arbitration itself. We put the proposition in these words in Butchers' Union Local 229 v. Cudahy Packing Co. (1967) 66 Cal.2d 925, 938: "Because arbitration substitutes for economic warfare the peaceful adjudication of disputes, and because controversy takes on ephemeral shapes and unforeseeable forms, courts do not congeal arbitration provisions into fixed molds but give them dynamic sweep." We therefore must be careful not to restrict unduly the *scope* of the arbitration by an overbroad definition of "merits, necessity or organization." Nor does this cautious judicial approach expose the city to an excessive assertion of the arbitrators' jurisdiction; the city council *after* the rendition of the award may reject any award that invades its authority over matters involving "merits, necessity or organization" since the charter itself limits the scope of the arbitration decision to that which is "consistent with applicable law."[6]

With this caveat in mind, we approach the specific problem of reconciling the two vague, seemingly overlapping phrases of the statute: "wages, hours and working conditions," which, broadly read could encompass practically any conceivable bargaining proposal; and "merits, necessity or organization of any service" which, expansively interpreted, could swallow the whole provision for collective negotiation and relegate determination of all labor issues to the city's discretion.

In attempting to reconcile these provisions, we note that the phrase "wages, hours and other terms and conditions of employment" in the MMBA was taken directly from the National Labor Relations Act[7] (hereinafter NLRA). (See Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 749.) The Vallejo charter only slightly changed the phrasing to "wages, hours and working conditions." A whole body of federal law has developed over a period of several decades interpreting the meaning of the federal act's "wages, hours and other terms and conditions of employment."

In the past we have frequently referred to such federal precedent in interpreting parallel language in state labor legislation. Thus, for example, in England v. Chavez (1972) 8 Cal.3d 572, 576, we determined the reach of the California Jurisdictional Strike Act in part by reference to judicial construction of similar language in the National Labor Relations Act. Similarly, in Petri Cleaners, Inc. v. Automotive Employees, Etc., Local No. 88 (1960) 53 Cal.2d 455, 459, we referred to judicial interpretation of the "interfere with, restrain and coerce" language in section 8(a)(1) and (2) of the NLRA to aid us in interpreting the meaning of "interfered with, dominated or controlled" in Labor Code section 1117.

The origin and meaning of the second phrase – excepting "merits, necessity or organization" from the scope of bargaining – cannot claim so rich a background. Apparently the Legislature included the limiting language not to restrict bargaining on matters directly affecting employees' legitimate interests in wages, hours and working conditions but rather to forestall any expansion of the language of "wages, hours and working conditions" to include more general managerial policy decisions.

Although the NLRA does not contain specific wording comparable to the "merits, necessity or organization" terminology in the city charter and the state act, the underlying fear that generated this language – that is, that wages, hours and working conditions could be expanded beyond reasonable boundaries to deprive an employer of his legitimate management prerogatives – lies imbedded in the federal precedents under the NLRA. As a review of federal case law in this field demonstrates, the trepidation that the union would extend its province into matters that should properly remain in the hands of employers has been incorporated into the interpretation of the scope of "wages, hours and terms and conditions of employment."[8] Thus, because the federal decisions effectively reflect the same interests as those that prompted the inclusion of the "merits, necessity or organization" bargaining limitation in the charter provision and state act, the federal precedents provide reliable if analogous authority on the issue.

The City of Vallejo objects to the use of NLRA precedents because of the alleged differences between employment relations in the public and private sectors. Although we recognize that there are certain basic differences between employment in the public and private sectors,[9] the adoption of legislation providing for public employment negotiation on wages, hours and working conditions just as in the private sector demonstrates that the Legislature found public sector and private sector employment relations sufficiently similar to warrant similar bargaining provisions.[10] We therefore conclude that the bargaining requirements of the National Labor Relations Act and cases interpreting them may properly be referred to for such enlightenment as they may render in our interpretation of the scope of bargaining under the Vallejo charter.

We now turn to an analysis of the specific bargaining proposals which are at issue here.

1. *Schedule of Hours*

The issue of Schedule of Hours by which the union proposed a maximum of 40 hours per week for fire fighters on 8-hour shifts and 56 hours per week for fire fighters on 24-hour shifts is clearly negotiable and arbitrable despite the city's argument that it involves the "organization" of the fire service. The Vallejo charter provides explicitly that city employees shall have the right to bargain on matter of wages, *hours* and working conditions; furthermore, working hours and work days have been held to be bargainable subjects under the National Labor Relations Act. In Meat Cutters v. Jewel Tea (1965) 381 U.S. 676, 691 the United States Supreme Court held that the limitation of butchers' work hours to the period of 9 a.m. to 6 p.m. was a mandatory

subject of bargaining. The city cites no authority to the contrary. Accordingly, we conclude that Schedule of Hours is a negotiable issue.

2. *Vacancies and Promotions*

The union's Vacancies and Promotions proposal concerns fire fighters' job security and opportunities for advancement and therefore relates to the terms and conditions of their employment. (Cf. District 50, United Mine Workers, Local 13942 v. N.L.R.B. (4th Cir. 1966) 358 F.2d 234.) Similar proposals for union hiring hall arrangements have been held to involve terms and conditions of employment under the National Labor Relations Act and to constitute mandatory subjects of bargaining. (N.L.R.B. v. Tom Joyce Floors, Inc. (9th Cir. 1965) 353 F.2d 768, 771.)

The city contends that this proposal may not apply to appointment or promotion to the position of deputy fire chief. Although the Vallejo charter does not contain any provision for determining the proper bargaining unit, supervisory or managerial employees are routinely excluded from the bargaining units under the National Labor Relations Act (N.L.R.B. v. Gold Spot Dairy, Inc. (10th Cir. 1970) 432 F.2d 125; see N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc. (1974) ____ U.S. ____ [94 S.Ct. 1757]; by analogy, we conclude that under the charter the union can claim no right to bargain as to supervisory positions.

We are presented with no facts which disclose whether the deputy fire chief's duties are supervisory; his title alone does not constitute a sufficient basis for excluding him from the bargaining unit. We therefore conclude that this issue should be submitted to the arbitrators who will hear the facts which will enable them to determine whether the deputy fire chief's duties are indeed supervisory. If so, the union's Vacancies and Promotions proposal does not apply to him or his position because he is not a member of the bargaining unit.

3. *Constant Manning Procedure*

An examination of this issue illustrates the wisdom of judicial self-restraint in attempting pre-arbitral definitions of the scope of arbitration. Apparently the union originally sought to add one engine company and to increase the personnel assigned to the existing engine companies. If these union demands required the building of a new fire house or the purchase of new equipment, they could very well intrude upon management's role of formulating policy. In view of the union's counterclaim that such a station and equipment were necessary for the safety of the men, this issue could have presented a complex problem. But the very flow of the proceedings washed away these questions because the union altered its position and accepted the recommendation of the fact finding committee "that the manning schedule presently in effect be continued without change during the term of the new Memorandum of Agreement." Hence we do not face the problem of whether the construction of a new fire house and the purchase of new equipment would intrude upon managerial prerogatives of policy making.

Although the city challenges even the limited status quo version of the manpower issue, contending that the fact finding ruling involves the "merits" and "organization" of the fire department and is therefore excluded from the scope of bargaining, we cannot conclude at this stage that the manpower proposal is necessarily nonarbitrable.

The city argues that manpower level in the fire department is inevitably a matter of fire prevention policy, and as such lies solely within the province of management. If the relevant evidence demonstrates that the union's manpower proposal is indeed directed to the question of maintaining a particular standard of fire prevention within the community, the city's objection would be well taken.

The union asserts, however, that its current manpower proposal is not directed at general fire prevention policy, but instead involves a matter of workload and safety for employees, and accordingly falls within the scope of negotiation and arbitration. Because the tasks involved in fighting a fire cannot be reduced, the union argues that the number of persons manning the fire truck or comprising the engine company fixes and determines the amount of *work* each fire fighter must perform. Moreover, because of the hazardous nature of the job, the union also claims that the number of persons available to fight the fire directly affects the *safety* of each fire fighter.

Insofar as the manning proposal at issue does in fact relate to the questions of employee workload and safety, decisions under the National Labor Relations Act fully support the union's contention that the proposal is arbitrable. First, the federal authorities uniformly recognize "workload"[11] issues as mandatory subjects of bargaining whose determination may not be reserved to the sole discretion of the employer. (See, e.g., Gallencamp Stores Co. v. N.L.R.B. (9th Cir. 1968) 402 F.2d 525, 529, fn. 4.) Thus, for example, in Beacon Piece Dyeing & Finishing Co., Inc. (1958) 121 N.L.R.B. 953, 954, 956, the National Labor Relations Board held that an employer could not unilaterally increase an employee's workload by assigning to him the operation of an extra machine. Similarly, the courts have recognized rules and practices affecting employee safety as mandatory subjects of bargaining since they indirectly concern the terms and conditions of his employment. (N.L.R.B. v. Gulf Power Company (5th Cir. 1967) 384 F.2d 822.)

Moreover, a recent California public employment case, Los Angeles County Employees Assn. Local 660 v. County of Los Angeles (1973) 33 Cal.App.3d 1, affords additional support for the union's position. In interpreting the scope of bargaining language in the Meyers-Milias-Brown Act -- language which, as pointed out earlier, largely parallels the scope of negotiation provision under the Vallejo City Charter -- the *Los Angeles County Employees* court held that the county was required to negotiate with the union with respect to the size of the caseloads carried by social service eligibility workers. Because the caseload, i.e., "workload," of the social workers effectively determined the number of these workers needed to service the recipients of aid, bargaining over the size of caseloads in *Los Angeles County Employees* was in reality comparable to bargaining over "manning" levels.[12] In the case before us, the union claims that the fire fighters, like the Los Angeles social workers, are essentially demanding a particular workload but have framed their demand in terms of "manning," that is the number of people available to fight each fire.

Given the parties' divergent characterizations of the instant manpower proposal, either one of which may well be accurate, we believe the proper course must be to submit the issue to the arbitrators so that a factual record may be established. The nature of the evidence presented to the arbitrators should largely disclose whether the manpower issue primarily involves the workload and safety of the men ("wages, hours and working conditions") or the policy of fire prevention of the city ("merits, necessity or organization of any governmental service"). On the basis of such a record, the arbitrators can properly determine in the first instance whether or not, and to what extent, the present manpower proposal is arbitrable.

Furthermore, the parties themselves, or the arbitrators, in the ongoing process of arbitration, might suggest alternative solutions for the manpower problem that might remove or transform the issue. Indeed, the union in the instant case has already abandoned one position and assumed another. These are the elements and considerations that argue against preliminary court rulings that would dam up the stream of arbitration by premature limitations upon the process, thwarting its potential destination of the resolution of the the issues. Hence we hold that the charter provision as to "merits, necessity or organization" of the service does not at this time preclude the arbitration of the union proposal that the manning schedule presently in effect be continued for the term of the new agreement.

4. *Personnel Reduction*

Finally, the union advanced a Personnel Reduction proposal which would require that the city bargain with the union with respect to any decision to reduce the number of fire fighters. Under the proposal, any reduction would be on a least-senority basis, and no new employees could be hired until all those laid off were given an opportunity to return. The city objects to that part of the proposal requiring bargaining on a decision to reduce personnel and contends that any such matter is not negotiable because it involves the merits, necessity or organization of the fire fighting service.

A reduction of the entire fire fighting force based on the city's decision that as a matter of policy of fire prevention the force was too large would not be arbitrable in that it is an issue involving the organization of the service.

Thus cases under the NLRA indicate that an employer has the right unilaterally to decide that a layoff is necessary, although it must bargain about such matters as the *timing* of layoffs and the *number* and *identity* of the employees affected. (N.L.R.B. v. United Nuclear Corporation (10th Cir. 1967) 381 F. 2d 972.) In some situations, such as that in which a layoff results from a decision to subcontract out bargaining unit work, the decision to subcontract and lay off employees is subject to bargaining. (Fibreboard Corp. v. Labor Board (1964) 379 U.S. 203.) The fact, however, that the decision to lay off results in termination of one or more individuals' employment is not '*alone* sufficient to render the decision itself a subject of bargaining. (N.L.R.B. v. Dixie Ohio Express Co. (6th Cir. 1969) 409 F.2d 10.)

On the other hand, because of the nature of fire fighting, a reduction of personnel may affect the fire fighters' working conditions by increasing their workload and endangering their safety in the same way that general manning provisions affect workload and safety. To the extent, therefore, that the decision to lay off some employees affects the workload and safety of the remaining workers, it is subject to bargaining and arbitration for the same reasons indicated in the prior discussion of the manning proposal.

Our conclusion that the issues of Personnel Reduction, Vacancies and Promotions, Schedule of Hours and Constant Manning Procedure, except as limited above, involve the wages, hours or working conditions of fire fighters and are negotiable requires in the context of this suit that the City of Vallejo submit these issues to arbitration. We in no way evaluate the merit of the union proposals, but hold only that under the Vallejo charter they are arbitrable.

Such a result comports with the strong public policy in California favoring peaceful resolution of employment disputes by means of arbitration. We have declared that state policy in California "favors arbitration provisions in collective bargaining agreements and recognizes the important part they play in helping to promote industrial stabilization." (Posner V. Grunwald-Marx, Inc. (1961) 56 Cal.2d 169, 180.) In this case the voters of the City of Vallejo similarly declared that they consider arbitration to be the most appropriate means of resolving labor disputes. Through section 810 the citizens of Vallejo delegated to a board of arbitrators the power to render a final and binding decision in labor disputes "to the extent permitted by law" after considering "all factors relevant to the issues from the standpoint of both the employer and the employee, including the City's financial condition."[13]

At the same time Vallejo voters provided that any employee who participated in a strike against the city should be automatically terminated. (§ 810.) Thus, the employee's *quid pro quo* for this no-strike provision consisted of the arbitrability of all disputes (see Boys Market v. Clerks Union (1970) 398 U.S. 235); the arbitration and no-strike provisions were interdependent. Any interpretation of the Vallejo charter which improperly failed to require arbitration on the full range of negotiable issues would not only erroneously curtail arbitration but would invite the very labor strife which the charter provisions seek to prevent.

For the foregoing reasons we dispose of the issues as follows: (1) The Schedule of Hours proposal must be submitted to arbitration in full. (2) The proposal as to Vacancies and Promotions is arbitrable. The arbitrators shall additionally hear the facts to determine whether the position of deputy fire chief is a supervisory one and thus excluded from the bargaining unit. If so, the Vacancies and Promotions proposal cannot apply to the deputy fire chief position. (3) The proposal that the manning schedule presently in effect be continued without changes during the term of the new agreement is arbitrable to the extent that it affects the working conditions and safety of the employees. (4) As to Personnel Reduction the proposal to reduce personnel is arbitrable only insofar as it affects the working conditions and safety of the remaining employees. Matters of seniority and reinstatement included in the Personnel Reduction proposal are arbitrable.

We affirm the judgment as herein modified and remand the case to the superior court with directions to issue a writ of mandamus requiring the City of Vallejo to proceed to arbitrate the issues of "Reduction of Personnel," "Vacancies and Promotions," "Schedule of Hours," and "Constant Manning Procedure" in accordance with this opinion. Each party shall bear its own costs on appeal.

TOBRINER, J.

WE CONCUR:

WRIGHT, C.J.
McCOMB, J.
MOSK, J.
BURKE, J.
SULLIVAN, J.
CLARK, J.

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[1]The court rejected the union's contention that the California Arbitration Act, Code of Civil Procedure section 1280, et seq., applied to this dispute, holding that it had no jurisdiction under the arbitration act and could not issue an order to arbitrate. The court upheld the writ of mandate to compel the city to arbitrate, however, because the union had no other plain, speedy and adequate remedy. Since the union did not initially seek an order to arbitrate under section 1281.2 of the act, but proceeded in the superior court with a petition for writ of mandate, we need not resolve the issue of the applicability of the California Arbitration Act.

[2]Section 809 provides: "Consistent with applicable law, the City Council shall by ordinance provide a system of collective negotiating to include:

"a. It shall be the right of City employees individually or collectively to negotiate on matters of wages, hours, and working conditions, but not on matters involving the merits, necessity, or organization of any service or activity provided by law, or on any matter arising out of Sections 803(n) or 803(o) of this Charter.

"b. The City Council shall direct the City Manager and/or his designated representative(s) to negotiate in good faith with recognized employee organizations.

"c. Agreements reached between City representatives authorized in (b) above and the representatives of recognized employee organizations shall be submitted in writing to the City Council for its approval, modification, or rejection.

"d. There shall be established a timetable for the total process of collective negotiations, including mediation and fact finding, as herein provided, which will, if successful, assure a final agreement between the parties no less than 45 days before the end of the current fiscal year.

"e. If, after a period of time to be set forth in the ordinance, no agreement can be reached between City representatives authorized in (b) above and the representatives of recognized employee organizations or if the City Council refuses to ratify the agreement arrived at or modifies such agreement in any manner unacceptable to said employee organizations, the parties shall request the State Conciliation Service, or other available impartial third-party mediation service mutually acceptable to the parties, to provide a mediator in accordance with its usual procedures.

"f. If no agreement between the parties has been reached within 10 days after the date for start of mediation, a fact-finding committee of three shall be appointed to deal with the disputed issues. One member of the fact-finding committee shall be appointed by the City Council, one member shall be appointed by the recognized employee organization, and those two appointed shall name a third, who shall be the chairman. If they are unable to agree upon a third, they shall select the third member from a list of five names to be provided by the State Conciliation service. The fact-finding committee shall make public its report, with recommendations, within 30 days. The Council shall then promptly consider and act upon the report."

[3]Section 810 provides: "Consistent with applicable law, the ordinance adopted by the Council under Section 809 shall in addition include a requirement that if the parties do not reach agreement within 10 days after the report and recommendations of the fact-finding committee, the issues shall be submitted to arbitration. The Board of Arbitrators shall be composed of three persons; one appointed by the City Council, one appointed by the recognized employee organization, and those two appointed shall appoint a third, who shall be chairman. If they are unable to agree upon a third, they shall select the third member from a list of five names to be provided by the State Conciliation Service. No member of the fact-finding committee shall be a member of the Board of Arbitrators. The arbitrators shall consider all factors relevant to the issues from the standpoint of both the employer and the employee, including the City's financial condition. To the extent permitted by law, the decision of a majority of the Board of Arbitrators shall be final and binding upon the parties. The cost of arbitration shall be borne equally by all parties.

"The Council shall also provide in said ordinance that any employee who fails to report for work without good and just cause during negotiations or who participates in strike against the City of Vallejo will be considered to have terminated his employment with the City, and the Council shall have no power to provide, by reinstatement or otherwise, for the return or reentry of said employee into the City service except as a new employee who is employed in accordance with the regular employment practices of the City in effect for the particular position of employment."

[4]The Meyers-Milias-Brown Act [hereinafter MMBA] applies to all local government employees in California. It provides for negotiation ("meet and confer") and mediation but not fact-finding or binding arbitration. (Gov. Code, §§ 3505 and 3505.2.)

[5]The meaning of the scope of bargaining language in the Vallejo charter does not differ from the meaning of such language in the MMBA because of the existence of dispute resolution provisions in the charter not present in the MMBA. The essential difference between the bargaining rights afforded Vallejo employees and those afforded local government employees in general under the MMBA relates only to the *remedies* available when negotiation breaks down and *not* to the scope of negotiation required.

The charter provides that "[i]t shall be the right of City employees . . . to *negotiate* on *matters* of wages, hours and working conditions, but not on matters involving the merits, necessity, or organization of any service or activity. . . ." (Emphasis added.) If no agreement is reached on *these matters*, they must be submitted to mediation, then fact-finding, then arbitration. The matters which are submitted to the three levels of dispute resolution are those upon which the parties *negotiate* but do not reach agreement. There is nothing in either section 809 or 810 which can be interpreted to exclude any matters which are subject to negotiation from subsequent submission to mediation, fact-finding and arbitration. Therefore interpretation of the scope of negotiation under the Vallejo charter is necessarily an interpretation of the scope of arbitration.

[6]California authorities establish that after an arbitration decision has been rendered, judicial review is available to determine whether the arbitrators have exceeded their powers. (See, e.g., Morris v. Zuckerman (1968) 69 Cal.2d 686, 691; National Indemnity Co. v. Superior Court (1972) 27 Cal.App. 3d 345, 349; Firestone Tire & Rubber Co. v. United Rubber Workers (1959) 168 Cal.App.2d 444, 449; Flores v. Borman (1955) 130 Cal.App.2d 282, 287; Drake v. Steen (1953) 116 Cal. App.2d 779, 785.)

[7]The NLRA provides that "to bargain colleotively is . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . ." (29 U.S.C. 158(d)).

[8]Thus federal cases have held an employer need not bargain about a decision to shut down one of its plants for economic reasons (N.L.R.B. v. Royal Plating & Polishing Co. (3d Cir. 1965) 350 F.2d 191), nor about a decision based on economic considerations alone to terminate its business and reinvest its capital in a different enterprise in another location as a minority partner (N.L.R.B. v. Transmarine Navigation Corp. (9th Cir. 1967) 380 F.2d 933). Furthermore, a decision to relocate the employer's plant to another location for economic reasons has been held "clearly within the realm of managerial discretion" and not subject to bargaining on the union's demand (N.L.R.B. v. Rapid Bindery, Inc. (2d Cir. 1961) 293 F.2d 170, 176).

[9]See generally Shaw & Clark, *Practical Differences Between Public & Private Sector Collective Bargaining* (1972) 19 U.C.L.A.L.Rev. 867; Wellington & Winter, *The Limits of Collective Bargaining in Public Employment* (1969) 78 Yale L.J. 1107; Report of the Western Assembly on Collective Bargaining in American Government (1972) pp. 4-5; *Project: Collective Bargaining and Politics in Public Employment* (1972) 19 U.C.L.A.L.Rev. 887.

[10]The Assembly Advisory Council on Public Employee Relations reached the same conclusion after studying arguments of alleged differences between the public and private sectors. (Final Rep., p. 139, March 15, 1973.) Furthermore, we applied private sector precedent in interpreting another aspect of the MMBA in Social Workers' Union, Local 535 v. Alameda Welfare Dept. (1974) 11 Cal. 3d 382.

[11]In the private sector employees rarely seek higher "manning" levels but instead usually frame similar demands in terms of reducing "workload." In one case, however, a union did phrase its proposal in "manning" terms, demanding an increase in the number of employees assigned to operate a specific 10-inch mill. The National Labor Relations Board found the proposal to constitute a mandatory subject of bargaining. (Timken Roller Bearing Co. (1946) 70 N.L.R.B. 500, 504-505, revd. on other grounds /6th Cir. 1947) 161 F.2d 949.)

[12]The city argues that the *Los Angeles County Employees* case is distinguishable from the instant matter because it only concerned the "negotiability" of the caseload issue and not its "arbitrability." As noted above (see fn. 5, *supra*), however, under the charter provision at issue in this case, the *scope* of negotiation and the *scope* of arbitration are identical

[13]An amicus has contended that the disputed issues are not arbitrable because submission of them to arbitration constitutes an unconstitutional delegation of legislative power. Arbitration of public employment disputes has been held constitutional by state supreme courts in State v. City of Laramie (Wyo. 1968) 437 P.2d 295 and City of Warwick v. Warwick Regular Firemen's Ass'n (R.I. 1969) 106 R.I. 109, 256 A.2d 206.

To the extent that the arbitrators do not proceed beyond the provisions of the Vallejo charter there is no unlawful delegation of legislative power.

Text of Labor Management Relations Act, 1947, as Amended by Labor-Management Reporting and Disclosure Act of 1959

Public Law No. 101, 80th Congress of the United States, Chapter 120, First Session, H.R. 3020, Passed June 23, 1947, over the President's Veto; Amended by Public Law No. 189, 82d Congress, October 22, 1951; by Judicial Review Act, Public Law 85-791, 85th Congress, August 28, 1958; by the Labor-Management Reporting and Disclosure Act of 1959; by Public Law 93-95, 93rd Congress, September 1973; and by Public Law 93-360, 93rd Congress, August 25, 1974.

AN ACT

TO AMEND THE NATIONAL LABOR RELATIONS ACT, TO PROVIDE ADDITIONAL FACILITIES FOR THE MEDIATION OF LABOR DISPUTES AFFECTING COMMERCE, TO EQUALIZE LEGAL RESPONSIBILITIES OF LABOR ORGANIZATIONS AND EMPLOYERS, AND FOR OTHER PURPOSES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE AND DECLARATION OF POLICY

SECTION 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Title I—Amendment of National Labor Relations Act *

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

"FINDINGS AND POLICIES

"SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

"DEFINITIONS

"SEC. 2. When used in this Act—

"(1) The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

[ED. NOTE: Sec. 2(2) was amended August 25, 1974, P.L. 93-360, 93rd Congress, to remove the exemption for nonprofit hospitals.]

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

"(4) The term 'representatives' in-

* ED. NOTE: Further amended October 22, 1951, by P.L. 189 (S. 1959), 82d Congress, 1st Session and on September 4, 1959, by P.L. —— (S. 1555), 85th Congress, 1st Session.

cludes any individual or labor organization.

"(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participated and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

"(8) The term 'unfair labor practice' means any unfair labor practice listed in section 8.

"(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

"(10) The term 'National Labor Relations Board' means the National Labor Relations Board provided for in section 3 of this Act.

"(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

"(12) The term 'professional employee' means—

"(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

"(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

"(13) In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

"(14) The term 'health care institution' shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged persons.

[ED. NOTE: Sec. 2(14) was added by amendments of August 25, 1974, P.L. 93-360, 93rd Congress, extending NLRB jurisdiction to nonprofit hospitals.]

"NATIONAL LABOR RELATIONS BOARD

"SEC. 3. (a) The National Labor Relations Board (hereinafter called the 'Board') created by this Act prior to its amendment by the Labor Management Relations Act, 1947, is hereby continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five year each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

"(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determines whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed."

[ED. NOTE: Section 3(b) was amended by Section 701(b) of the Labor-Management Reporting and Disclosure Act of 1959, effective 60 days after enactment, authorizing the Board to delegate to its regional directors its powers under Section 9 regarding representation and election issues.]

"(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

"(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted."

[ED. NOTE: Section 3(d) was amended by Sec. 703 of the Labor-Management Reporting and Disclosure Act of 1959 to add the last sentence, effective 60 days after enactment.]

"SEC. 4. (a) Each member of the Board and the General Counsel of the Board shall receive a salary of

$12,000* a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

"(b) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

"SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

"SEC. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

"RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"UNFAIR LABOR PRACTICES

"SEC. 8. (a) 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;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

"(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; *Provided*, That nothing in this Act, or any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

[ED. NOTE: The above subsection was amended October 22, 1951, by substitution of the words at the end of the first proviso "and has at the time • • • such an agreement" in the place of the former language, which was as follows:

"and (ii), if, following the most recent election held as provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement;".

Clause (i) was amended by Sec. 201(3) of the Labor-Management Reporting and Disclosure Act of 1959 to strike out at the end thereof the language "and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9(f), (g), (h)."]

"(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an in-

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* ED. NOTE: Pursuant to Public Law 854, 84th Congress, 2d Session, Title I, approved July 31, 1956, the salary of the Chairman of the Board shall be $20,500 per year and the salaries of the General Counsel and each Board member shall be $20,000 per year.

dustry affecting commerce, where in either case an object thereof is:

"(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

"(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution."

[Ed. Note: Sec. 8(b)(4) was amended by Sec. 704(a) of the Labor-Management Reporting and Disclosure Act of 1959, effective 60 days after enactment. The amended section does the following: (1) Sec. 8(b)(4)(i) contains a revised ban on inducement or encouragement of an individual to strike or refuse to perform services; (ii) contains a new ban on threatening, restraining, or coercing any person (including an employer); (2) Secs 8(b)(4)(A), (B), (C), and (D) specify the objects that make the conduct in (i) and (ii) unlawful; and (3) a proviso at the end of the section contains the old provision that nothing in 8(b)(4) shall make it unlawful for an employee to refuse to cross a picket line at the premises of an employer other than his own, and the new clarification regarding the use of other means of advertising a dispute.]

"(5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

"(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

"(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

"(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

"(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

"(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

"Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section (8)(b)."

[Ed. Note: Sec. 8(b) was amended by Sec. 704(c) of the Labor-Management Reporting and Disclosure Act of 1959, effective 60 days after enactment, to strike out the word "and" at the end of paragraph (5), to strike out the period at the end of paragraph (6) and to insert in lieu thereof a semicolon and the word "and" and to add a new paragraph (7).]

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) shall be modified as follows:

"(A) The notice of section 8(d)(1) shall be ninety days; the notice of section 8(d)(3) shall be sixty days; and the contract period of section 8(d)(4) shall be ninety days.

"(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3).

"(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts by mediation and conciliation to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

[Ed. Note: Section 8(d) was amended August 25, 1974, P.L. 93-360, 93rd Congress, special provisions for disputes involving health care institutions.]

"(e) It shall be an unfair labor practice for any labor organization and any emloyer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection (e) and section 8(b)(4(B) the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception."

[Ed. Note: Sec. 8 was amended by Sec. 704 (b) of the Labor-Management Reporting and Disclosure Act of 1959, effective 60 days after enactment, to add subsection (e) above.]

"(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: Provided further, That any agreement which would be invalid but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)."

[Ed. Note: Sec. 8 was amended by Sec. 705 (a) of the Labor-Management Reporting and Disclosure Act of 1959, effective 60 days after enactment, to add subsection (f) above. Sec. 705(b) of the Labor-Management Reporting and Disclosure Act of 1959 states: "Nothing contained in the amendment made by subsection (a) shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."]

"(g) A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

[Ed. Note: Section 8 was amended August 25, 1974, P.L. 93-360, 93rd Congress, to add subsection (g) above.]

"REPRESENTATIVES AND ELECTIONS

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees

who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

"(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a runoff shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

[Ed. Note: Sec. 9(c)(3) was amended by Sec. 702 of the Labor-Management Reporting and Disclosure Act of 1959, effective 60 days after enactment, to amend the second sentence to read as above. The sentence previously read: "Employees on strike who are not entitled to reinstatement shall not be eligible to vote."]

"(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

"(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

"(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

"(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a) (3), of a petition alleging the desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

[Ed. Note: Section 9(e)(1) above was substituted October 22, 1951, for former Subsection 9(e)(1) and (2). The former subsections were as follows:

"(e)(1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9(a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

"(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3)(ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer."]

"(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

[Ed. Note: This subsection was renumbered from (3) to (2) by P.L. 189 approved October 22, 1951.]

[Ed. Note: Subsections (f), (g), and (h) of Section 9 were repealed by Sec. 201(d) of the Labor-Management Reporting and Disclosure Act of 1959. The subsections dealt with requirements regarding filing of union financial and other reports and non-Communist affidavits.]

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) 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: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provisions of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in

its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and 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: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceedings a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

"(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

"(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

"(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

"(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes', approved March 23, 1932 (U.S.C., Supp. VII, title 29, secs. 101-115).

"(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

"(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to

petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

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

"(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b) or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* that no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, that such officer of regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition, the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* that for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b) (4) (D).

[Ed. Note: Section 101(1) was amended by Section 704(d) of the Labor-Management Reporting and Disclosure Act of 1959 to add after the words "section 8(b)" in the first sentence the words "or section 8(e) or section 18(b)(7) and to strike the period at the end of the third sentence and insert to second proviso. The amendments were made effective 60 days after enactment.]

"(m) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 8, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (1)."

[Ed. Note: Section 10 was amended by Sec. 706 of the Labor-Management Reporting and Disclosure Act of 1959 to add at the end thereof a new subsection (m).]

"INVESTIGATORY POWERS

"SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

"(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

"(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

[Ed. Note: Section 11(3) was repealed by Title II of the Organized Crime Control Act of 1970, effective December 14, 1970, which deals with compelling testimony from witnesses who claim privilege against self-incrimination.]

"(4) Complaints, orders and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

"(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

"(6) The several departments and agencies of the Government, when directed by the President, shall furnish

the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

"SEC. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

"LIMITATIONS

"SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

"SEC. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

"(b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

FEDERAL-STATE JURISDICTION

"(c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

"(2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction."

[ED. NOTE: Section 14 was amended by Section 701 of the Labor-Management Reporting and Disclosure Act of 1959 to add at the end thereof the new subsection (c).]

"SEC. 15. Wherever the application of the provisions of section 272 of chapter 10 of the Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', approved July 1, 1898, and Act amendatory thereof and supplementary thereto (U.S.C., title 11, sec. 672), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided,* That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

"SEC. 16. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

"SEC. 17. This Act may be cited as the 'National Labor Relations Act'.

"SEC. 18. No petition entertained, no investigation made, no election held, and no certification issued by the National Labor Relations Board, under any of the provisions of section 9 of the National Labor Relations Act, as amended, shall be invalid by reason of the failure of the Congress of Industrial Organizations to have complied with the requirements of section 9(f), (g), or (h) of the aforesaid Act prior to December 22, 1949, or by reason of the failure of the American Federation of Labor to have complied with the provisions of section 9(f), (g), or (h) of the aforesaid Act prior to November 7, 1947: *Provided,* That no liability shall be imposed under any provision of this Act upon any person for failure to honor any election or certificate referred to above, prior to the effective date of this amendment: *Provided, however,* That this proviso shall not have the effect of setting aside or in any way affecting judgments or decrees heretofore entered under section 10(e) or (f) and which have become final.

[ED. NOTE: Sec. 18 was added October 22 1951, by P.L. 189, 82 Congress.]

INDIVIDUALS WITH RELIGIOUS CONVICTIONS

SEC. 19. Any employee of a health care institution who is a member of and adheres to established and traditional tenets or teachings of a bona fide fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required, in lieu of periodic dues and initiation fees, to pay sums equal to such dues and intiation fees to a nonreligious charitable fund exempt from taxation under section 501(c)(3) of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in a contract between such institution and a labor organization, or if the contract fails to designate such funds, then to any such fund chosen by the employee."

[ED. NOTE: Sec. 19 was added by amendments of August 25, 1974, P.L. 93-360, 93rd Congress.]

EFFECTIVE DATE OF CERTAIN CHANGES

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8(a) (3) and section 8(b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8(3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

SEC. 103. No provisions of this title shall affect any certification of representatives or any determination as to the appropriate collective-bargaining unit, which was made under section 9 of the National Labor Relations Act prior to the effective date of this title until one year after the date of such certification or if, in respect of any such certification, a collective-bargaining contract was entered into prior to the effective date of this title, until the end of the contract period or until one year after such date, whichever first occurs.

SEC. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

Title II—Conciliation of Labor Disputes In Industries Affecting Commerce; National Emergencies

SEC. 201. That it is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the repre-

sentatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

SEC. 202. (a) There is hereby created an independent agency to be known as the Federal Mediation and Conciliation Service (herein referred to as the "Service", except that for sixty days after the date of the enactment of this Act such term shall refer to the Conciliation Service of the Department of Labor). The Service shall be under the direction of a Federal Mediation and Conciliation Director (hereinafter referred to as the "Director"), who shall be appointed by the President by and with the advice and consent of the Senate. The Director shall not engage in any other business, vocation, or employment.

(b) The Director is authorized, subject to the civil-service laws, to appoint such clerical and other personnel as may be necessary for the execution of the functions of the Service, and shall fix their compensation in accordance with the Classification Act of 1949, as amended, and may, without regard to the provisions of the civil-service laws and the Classification Act of 1949 as amended, appoint and fix the compensation of such conciliators and mediators as may be necessary to carry out the functions of the Service. The Director is authorized to make such expenditures for supplies, facilities, and services as he deems necessary. Such expenditures shall be allowed and paid upon presentation of itemized vouchers therefor approved by the Director or by any employee designated by him for that purpose.

(c) The principal office of the Service shall be in the District of Columbia, but the Director may establish regional offices convenient to localities in which labor controversies are likely to arise. The Director may by order, subject to revocation at any time, delegate any authority and discretion conferred upon him by this Act to any regional director, or other officer or employee of the Service. The Director may establish suitable procedures for cooperation with State and local mediation agencies. The Director shall make an annual report in writing to Congress at the end of the fiscal year.

(d) All mediation and conciliation functions of the Secretary of Labor or the United States Conciliation Service under section 8 of the Act entitled "An Act to create a Department of Labor", approved March 4, 1913 (U.S.C., title 29, sec. 51), and all functions of the United States Conciliation Service under any other law are hereby transferred to the Federal Mediation and Conciliation Service, together with the personnel and records of the United States Conciliation Service. Such transfer shall take effect the sixtieth day after the date of enactment of this Act. Such transfer shall not affect any proceedings pending before the United States Conciliation Service or any certification, order, rule, or regulation theretofore made by it or by the Secretary of Labor. The Director and the Service shall not be subject in any way to the jurisdiction or authority of the Secretary of Labor or any official or division of the Department of Labor.

FUNCTIONS OF THE SERVICE

SEC. 203. (a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation service are available to the parties. Whenever the Service does proffer its services in any disputes, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

SEC. 204. (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—

(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements;

(2) whenever a dispute arises over the terms or application of a collective-bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously; and

(3) in case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this Act for the purpose of aiding in a settlement of the dispute.

SEC. 205. (a) There is hereby created a National Labor-Management Panel which shall be composed of twelve members appointed by the President, six of whom shall be selected from among persons outstanding in the field of management and six of whom shall be selected from among persons outstanding in the field of labor. Each member shall hold office for a term of three years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and the terms of office of the members first taking office shall expire, as designated by the President at the time of appointment, four at the end of the first year, four at the end of the second year, and four at the end of the third year after the date of appointment. Members of the panel, when serving on business of the panel, shall be paid compensation at the rate of $25 per day, and shall also be entitled to receive an allowance for actual and necessary travel and subsistence expenses while so serving away from their places of residence.

(b) It shall be the duty of the panel, at the request of the Director, to advise in the avoidance of industrial controversies and the manner in which mediation and voluntary adjustment shall be administered, particularly with reference to controversies affecting the general welfare of the country.

NATIONAL EMERGENCIES

SEC. 206. Whenever in the opinion of the President of the United States,

a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

SEC. 207. (a) A board of inquiry shall be composed of a chairman and such other members as the President shall determine, and shall have power to sit and act in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.

(b) Members of a board of inquiry shall receive compensation at the rate of $50 for each day actually spent by them in the work of the board, together with necessary travel and subsistence expenses.

(c) For the purpose of any hearing or inquiry conducted by any board appointed under this title, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U.S.C. 19, title 15, secs. 49 and 50, as amended), are hereby made applicable to the powers and duties of such board.

SEC. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) In any case, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", shall not be applicable.

(c) The order or orders of the court shall be subject to review by the appropriate circuit court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 29, secs. 346 and 347).

SEC. 209. (a) Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

SEC. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

COMPILATION OF COLLECTIVE BARGAINING AGREEMENTS, ETC.

SEC. 211. (a) For the guidance and information of interested representatives of employers, employees, and the general public, the Bureau of Labor Statistics of the Department of Labor shall maintain a file of copies of all available collective bargaining agreements and other available agreements and actions thereunder settling or adjusting labor disputes. Such file shall be open to inspection under appropriate conditions prescribed by the Secretary of Labor, except that no specific information submitted in confidence shall be disclosed.

(b) The Bureau of Labor Statistics in the Department of Labor is authorized to furnish upon request of the Service, or employers, employees, or their representatives, all available data and factual information which may aid in the settlement of any labor dispute, except that no specific information submitted in confidence shall be disclosed.

EXEMPTION OF RAILWAY LABOR ACT

SEC. 212. The provisions of this title shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time.

CONCILIATION OF LABOR DISPUTES IN THE HEALTH CARE INDUSTRY

SEC. 213. (a) If, in the opinion of the Director of the Federal Mediation and Conciliation Service a threatened or actual strike or lockout affecting a health care institution will, if permitted to occur or to continue, substantially interrupt the delivery of health care in the locality concerned, the Director may further assist in the resolution of the impasse by establishing within 30 days after the notice to the Federal Mediation and Conciliation Service under Clause (A) of the last sentence of section 8(d) (which is required by clause (3) of such section 8(d)), or within 10 days after the notice under clause (B), an impartial Board of Inquiry to investigate the issues involved in the dispute and to make a written report thereon to the parties within fifteen (15) days after the establishment of such a Board. The written report shall contain the findings of fact together with the Board's recommendations for settling the dispute, with the objective of achieving a prompt, peaceful and just settlement of the dispute. Each such Board shall be composed of such number of individuals as the Director may deem desirable. No member appointed under this section shall have any interest or involvement in the heath care institutions or the employee organizations involved in the dispute.

"(b)(1) Members of any board established under this section who are otherwise employed by the Federal Government shall serve without compensation but shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in carrying out its duties under this section.

"(2) Members of any board established under this section who are not subject to paragraph (1) shall receive compensation at a rate prescribed by the Director but not to exceed the daily rate prescribed for GS-18 of the General Schedule under section 5332 of title 5, United States Code, including travel for each day they are engaged in the performance

of their duties under this section and shall be entitled to reimbursement for travel, subsistence, and other necessary expenses incurred by them in carrying out their duties under this section.

"(c) After the establishment of a board under subsection (a) of this section and for 15 days after any such board has issued its report, no change in the status quo in effect prior to the expiration of the contract in the case of negotiations for a contract renewal, or in effect prior to the time of the impasse in the case of an initial bargaining negotiation, except by agreement, shall be made by the parties to the controversy.

"(d) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.

[ED. NOTE: Title II was amended August 25, 1974, P.L. 93-360, 93rd Congress, by adding Sec. 213 above.]

Title III

SUITS BY AND AGAINST LABOR ORGANIZATIONS

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

"Sec. 302. (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

"(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

"(2) to any labor organization or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

"(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

"(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

"(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

"(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

"(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length

of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided,* that no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided,* that the requirements or clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further,* that no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under the National Labor Relations Act, as amended, or this Act; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959.

[Ed. Note: Subsections (a), (b), and (c) were amended by Section 505 of the Labor Management Reporting and Disclosure Act of 1959. The amendments revised Secs. (a) and (b), expanded subsection (c), and added subsections (a)(2), (3), and (4); (b)(2); and (c)(6). Subsection (c)(7) was added by P.L. 91-86, October 14, 1969.

Subsection (c)(8) was added by P.L. 93-95, August 15, 1973.]

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U.S.C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U.S.C., title 15, sec. 17, and title 29, sec. 52), and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U.S.C., title 29, secs. 101-115).

(f) This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c)(5)(B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

"SEC. 303(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended."

[Ed. Note: Section 303(a) was amended by Section 704(e) of the Labor-Management Reporting and Disclosure Act of 1959, effective 60 days after enactment. The effect of the amendment is to make the damage remedy applicable to secondary boycotts as now defined under Section 8(b)(4).]

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

RESTRICTION ON POLITICAL CONTRIBUTIONS

SEC. 304. Section 313 of the Federal Corrupt Practices Act, 1925 (U.S.C., 1940 edition, title 2, sec. 251; Supp. V, title 50, App., sec. 1509), as amended, is amended to read as follows:

"SEC. 313. It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidates, political committee, or other person to accept or receive any contribution prohibited by this section. Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, in violation of this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both. For the purposes of this section 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

[Ed. Note: Paragraph 2 of Section 304 above was amended in 1951 to apply its penalties to any person who accepts or receives any prohibited contribution. The maximum penalty for individual violations was increased to a fine of $10,000 or imprisonment for two years or both in the case of a willful violation (Act of October 31, 1951, Ch. 655, Sec. 20(c)).]

STRIKES BY GOVERNMENT EMPLOYEES

SEC. 305. [Repealed by Ch. 690, 69 Stat. 624, effective August 9, 1955. Sec. 305 made it unlawful for government employees to strike and made strikers subject to immediate discharge, forfeiture of civil-service status, and three-year blacklisting for federal employment.]

Title IV

CREATION OF JOINT COMMITTEE TO STUDY AND REPORT ON BASIC PROBLEMS AFFECTING FRIENDLY LABOR RELATIONS AND PRODUCTIVITY

SEC. 401. There is hereby established a joint congressional committee to be known as the Joint Committee on Labor-Management Relations (hereafter referred to as the committee), and to be composed of seven Members of the Senate Committee on Labor and Public Welfare, to be appointed by the President pro tempore of the Senate, and seven Members of the House of Representatives Committee on Education and Labor, to be appointed by the Speaker of the House of Representatives. A vacancy in membership of the committee shall not affect the powers of the remaining members to execute the functions of the committee, and shall be filled in the same manner as the original selection. The committee shall select a chairman and a vice chairman from among its members.

SEC. 402. The committee, acting as a whole or by subcommittee shall conduct a thorough study and investigation of the entire field of labor-management relations, including but not limited to—

(1) the means by which permanent friendly cooperation between employers and employees and stability of labor relations may be secured throughout the United States;

(2) the means by which the individual employee may achieve a greater productivity and higher wages, including plans for guaranteed annual wages, incentive profit-sharing and bonus systems;

(3) the internal organization and administration of labor unions, with special attention to the impact on individuals of collective agreements requiring membership in unions as a condition of employment;

(4) the labor relations policies and practices of employers and associations of employers;

(5) the desirability of welfare funds for the benefit of employees and their relation to the social-security system;

(6) the methods and procedures for best carrying out the collective-bargaining processes, with special attention to the effects of industry-wide or regional bargaining upon the national economy;

(7) the administration and operation of existing Federal laws relating to labor relations; and

(8) such other problems and subjects in the field of labor-management relations as the committee deems appropriate.

SEC. 403. The committee shall report to the Senate and the House of Representatives not later than March 15, 1948, the results of its study and investigation, together with such recommendations as to necessary legislation and such other recommendations as it may deem advisable, and shall make its final report not later than January 2, 1949.

SEC. 404. The committee shall have the power, without regard to the civil-service laws and the Classification Act of 1923, as amended, to employ and fix the compensation of such officers, experts, and employees as it deems necessary for the performance of its duties, including consultants who shall receive compensation at a rate not to exceed $35 for each day actually spent by them in the work of the committee, together with their necessary travel and subsistence expenses. The committee is further authorized, with the consent of the head of the department or agency concerned, to utilize the services, information, facilities, and personnel of all agencies in the executive branch of the Government and may request the governments of the several States, representatives of business, industry, finance, and labor, and such other persons, agencies, organizations, and instrumentalities as it deems appropriate to attend its hearings and to give and present information, advice, and recommendations.

SEC. 405. The committee, or any subcommittee thereof, is authorized to hold such hearings; to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Eightieth Congress; to require by subpena or otherwise the attendance of such witnesses and the production of such books, papers, and documents; to administer oaths; to take such testimony; to have such printing and binding done; and to make such expenditures within the amount appropriated therefor; as it deems advisable. The cost of stenographic services in reporting such hearings shall not be in excess of 25 cents per one hundred words. Subpenas shall be issued under the signature of the chairman or vice chairman of the committee and shall be served by any person designated by them.

SEC. 406. The members of the committee shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of the duties vested in the committee, other than expenses in connection with meetings of the committee held in the District of Columbia during such times as the Congress is in session.

SEC. 407. There is hereby authorized to be appropriated the sum of $150,000, or so much thereof as may be necessary, to carry out the provisions of this title, to be disbursed by the Secretary of the Senate on vouchers signed by the chairman.

Title V

DEFINITIONS

SEC. 501. When used in this Act—

(1) The term "industry affecting commerce" means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

(3) The terms "commerce," "labor disputes," "employer," "employee," "labor organization," "representative," "person," and "supervisor" shall have the same meaning as when used in the National Labor Relations Act as amended by this Act.

SAVING PROVISION

SEC. 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

SEPARABILITY

SEC. 503. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Supreme Court: Agreements Are Binding Under MMB

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, IN BANK

GLENDALE CITY EMPLOYEES ASSOCIATION, INC., et al., Plaintiffs and Appellants,

v.

CITY OF GLENDALE et al., Defendants and Appellants.

L.A. 30357

(Super. Ct. No. 988 944)

Filed: October 3, 1975

With the enactment of the George Brown Act (Stats. 1961, ch. 1964) in 1961, California became one of the first states to recognize the right of government employees to organize collectively and to confer with management as to the terms and conditions of their employment. Proceeding beyond that act the Meyers-Milias-Brown Act (Stats. 1968, ch. 1390) authorized labor and management representatives not only to confer but to enter into written agreements for presentation to the governing body of a municipal government or other local agency.[1] The present case raises among other issues which we shall discuss the fundamental question unanswered by the literal text of these statutes: whether an agreement entered into under the Meyers-Milias-Brown Act, once approved by the governing board of the local entities, binds the public employer and the public employee organization. We conclude that the Legislature intended that such an understanding, *once ratified*, is indeed binding upon the parties.

1. *Statement of facts.*

Pursuant to the Meyers-Milias-Brown Act, negotiators for plaintiff Glendale City Employees' Association, Inc., the designated representative for the city employees, met with Charles Briley, the assistant city manager, to discuss employee salaries for the 1970-1971 fiscal year. The parties negotiated a memorandum of understanding, which they presented to the city council. On June 9, 1970, the council passed a motion approving the memorandum. The memorandum of understanding provides for a cost of living adjustment, sick leave, incentive pay, and a salary survey; the only matter that remains at issue is the survey provision.[2]

The survey provision reads as follows: "The parties hereto will conduct a joint salary survey and using as guide lines data secured from the following jurisdictions, Burbank, Pasadena, Santa Monica, Long Beach, Anaheim, Santa Ana, Los Angeles City and Los Angeles County. *The intent of the survey will*

be to place Glendale salaries in an above average position with reference to the jurisdictions compared with proper consideration given to internal alignments and traditional relationships. The data used will be that data available to us and intended for use in fiscal year 1970-71. Adjustments which it is agreed shall be made will have an effective date of October 1, 1970. It is intended that comparisons will be made on a classification basis and not title only, and that the classifications shall be determined by professional judgment of the highest qualified personnel people with whom we would confer in the jurisdictions with which we will compare." (Emphasis added.)

The city conducted the survey. Consistent with past practice, the city organized the data by preparing bar graphs comparing Glendale salaries with the surveyed jurisdiction. Although the graphs show the entire salary range for each job classification, the parties are primarily concerned with the salaries paid employees in the top (5th or E) step of each salary range since a majority of Glendale employees are at that level.

By viewing the bar graphs, the city manager could obtain a rough idea of how Glendale salaries at each step compared with salaries paid in surveyed jurisdictions. On this basis the city manager, in September of 1970, prepared a draft salary ordinance. Plaintiff association, using the survey date, computed the arithmetic average of salaries from the surveyed jurisdictions for the top step of each job classification, and discovered that in many instances the salary proposed in the draft ordinance was below this average. Over the objection of the association the city council, on October 1, 1970, enacted the ordinance (Salary Ordinance No. 3936) recommended by the city manager.

On behalf of the class of city employees, plaintiff association and certain of its members filed the instant suit against the City of Glendale and its councilmen. Upholding the binding nature of the memorandum of understanding, the trial court admitted parol testimony of the negotiators to aid in the interpretation of its provisions. On the basis of that testimony, the court concluded that the city must compute the arithmetic (mean) average of the salaries paid employees in the highest step of each comparable classification in the surveyed jurisdictions, and must pay Glendale employees in the fifth step of each classification a salary equal to the average from the surveyed jurisdiction, plus one cent. Salaries of workers in the lower steps would be determined by the existing ratio of such salaries to step E salaries, thus preserving "internal alignments" as required by the memorandum.[3]

The court concluded that Salary Ordinance No. 3936 did not meet these criteria, and that the failure of the city to pay salaries in excess of the arithmetic average of surveyed jurisdictions constituted an abuse of discretion and a breach both of the memorandum of understanding and of the city's duty under the Meyers-Milias-Brown Act. Finally, the court concluded that since plaintiffs had no adequate remedy at law, mandamus should issue to compel defendants to compute and pay compensation to city employees in accord with the formula set out in the court's findings and conclusions. The court directed that 25 percent of all retroactive salaries and wages recovered should be payable to plaintiffs' counsel as attorneys' fees.

Defendants appealed. They contend that the memorandum of understanding was not binding, that the trial court erred in its interpretation of the memorandum, and that in any event the memorandum cannot be enforced by writ of mandamus. Defendants also argue that the present suit is not a proper class action, and that relief is barred by plaintiff's failure to exhaust administrative remedies. Plaintiffs filed a cross-appeal which raises a single limited issue; plaintiffs maintain that whenever an employee's salary must be increased to bring it into line with the survey, it should be increased not only to a figure one cent above average, but to a figure lying on a higher salary range.

2. *The memorandum of understanding, once approved by the city council, is binding upon the parties.*

The Meyers-Milias-Brown Act, as set forth in Government Code section 3505.1, provides that after negotiations "If agreement is reached by the representatives of the public agency and a recognized employee organization . . . they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to the governing body or its statutory representative for determination."[4] As we shall explain once the governmental body votes to accept the memorandum, it becomes a binding agreement.

The historical progression in the legislative enactments began with the George Brown Act.[5] That act sought in general to promote "the improvement of personnel management and employer-employee relations . . . through the establishment of uniform and orderly methods of communication between employees and the public agencies by which they are employed." (Stats. 1961, ch. 1464, p. 4141.) It provided, in former section 3505, that "The governing body of a public agency [or its representatives] shall meet and confer with representatives of employee organizations upon request, and shall consider as fully as it deems reasonable such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action." (Stats. 1961, ch. 1964, p. 4142.)[6]

During the years following enactment of the George Brown Act public employee unions continued to grow in size[7] and to press their claims that public employees should enjoy the same bargaining rights as private employees so long as such rights did not conflict with the public service.[8] The George Brown Act, originally a pioneering piece of legislation, provided only that management representatives should listen to and discuss the demands of the unions. Apparently the failure of that act to resolve the continual controversy between the growing public employees' organizations and their employers led to further legislative inquiry. Moreover, subsequent enactments of other states, which granted public employees far more extensive bargaining rights,[9] further exposed the limitations of the George Brown Act.

Cognizant of this turn of events the Legislature in 1968 enacted the Meyers-Milias-Brown Act.[10] Expressly intending the new law to strengthen employer-employee communication, the Legislature provided for "a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment." (Gov. Code, § 3500.) The public agency must not only listen to presentations, but "meet and confer in good faith" (Gov. Code, § 3505), a phrase

statutorily defined to include a free exchange of information, opinions and proposals, with the *objective* of reaching "agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year." (*Ibid.*) Section 3505.1, quoted earlier, provides that if agreement is reached it should be reduced to writing and presented to the governing body of the agency for determination. This statutory structure necessarily implies that an agreement, *once approved by the agency, will be binding.* The very alternative prescribed by the statute – that the memorandum "shall not be binding" except upon presentation " to the governing body or its statutory representative *for determination*," – manifests that *favorable* "determination" engenders a binding agreement.

Why negotiate an agreement if either party can disregard its provisions? What point would there be in reducing it to writing, if the terms of the contract were of no legal consequence? Why submit the agreement to the governing body for determination, if its approval were without significance? What integrity would be left in government if government itself could attack the integrity of its own agreement? The procedure established by the act would be meaningless if the end-product, a labor-management agreement ratified by the governing body of the agency, were a document that was itself meaningless.

The Legislature designed the act, moreover, for the purpose of resolving labor disputes. (See Gov. Code, § 3500.) But a statute which encouraged the negotiation of agreements, yet permitted the parties to retract their concessions and repudiate their promises whenever they choose, would impede effective bargaining. Any concession by a party from a previously held position would be disastrous to that party if the mutual agreement thereby achieved could be repudiated by the opposing party. Successful bargaining rests upon the sanctity and legal viability of the given word.

In applying the Meyers-Milias-Brown Act, "the courts have uniformly held that a memorandum of understanding, once adopted by the governing body of a public agency, becomes a binding agreement." (Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 756.)[11] The leading decision, however, is one which although decided in 1970 arose under the earlier George Brown Act, East Bay Mun. Employees Union v. County of Alameda, supra, 3 Cal.App.3d 578. Settling a strike by county hospital employees, Alameda County agreed to reinstate the strikers without loss of any benefits previously earned by those employees. Upon reinstatement, however, the county classified the strikers as new employees, with resultant loss of seniority, vacation, sick leave, retirement and other benefits.

Reversing a trial court ruling which declined to enforce the agreement, the Court of Appeal through Justice Wakefield Taylor stated that the George Brown Act "required the public agency to meet and confer and listen. . . . [T]he modern view of statutory provisions similar to the Brown Act is that when a public employer engages in such meetings with the representatives of the public employee organization, any agreement that the public agency is authorized to make and, in fact, does enter into, should be held valid and binding as to all parties." (3 Cal.App.3d 578, 584.) If, under the more limited provisions of the George Brown Act, which does not specifically refer to an "agreement reached by the representatives of the public agency and a recognized employer organization," nevertheless the negotiation and agreement by such parties are "valid and binding," we conclude a fortiori that the memorandum of understanding reached under the broader Meyers-Milias-Brown Act is indubitabiy binding.

3. *The city has failed to comply with the terms of the memorandum of understanding.*

Defendants challenge the trial court's finding that the city did not comply with the terms of the agreement. We have pointed out that the trial judge found the agreement uncertain in meaning and admitted parol evidence to aid in its construction. Defendants do not contend that the evidence received was inadmissible under the parol evidence rule,[12] nor that the evidence so admitted does not support the findings and conclusions of the trial court. Instead, the defendants argue first, that the city singularly enjoys a unilateral right to insist upon any reasonable interpretation of the agreement that it chooses, and second, that the agreement can properly be interpreted to require only the taking of a salary survey, leaving the fixing of salary ranges to later administrative determination.

The city's claim to a unilateral right to interpret the memorandum rests upon numerous cases holding that a city wage ordinance will not be held to conflict with charter provisions requiring payment of prevailing wages unless the city's action is "so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law." (Sanders v. City of Los Angeles (1970) 3 Cal.3d 252, 261; Walker v. County of Los Angeles (1961) 55 Cal.2d 626, 639; City & County of San Francisco v. Boyd (1943) 22 Cal. 2d 685, 690.)[13] The city seeks to apply this doctrine to the present case; it argues that in enacting Salary Ordinance No. 3936 it attempted to comply with its duty under the memorandum, and that this ordinance cannot be set aside unless it is fraudulent or palpably unreasonable.

This argument, however, misses the point; the issue here is not the validity of Ordinance No. 3936, but the sufficiency of that ordinance to fulfill the city's duty under the memorandum. Although the cited cases recognize the broad discretion of a city in interpreting its respective charter's prevailing wage provisions, and although defendant city here would analogize the instant issue with such a prevailing wage case, defendant's position founders on the rock of the *bilateral* nature of the instant memorandum of understanding. We do not probe the city's interpretation and application of a prevailing wage ordinance or even an alleged abuse of discretion by the city in so applying it; we deal here with a mutually agreed covenant, a labor management contract. We know of no case that holds that one party can impose his own interpretation upon a two-party labor-management contract.

In pre-Wagner Act days some courts considered collective bargaining agreements to be merely statements of intention or unilateral memoranda. (See Chamberlain, *Collective Bargaining and the Concept of Contract* (1948) 48 Colum.L.Rev. 829, 832; Annot. (1935) 95 A.L.R. 10, 34-37.) But all modern California decisions treat labor-management agreements whether in public employment[14] or private[15] as enforceable

contracts (see Lab. Code, § 1126) which should be interpreted to execute the mutual intent and purpose of the parties.[16]

This principle applies as much to agreements between government employees and their employers as to private collective bargaining agreements.[17] Agreements reached under the Meyers-Milias-Brown Act, like their private counterparts, are the product of negotiation and concession; they can serve as effective instruments for the promotion of good labor-management relations only if interpreted and performed in a manner consistent with the objectives and expectations of the parties.

The city raises many other objections to the trial court's interpretation of the agreement: it contends that the memorandum gave the council discretion to choose whether to implement the survey findings; that the memorandum is but an agreement to agree in the future concerning new salary ranges; that the term "average salaries" in the memorandum does not mean an arithmetic average but refers to the city's practice of using bar graphs to visualize an average salary level; that the phrase "proper consideration [for] internal alignments and traditional relationships" in the memorandum authorizes the city to use such alignments and relationships to justify payment of below average salaries.

All the above contentions violate the established rule that if the construction of a document turns on the resolution of conflicting extrinsic evidence, the trial court's interpretation will be followed if supported by substantial evidence. (See 6 Witkin, Cal. Procedure (2d ed. 1971) pp. 4248-4249 and cases there cited.) In light of this rule, defendants, in order to overturn the trial court's interpretation, must demonstrate either that the extrinsic evidence on which the court relied conflicts with any interpretation to which the instrument is reasonably susceptible (Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co., *supra*, 69 Cal.2d 33, 40) or that such evidence does not provide substantial support for the court's interpretation. But defendants present neither contention. Their arguments, based upon an interpretation of the memorandum on its face without reference to the extrinsic evidence or the trial court's findings, pose no issue cognizable within the scope of our appellate review.

4. *Plaintiff union may maintain this action on behalf of the Glendale city employees; allegations that this suit is a class action are superfluous and do not affect the validity of the judgment.*

Plaintiffs' complaint alleges, and the court found, that plaintiffs filed suit on behalf of the class of city employees. Defendants argue that plaintiffs failed to provide adequate notice to the members of the class;[18] plaintiffs respond that defendants first raised this issue on appeal. Plaintiffs' class allegations, however, are superfluous; plaintiff association, as the recognized representative of city employees, may sue in its own name to enforce the memorandum of understanding. (See Professional Fire Fighters, Inc. v. City of Los Angeles (1963) 60 Cal.2d 276, 283-284.) Since the class action format adds nothing to the rights or liabilities of the parties,[19] the issue of notice to the members of the class is immaterial.

The instant case in this respect closely resembles Daniels v. Sanitarium Assn., Inc. (1963) 59 Cal.2d 602, in which we first confirmed the right of a union to sue as a legal entity. In *Daniels*, the union vice-president sued as a "representative" of the union; we held that the suit should have been filed by the union directly. We stated, however, that "we do not believe the form in which the action is brought should be crucial. Here Daniels sued 'in a representative capacity for and on behalf of' the union. . . . But the union, as we have pointed out, may sue as an entity for the wrong done to itself; such an action is not a class action but a direct one by the union. Hence the better and simplest form of procedure would be the suit in the name of the union as such. Since the matter is procedural only, however, we have considered, and sustained, the instant complaint as one brought by the union as an entity." (59 Cal.2d at pp. 608-609.)

In accord with *Daniels*, we conclude that the unnecessary allegations and findings that the suit is a class action do not detract from the merits of plaintiff association's suit as the recognized representative of the city employees. "Superfluidity does not vitiate." (Civ. Code, § 3537.)

5. *Plaintiffs' action is not barred for failure to exhaust administrative remedies.*

Defendants contend that this suit is barred by plaintiffs' failure to exhaust administrative remedies. Defendants refer to the grievance procedure established by Ordinance No. 3830, enacted in 1968. Section 9 of this ordinance provides that an aggrieved employee, whose dispute relates to "the interpretation or application of this Ordinance, an ordinance resulting from a memorandum of understanding, or of rules or regulations governing personnel practices or working conditions" should first consult informally with his supervisor. If that consultation does not resolve the dispute, the employee may file a grievance form with the supervisor, who must enter his decision and reasons and return the form to the employee. If dissatisfied with the supervisor's response, the employee may forward the form to the division head; if dissatisfied with the division head's response, he may forward the form to the city manager, whose decision is final. Plaintiffs did not follow this procedure before instituting the present action.

The requirement of exhaustion of administrative remedies does not apply if the remedy is inadequate. (Ogo Associates v. City of Torrance (1974) 37 Cal.App.3d 830,834; Diaz v. Quitoriano (1969) 268 Cal. App.2d 807, 812; Comment, *Exhaustion of Administrative Remedies in California* (1968) 56 Cal.L.Rev. 1061, 1079-1080.) The city's grievance procedure is inadequate to the resolution of the present controversy in two respects.

First, the pertinent portion of Ordinance No. 3830 provides only for settlement of disputes relating to the "interpretation or application of . . . *an ordinance resulting* from a memorandum of understanding." (Emphasis added.) The crucial threshold issue in the present controversy – whether the ratified memorandum of understanding *itself* is binding upon the parties – does not involve an "ordinance" and hence does not fall within the scope of grievance resolution.

Second, the city's procedure is tailored for the settlement of minor *individual* grievances. A procedure which provides merely for the submission of a grievance form, without the

taking of testimony, the submission of legal briefs, or resolution by an impartial finder of fact is manifestly inadequate to handle disputes of the crucial and complex nature of the instant case, which turns on the effect of the underlying memorandum of understanding itself. (Cf. Martino v. Concord Community Hosp. Dist. (1965) 233 Cal.App.2d 51, 57.)

6. *Mandamus lies to enforce the memorandum of understanding.*

The usual remedy for failure of an employer to pay wages owing to an employee is an action for breach of contract; if that remedy is adequate, mandate will not lie. (See Elevator Operators etc. Union v. Newman (1947) 30 Cal.2d 799,808 and cases there cited.) But often the payment of the wages of a *public* employee requires certain preliminary steps by public officials; in such instances, the action in contract is inadequate and mandate is the appropriate remedy. (See Tevis v. City & County of San Francisco (1954) 43 Cal.2d 190 (mandate to compel officials to approve payroll); Ross v. Board of Education (1912) 18 Cal. App.222 (mandate to compel officials to approve payment); cf. Flora Crane Service, Inc. v. Ross (1964) 61 Cal.2d 199 (mandate to compel controller to certify that funds have been appropriated).) The superior court in the present case concluded that since "enforcement of the rights of [plaintiffs] requires obtaining the official cooperation necessary to implement the application of the formula agreed upon in the Memorandum of Understanding. . . . [Plaintiffs] do not have a speedy or adequate remedy at law to prevent the deprivation of their rights other than by mandamus."[20]

Although defendants do not challenge the court's conclusion that plaintiffs have no other adequate remedy, they nonetheless urge that the remedy of mandamus is not available. Defendants contend that the adoption of a salary ordinance constitutes a legislative act within the discretion of the city council, and that mandamus will not issue to compel action lying within the scope of agency or official discretion, or to compel performance of a legislative act.[21]

Defendants' contention rests upon the mistaken impression that the trial court mandated the enactment of a new salary ordinance. The trial court's judgment, however, proceeded upon the theory that the council's approval of the memorandum of understanding in itself constituted the legislative act that fixed employee salaries in accord with that understanding. The writ, therefore, did not command the enactment of a new salary ordinance, but directed the non-legislative and ministerial acts of computing and paying the salaries as fixed by the memorandum and judgment.[22] The use of mandamus in the present case thus falls within the established principle that mandamus may issue to compel the performance of a ministerial duty[23] or to correct an abuse of discretion.[24]

"The critical question in determining if an act required by law is ministerial in character is whether it involves the exercise of judgment and discretion." (Jenkins v. Knight (1956) 46 Cal.2d 220, 223-224.) In the present case, the city entered into an understanding which, we have held, became a valid and binding agreement upon approval by resolution of the council. That agreement, as interpreted by the trial court, is definitive, and admits of no discretion.

The findings and judgment establish precise mathematical standards which, applied to the survey data, yield the exact sums due. The trial court, in fact, awarded plaintiffs prejudgment interest on the ground that the action was one "to enforce an underlying monetary obligation *the amount of which was certain or could have been made certain by calculation.*" (Emphasis added.) Unquestionably the *negotiation* and *approval* of the understanding involved the exercise of discretion by city officials. (San Joaquin County Employees' Assn., Inc. v. County of San Joaquin, *supra*, 39 Cal.App.3d 83, 87-88.) But in approving the understanding, the city exhausted that discretion; the duty of its officials to carry out its obligations is of ministerial character.

7. *The cause must be remanded for joinder of the city officers charged with the duty of computing and paying wages and salaries of city employees.*

As we have noted, the trial court mandated performance of the ministerial acts of computing and paying the salaries as fixed by the judgment. The court's writ, however, was directed only to the city and its councilmen; plaintiffs failed to join as additional defendants the city officials entrusted with the administrative duties of computing and paying salaries. The trial court judgment and mandate thus suffer from a procedural defect similar to that discussed by the Court of Appeal in Martin v. County of Contra Costa (1970) 8 Cal.App.3d 856.

In *Martin*, plaintiffs sued the county and its board of supervisors to mandate payment of uniform allowances. The trial court rendered judgment only against those named defendants, and not against the county officers responsible for payment of the allowances. In remanding the cause for further proceedings, the Court of Appeal stated that "The only defect in proceedings and judgment is the failure to join the proper ministerial officers of the county government. Plaintiffs should be permitted to join the proper parties. . . . Since the county is the real party in interest and has been represented throughout, those ministerial officers should not be permitted to assert any laches or limitations upon being joined, but should be bound by the findings made against the county and its board of supervisors which have been approved in this opinion." (8 Cal.App.3d at p. 866.)

Following the reasoning of the Court of Appeal, we hold that the present judgment in favor of plaintiffs must be reversed and remanded to permit joinder of the appropriate city officials. These ministerial officers should not be permitted to assert any defense of laches or limitations, and will be bound by the findings of the trial court made against the city.

8. *Plaintiffs' cross-appeal is not meritorious.*

The City of Glendale has traditionally determined employee salaries by establishing a five-step salary range for each job classification. The trial court directed that whenever Glendale's salary for the fifth step of a salary range was less than the average salary from the surveyed jurisdictions, the city must raise the fifth step salary to an amount equal to that average plus one cent; it further directed that salaries for steps one through four be raised proportionately to the fifth step salary.

Plaintiffs argue on their cross-appeal that the trial court, instead of directing payment of fifth step salaries equal to the survey average plus one cent, should have ordered the city to provide salary increases to the closest fifth step of a higher range above the average. We believe, however, that the court did exactly that which plaintiffs now request; in fixing step five salaries at the average plus one cent, and increasing step one through four salaries proportionately, the court in effect established a new salary range at a level sufficient to assure plaintiffs a salary above the average from the surveyed jurisdiction. Although plaintiffs would prefer a raise to a salary range which exceeded that average by more than the one cent differential established by the trial court, they point to nothing in the memorandum of understanding or the evidence which bars the creation of new salary ranges so long as they yield an above-average wage.

9. *Conclusion*

For the foregoing reasons, the judgment is reversed, and the cause remanded for further proceedings in accord with the views expressed in this opinion. Each side shall bear its own costs on appeal.

TOBRINER, J.

WE CONCUR:

WRIGHT, C.J.
McCOMB, J.
SULLIVAN, J.
CLARK, J.
RICHARDSON, J.

[Concurring and Dissenting opinion of Justice Mosk omitted.]

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[1] The Meyers-Milias-Brown Act (Gov. Code, §§ 3500-3510) applies to employees of municipalities and most other local governmental agencies. Employees of school districts, however, fall under the Winton Act (Ed. Code, §§ 13080-13090) and employees of some transit districts come within the scope of special legislation governing those districts (see, e.g., Pub. Util. Code, §§ 25051-25057). The George Brown Act, now renumbered as Government Code sections 3525-3536, still governs relations between the state and its employees.

[2] [Omitted.]

[3] The trial court also found: (a) that salary data from Los Angeles City and Los Angeles County should be included in computing the average salary, not merely utilized as "reference points" as the city claimed; (b) that the term "traditional relationships" referred to the historical relationship between salaries paid certain Glendale employees and the salaries paid employees of other jurisdictions holding comparable positions; (c) that the term "internal alignments" referred to salary relationships between Glendale employees at different salary steps and classes; (d) that the proviso requiring "proper consideration" for traditional relationships and internal alignments did not authorize the city to rely on such factors to justify payment of below-average salaries.

[4] Section 3500 of the Meyers-Milias-Brown Act does not clearly prescribe whether a local agency may adopt methods of administering employer-employee relations which differ from those prescribed by the act. (See discussion in Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 723-725; Grodin, *California Public Employee Bargaining Revisited: The MMB Act in the Appellate Courts* (1974) California Public Employee Relations No. 21, p. 2.) We need not reach that question here, for Glendale has adopted a format for labor-management relations essentially identical to that set out in the Meyers-Milias-Brown Act. The city's employee relation ordinance states that employee organizations shall present written proposals on salaries, fringe benefits, and other conditions of employment to the city manager. It then provides in language parallel to Government Code section 3505.1, that "If agreement is reached by the City Manager and the recognized employee representative, they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to The Council by May 1 of each year." (Ordinance No. 3830, § 11.)

[5] [Omitted.]

[6] [Omitted.]

[7] [Omitted.]

[8] [Omitted.]

[9] [Omitted.]

[10] [Omitted.]

[11] Professor Grodin's article, published in March 1972, cites only superior court decisions in support of his position; but subsequent to that publication two Court of Appeal decisions have also enforced agreements reached under the Meyers-Milias-Brown Act. (San Joaquin County Employees' Assn., Inc. v. County of San Joaquin (1974) 39 Cal.App.3d 83, 88-89; Wilson v. San Francisco Mun. Ry. (1973) 29 Cal.App. 3d 870.) These decisions, as well as the Court of Appeal opinion in the instant case, are analyzed in a second article by Professor Grodin, *California Public Employees Bargaining Revisited: The MMB Act in the Appellate Courts* (1974) California Public Employee Relations No. 21, page 2.

Professor Edwards of the University of Michigan Law School summarized the decisions of other states: "It is increasingly apparent in the developing case law that once a contract has been signed, the public employer must, in effect 'adopt' the contract and do everything reasonably within its power to see that it is carried out." (Edwards, *The Emerging Duty to Bargain in the Public Sector* (1973) 71 Mich.L.Rev. 885, 929.) The phrase "everything reasonably within its power" refers to the problems, discussed by Edwards, which may arise when a public agency agrees to a contract but must depend on appropriations from another agency to carry

out that contract. Since the Glendale City Council has authority to appropriate sums needed to pay the salary increase it agreed to pay, those problems do not arise in the present case.

[12]See Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co. (1968) 69 Cal.2d 33, 40; Tahoe National Bank v. Phillips (1971) 4 Cal.3d 11, 22-23; Jones, *Evidentiary Concepts in Labor Arbitration: Some Modern Variations on Ancient Legal Themes* (1969) 13 U.C.L.A.L. Rev. 1241, 1263-1269 fully discusses the effect of the parol evidence rule on the interpretation of collective bargaining agreements.

[13]See also Alameda County Employees Assn. v. City of Alameda (1973) 30 Cal.App.3d 518,532; Sanders v. City of Los Angeles (1967) 252 Cal.App.2d 488, 490; Anderson v. Board of Supervisors (1964) 229 Cal. App.2d 796, 798-800; San Bernardino Fire & Police Protective League v. City of San Bernardino (1962) 199 Cal.App.2d 401, 408.

[14]See East Bay Mun. Employees Union v. County of Alameda, *supra*, 3 Cal.App.3d 578, 584; San Joaquin County Employees' Assn., Inc. v. County of San Joaquin, *supra*, 39 Cal.App.3d 83, 88-89.

[15]See Posner v. Grunwald-Marx, Inc. (1961) 56 Cal.2d 169, 177; McCarroll v. L.A. County etc. Carpenters (1957) 49 Cal.2d 45, 66-67; Holayter v. Smith (1972) 29 Cal. App. 3d 326, 333-334; San Diego etc. Carpenters v. Wood, Wire, etc. Union (1969) 274 Cal.App. 2d 683, 689; Div. Labor L. Enf. v. Ryan Aero Co. (1951) 106 Cal.App.2d Supp. 833.

[16]Civil Code section 1636 declares that "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." This section was applied to the interpretation of private collective bargaining agreements in General Precision, Inc. v. International Association of Machinists (1966) 241 Cal.App.2d 744, 746-747 and McKay v. Coca-Cola Bottling Co. (1952) 110 Cal. App. 2d 672, 676.

In Posner v. Grunwald-Marx, Inc. (1961) 56 Cal.2d 169, 177, we observed that a collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate. . . . It calls into being a new common law – the common law of the particular industry." (56 Cal.2d 169, 177, quoting United Steelworkers v. Warrior & Gulf Navigation Co. (1960) 363 U.S. 574, 578-579.)

[17]Courts have frequently drawn upon precedents involving private labor-management relations to aid in determining the rights of public employees and employee organizations. (See, e.g., Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 617; Social Workers' Union, Local 535 v. Alameda County Welfare Dept. (1974) 11 Cal.3d 382, 341; San Joaquin County Employees' Assn., Inc. v. County of San Joaquin, *supra*, 39 Cal.App.3d 83, 86.

[18][Omitted.]

[19][Omitted.]

[20][Omitted.]

[21][Omitted.]

[22]Part 1 of the trial court judgment provides "That a peremptory writ of mandate issues directing the respondents . . . to proceed at once to provide salary and wage increases . . . in accordance with the following standard: . . ." The judgment then sets out in detail the formula by which the wage increase for each step of each job classification must be computed. Part 2 of the judgment then provides that "When the foregoing computations have been made, respondents are further directed to proceed at once to pay the differential sum due each said employee for the period October 1, 1970 through June 30, 1971, together with interest as provided by law. . . ."

[23]See People ex rel. Younger v. County of El Dorado (1971) 5 Cal.3d 480, 491; Jenkins v. Knight (1956) 46 Cal. 2d 220; California Civil Writs (Cont.Ed. Bar 1970) sections 5.25-5.26.

[24]"While mandamus will not lie to control the discretion exercised by a public officer or board . . . it will lie to correct an abuse of discretion by such officer or board." (Baldwin-Lima-Hamilton Corp. v. Superior Court (1962) 208 Cal.App.2d 803, 823; see Walker v. County of Los Angeles, *supra*, 55 Cal.2d 626, 639; Cal. Civil Writs (Cont.Ed.Bar 1970) §§ 5.33-5.35; 5 Witkin, Cal. Procedure (2d ed. 1971) pp. 3853-3854.) Contrary to the claim of the concurring and dissenting opinion [omitted] appellate courts in this state have on numerous occasions mandated legislative bodies to enact salary ordinances. (See, e.g., Sanders v. City of Los Angeles (1970) 3 Cal.3d 252, 262; Walker v. County of Los Angeles (1961) 55 Cal. 2d 626, 639; Sanders v. City of Los Angeles (1967) 252 Cal.App.2d 488; accord Griffin v. Board of Supervisors (1963) 60 Cal.2d 318 (mandate directing board of supervisors to reapportion county).)

[Civ. No. 36260. First Dist., Div. Four. Feb. 18, 1976.]

HENRY GRIER et al., Plaintiffs and Appellants, v. ALAMEDA-CONTRA COSTA TRANSIT DISTRICT, Defendant and Respondent.

SUMMARY

Several bus drivers employed by a public transit district, and their union, brought an action against the district for declaratory relief and damages, alleging that the district's enforcement of a provision of a collective bargaining agreement requiring drivers who arrived for work late to work without pay for periods in excess of the time actually lost through tardiness, violated Lab. Code, § 2928, providing that no deduction from the wages of an employee on account of his coming late shall be made in excess of the proportional wage that would have been earned during the time actually lost. The trial court entered a judgment for the transit district, holding that the statute was not applicable to the transit district. (Superior Court of Alameda County, No. 424097, Robert L. Bostick, Judge.)

The Court of Appeal reversed and remanded. The court held that it did not appear that the Legislature intended the transit district's labor relations to be governed only by the Public Utility Code provisions creating the district, and also held that the application of the Labor Code provision to the district would not result in an infringement upon its sovereign governmental powers. The court concluded that the effect of the provision requiring late drivers to work a certain period without pay was to withhold wages for work actually performed, and thus it violated Lab. Code, § 2928, and that the district and the union were without authority to include such a provision in the collective bargaining agreement. The court also held that the fact that the provision was omitted from a subsequent bargaining agreement, prior to the appeal, did not render the appeal moot, since plaintiffs had sought damages in addition to declaratory relief, which was a material issue requiring

determination. (Opinion by Caldecott, P. J., with Rattigan and Christian, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a, 1b) **Appellate Review § 120—Dismissal—Grounds—Mootness—What Constitutes.**—An appeal by bus drivers employed by a public transit district from an adverse judgment in an action against the district seeking declaratory relief and damages arising out of the enforcement of a provision of a collective bargaining agreement was not rendered moot by the fact that a new collective bargaining agreement was entered into prior to the appeal which did not contain the contested provision, where plaintiffs' claim for damages was based upon the alleged invalidity of the provision and remained to be determined if the trial court's decision was found to be erroneous.

(2) **Appellate Review § 119—Dismissal—Grounds—Mootness.**—Although as a general rule an appeal presenting only abstract or academic questions should be dismissed as moot, the appeal is not moot nor subject to dismissal if the question to be decided is of general public interest, or if there is a likelihood of recurrence of the controversy between the same parties or others, or if there remains material questions for the court's determination.

(3) **Public Transit § 2—Transit Districts—Labor Relations.**—In an action by bus drivers employed by a public transit district, in which the complaint alleged that a provision of the collective bargaining agreement between the union and the district violated Lab. Code, § 2928, prohibiting deductions from wages of employees late to work in excess of time actually lost, the trial court erroneously concluded that only the provisions of the Transit District Law (Pub. Util. Code, §§ 24501 et seq.), and the rules and regulations adopted by the board of directors of the district pursuant thereto, controlled the district's labor relations, where nothing in the express language of the Transit District Law indicated an intent for such exclusiveness, and where the statutory provisions governing collective bargaining by other transit districts, expressly provided that those districts should not be limited or restricted by provisions of other laws or

statutes, but no such express provision was contained in the transit district laws applicable to the defendant district.

(4) **Public Transit § 2—Transit Districts—Labor Relations.**—The general rule that in the absence of express words to the contrary, public entities are not included within the general words of a statute, did not preclude Lab. Code, § 2928, prohibiting excess deduction of wages from employees coming late to work, from being applied to a public transit district, where it did not appear that the application of the statute to the district would infringe its sovereign powers, inasmuch as the district had enacted a rule requiring drivers who arrived for work late to work without pay for periods in excess of the time actually lost through tardiness, pursuant to a collective bargaining agreement with the driver's union, which implicitly acknowledged the district's belief that the matter was beyond its sovereign powers as to discipline. Furthermore, a subsequent collective bargaining agreement omitted the wage deduction provisions, thus indicating that the previous rule was not necessary to the continued reliable functioning of the district. Governmental agencies are excluded from the operation of general statutory provisions only if their inclusion would result in an infringement upon sovereign governmental powers.

(5) **Labor § 11—Regulation of Working Conditions—Wages—Requirements as to Payments.**—Since full payment of accrued wages is an important state policy, enacted for protection of employees generally, it is not to be avoided by the terms of a private agreement. Accordingly, a public transit district and a union representing bus drivers employed by the district, were without authority to agree to any provision in violation of Lab. Code, § 2928, prohibiting the deduction from the wages of an employee coming late to work in excess of the proportionate wage that would have been earned during the time actually lost.

(6) **Labor § 11—Regulation of Working Conditions—Wages—Requirements as to Payments.**—A provision of a collective bargaining agreement between a union and a public transit district, which required drivers who arrived for work late to sit, without pay, in the dispatching area of the transit district until the driver was released for the day or was assigned to a run, which penalty was imposed without regard to the actual amount of time that the employee was tardy, violated Lab. Code, § 2928, prohibiting the deduction from

the wages of an employee on account of coming late to work in excess of the proportionate wage that would have been earned during the time actually lost, where other employees of the district were paid full compensation for performing the same duty of waiting for assignment at the dispatching area. Accordingly, the effect of the provision was to withhold wages for work actually performed and was therefore invalid.

[See **Cal.Jur.2d,** Labor, § 19 et seq.; **Am.Jur.2d,** Labor, § 1802.]

COUNSEL

Brundage, Neyhart, Beeson & Tayer, Joseph Freitas, Jr., and Peter N. Hagberg for Plaintiffs and Appellants.

Hardin, Cook, Loper, Engel & Bergez, Herman Cook, Steven M. Kohn, Robert E. Nisbet and Richard W. Meier for Defendant and Respondent.

OPINION

CALDECOTT, P. J.—Plaintiffs and appellants Henry Grier, Michael Chuba, Donald E. Figas, and Orlin Purdue, Sr., on behalf of themselves and all others similarly situated, and Division 192, Amalgamated Transit Union, the labor union representing the named plaintiffs and other bus drivers employed by respondent, brought this action for declaratory relief and damages. The complaint alleged that respondent Alameda-Contra Costa Transit District (hereinafter Transit District) was violating Labor Code section 2928 by requiring drivers who arrived for work late to work without pay for periods in excess of the time actually lost through tardiness. Following judgment for respondent this appeal was filed.

Respondent Transit District is a public entity created pursuant to the provisions of the Transit District Law, Public Utilities Code sections 24501-27509. The individual appellants are bus drivers, employees of respondent, and are members of appellant Division 192, Amalgamated Transit Union (hereinafter union). The union is the collective bargaining representative for the bus drivers employed by the Transit District.

The collective bargaining agreement signed by the union and the Transit District contained certain provisions relating to "oversleeps," the euphemistic term applied to tardiness for work for any reason. Section 50 of the agreement provided that drivers who were late for work without a satisfactory excuse would serve "penalty point" duty. This consisted of sitting in the dispatching area of the Transit District until the driver was released for the day or was assigned to a run. The penalties for oversleeps were imposed without regard to the actual amount of time that the employee was tardy; i.e., five minutes of tardiness could result, on a first oversleep, in two hours of penalty point, or, on a fifth oversleep, in 12 hours of penalty point. A driver not assigned to a run during the two hours of penalty point was released for that day, and was not paid at all for the two hours. A driver sitting penalty point who was actually assigned to a run during that time was paid for all time worked, with a minimum of four hours guaranteed pay.

Other drivers for the Transit District regularly perform the same duties, sitting in the dispatch office waiting for an assignment. This is called sitting "pay point." These drivers are paid either straight time or time and a half, depending on whether they work on their regular days, or days off.

Labor Code section 2928 provides: "No deduction from the wages of an employee on account of his coming late to work shall be made in excess of the proportionate wage which would have been earned during the time actually lost, but for a loss of time less than 30 minutes, a half hour's wage may be deducted."

Appellants argued that the penalty point provisions were in violation of the quoted Labor Code section, and sought damages for the hours worked without pay. Respondents contended, and the court below found, that Labor Code section 2928 does not apply to the Transit District.

I

(1a) Respondent contends that this appeal has been rendered moot by the parties' entry into a new collective bargaining agreement in August 1974, containing no oversleep provisions. It asserts that since the penalty point system is no longer in effect, the question of whether it was invalid under Labor Code section 2928 is moot.

(2) Although, as a general rule, an appeal presenting only abstract or academic questions should be dismissed as moot (*Paul* v. *Milk Depots, Inc.*, 62 Cal.2d 129, 132 [41 Cal.Rptr. 468, 396 P.2d 924]), the appeal is not moot nor subject to dismissal if the question to be decided is of general public interest (*County of Madera* v. *Gendron*, 59 Cal.2d 798, 804 [31 Cal.Rptr. 302, 382 P.2d 342, 6 A.L.R.3d 555]); or if there is a likelihood of recurrence of the controversy between the same parties or others; or if there remain material questions for the court's determination. (*Diamond* v. *Bland*, 3 Cal.3d 653, 657 [91 Cal.Rptr. 501, 477 P.2d 733]; *Eye Dog Foundation* v. *State Board of Guide Dogs for the Blind*, 67 Cal.2d 536, 541 [63 Cal.Rptr. 21, 432 P.2d 717].) This appeal should not be considered moot.

(1b) In addition to declaratory and injunctive relief relating to the oversleep provisions, the complaint sought damages for the individual named plaintiffs and the class they claimed to represent. The claim for damages was based upon the alleged invalidity of the penalty point system under state law, and the wages unpaid for periods of sitting penalty point when no assignment out was made.

This issue of damages is plainly a "material issue for the court's determination." If the decision of the court below is found to be erroneous, and the oversleep section is found to violate applicable state law, the case must be remanded for a determination of the number of hours each employee was required to work without pay. Thus, though the other questions may be moot as a result of the new collective bargaining agreement, the matter of damages is not. (Cf. *Sauer* v. *McCarthy*, 54 Cal.2d 295, 297 [5 Cal.Rptr. 682, 353 P.2d 290]; *Elevator Operators etc. Union* v. *Newman*, 30 Cal.2d 799, 803 [186 P.2d 1].)

Respondent urges that the case of *Consol. etc. Corp.* v. *United A. etc. Workers*, 27 Cal.2d 859 [167 P.2d 725], is controlling. The Supreme Court dismissed the appeal as moot, because a new contract had been entered into superseding the agreement in question and the union's claim of damages was based on breach of contract and there was no breach. *Consol. Corp.* is plainly distinguishable from the instant case. (See also *Keith Garrick, Inc.* v. *Local No. 2*, 213 Cal.App.2d 434, 435 [28 Cal.Rptr. 750] (appeal dismissed as moot because new collective bargaining agreement entered and *plaintiffs had waived damages*); *Paoli* v. *Cal. & Hawaiian Sugar etc. Corp.*, 140 Cal.App.2d 854 [296 P.2d 31] (appeal

dismissed as moot because new collective bargaining agreement entered and *plaintiffs had not appealed the trial court's finding of "no damages."*).)[1]

II

(3) The court below concluded that the Legislature intended that *only* the provisions of the Transit District Law (Pub. Util. Code, § 24501 et seq.) and the rules and regulations adopted by the board of directors of the Transit District pursuant thereto, should control the district's labor relations. Nothing in the express language of the Transit District Law indicates an intent for such exclusiveness.

The court below cited several portions of the Transit District Law in support of its conclusion. Section 24883 provides that the board of directors "is the legislative body of the district and determines all questions of policy." Section 24886 authorizes the board to adopt a personnel system. Section 24936, subdivision (d), empowers the general manager to administer the personnel system adopted by the board and "to appoint, discipline or remove all officers and employees subject to the rules and regulations adopted by the board and the labor provisions

[1]With regard to damages, respondent further asserts that this case is not a proper class action because no evidentiary hearing was held below to determine the propriety of proceeding as such. it should be noted, of course, that regardless of the class aspects of the case, the individual plaintiffs have asserted monetary claims, and these alone are sufficient to preclude a finding of mootness.

The complaint alleged that the individual employees sued on behalf of all bus drivers in the Transit District, who were too numerous to be joined and who would be adequately represented by the named plaintiffs. Further, it alleged that the union is the bargaining representative for the bus drivers, and sued in that capacity in their behalf.

The questions of law raised are common to the class; the only question of fact is individual damages, and "[t]he mere fact that ultimately each class member will be required to establish his individual amount of damages does not preclude the maintenance of a class action." (*Santa Barbara Optical Co., Inc.* v. *State Bd. of Equalization*, 47 Cal.App.3d 244, 250 [120 Cal.Rptr. 609].) Of course, ordinarily, a hearing is essential to determine whether and how to proceed in the class form under Code of Civil Procedure section 382. (*Bauman* v. *Islay Investments*, 45 Cal.App.3d 797, 800 [119 Cal.Rptr. 681]; *Home Sav. & Loan Assn.* v. *Superior Court*, 42 Cal.App.3d 1006 [117 Cal.Rptr. 485].) However, not only did the parties stipulate to propriety of the class during the hearing on the preliminary injunction, but obvious questions of acquiescence and waiver are also present.

More significantly (in view of the due process notice requirements, which of course could not be satisfied for *absent* class members by stipulation or waiver of the parties), the union was joined as a plaintiff. As bargaining agent for the bus drivers under the very collective agreement challenged, the union is a proper class action representative (*Professional Fire Fighters, Inc.* v. *City of Los Angeles*, 60 Cal.2d 276, 283-284 [32 Cal.Rptr. 830, 384 P.2d 158]; *California Sch. Employees Assn.* v. *Willits Unified Sch. Dist.*, 243 Cal.App.2d 776, 780 [52 Cal.Rptr. 765]; see also Class Action Manual (prepared by Los Angeles Superior Court) § 404, p. 7), and as agent for its members received appropriate notice herein.

of this law, whichever are applicable." Section 25051 authorizes the board to negotiate with an appropriate collective bargaining unit to reach agreement on "the terms of a written contract governing wages, salaries, hours, working conditions, and grievance procedures."

The trial court reached its conclusion by applying the rule of construction that specific statutes control general statutes, and that specific provisions relating to a particular subject will govern general provisions which might otherwise, standing alone, be broad enough to include the subject to which the more particular provision relates. (Code Civ. Proc., § 1859; *McGriff* v. *County of Los Angeles,* 33 Cal.App.3d 394, 399 [109 Cal.Rptr. 186]; *Bozaich* v. *State of California,* 32 Cal.App.3d 688, 697 [108 Cal.Rptr. 392].) In the instant case, however, this principle is of little assistance: it might be argued with equal force that the *specific* provision is that restricting wage deductions for tardiness (Lab. Code, § 2928), and the general provisions are those broadly governing the Transit District without reference to such details as oversleep regulations.

The most salient point in support of a conclusion opposite to that of the trial court is that the statutory provisions governing the Southern California Rapid Transit District, the Orange County Transit District, and the San Diego Transit District, contain the precise language that respondents urge us to find by implication here. These Public Utility Code provisions (§§ 30750, subd. (c), 40126 and 90300, subd. (f)), all state, in relation to collective bargaining provisions that: "The obligation of the district to bargain in good faith with a duly designated or certified labor organization and to execute a written collective bargaining agreement with such labor organization covering the wages, hours, and working conditions of the employees represented by such labor organization in an appropriate unit, and to comply with the terms thereof *shall not be limited or restricted by the provisions of the Government Code or other laws or statutes. . . .*" Insofar as the various transit district laws are substantially similar, the absence of such a provision in the Alameda-Contra Costa County law (and in the San Francisco Bay Area, Stockton, and Marin laws) evidences a different intent on the part of the Legislature, even though the laws were enacted at different times. (*City of Port Hueneme* v. *City of Oxnard,* 52 Cal.2d 385, 395 [341 P.2d 318].) The Legislature plainly thought it necessary to include the express language negating other statutory restrictions in the later-enacted provisions of the San Diego, Orange County, and Southern California laws. The absence of such express terms in the other, earlier transit district laws indicates that a different meaning was intended.

Thus, it does not appear that the Legislature intended Alameda-Contra Costa County Transit District labor relations to be governed *only* by the Public Utility Code provisions relating thereto. Rather, the rules and regulations adopted by the board of directors (and administered by the general manager under § 24936 subd. (d)), including those adopted by a resolution approving a collective bargaining agreement, must themselves be promulgated *subject to* the limitations and restrictions of other applicable laws.

III

The specific question of the applicability of Labor Code section 2928 must therefore be discussed. Two matters are presented for decision: whether the section applies to the Transit District; and, if so, whether it invalidates section 50 of the collective bargaining agreement.

(4) The first problem invokes the general rule that in the absence of express words to the contrary, public entities are not included within the general words of a statute. (*People* v. *Centr-O-Mart*, 34 Cal.2d 702, 703 [214 P.2d 378]; *Estate of Miller*, 5 Cal.2d 588, 591 [55 P.2d 491].) However, this broad statement has received narrower application, so that governmental agencies are excluded "from the operation of general statutory provisions *only if their inclusion would result in an infringement upon sovereign governmental powers.* 'Where . . . no impairment of sovereign powers would result, the reason underlying this rule of construction ceases to exist and the Legislature may properly be held to have intended that the statute apply to governmental bodies even though it used general statutory language only.' " (*City of Los Angeles* v. *City of San Fernando*, 14 Cal.3d 199, 276-277 [123 Cal.Rptr. 1, 537 P.2d 1250]; italics added; quoting *Hoyt* v. *Board of Civil Service Commrs.*, 21 Cal.2d 399, 402 [132 P.2d 804].)

The court below, citing *Nutter* v. *City of Santa Monica*, 74 Cal.App.2d 292 [168 P.2d 741], concluded that application of Labor Code section 2928 to invalidate section 50 of the agreement would impinge upon the sovereign powers of the Transit District and thus violate the above prescription. "Serious interference with the Board's management of personnel problems in the District would result, and the ability of the District to perform its function of providing reliable on-schedule transportation to the public would be damaged."

Labor Code section 2928 is part of what has been termed the "established policy of our Legislature of protecting and promoting the right of a wage earner to all wages lawfully accrued to him." (*City of Ukiah* v. *Fones*, 64 Cal.2d 104, 108 [48 Cal.Rptr. 865, 410 P.2d 369].) Although public entities are exempted by statute from some code provisions relating to wages (e.g., Lab. Code, §§ 213, subd. (b), 220), Labor Code section 2924 (grounds for employer termination of employment before end of term), a part of the same division and chapter, has been applied to a public entity. (*Holtzendorff* v. *Housing Authority*, 250 Cal.App.2d 596, 609-610 [58 Cal.Rptr. 886].)

Two factors belie the assertion of infringement of sovereign powers in the present case. The very fact that wages, hours, and working conditions are to be set by the collective bargaining process distinguishes this case from *Nutter, supra*, relied upon by the trial court. In *Nutter*, the court characterized the relevant Labor Code sections as relating "to the field of industry in which employer-employee relationships are fixed by contract" (74 Cal.App.2d 292, 297), and held the general labor statutes inapplicable to a governmental entity based upon this distinction.

In the present case, the Transit District clearly retains the right to establish rules and regulations governing employee discipline (as do private employers generally). However, insofar as it is required to negotiate in good faith with the union on wages, salaries, hours, working conditions and grievance procedures (Pub. Util. Code, § 25051), it does *not* have any power to unilaterally adopt rules or regulations affecting such matters, as they are properly subjects of collective bargaining. Labor Code section 2928 relates to deductions from wages. The Transit District implicitly acknowledged its belief that this matter was beyond its sovereign powers as to discipline when it submitted the subject to the bargaining process. In this it was correct, and the application of the statute to the Transit District therefore, could not infringe upon any sovereign power.

Labor Code section 2928 permits deduction from wages for time actually missed due to oversleep. Moreover, the new collective agreement, providing for suspension of drivers who oversleep, indicates that the oversleep rules of section 50 were not necessary to the continued reliable functioning of the Transit District. Respondent does not offer any argument that the new regulation (consistent with Lab. Code § 2928) has impaired its performance, or that the new format has "injuriously affect[ed] the capacity to perform state functions." (Nutter, *supra*, 74 Cal.App.2d at p. 300.)

However, it does not follow that, because the subject of penalty point provisions was not within the sovereign powers of the Transit District, it was necessarily within the scope of permissible agreement between the parties. (5) As noted earlier, full payment of accrued wages is an important state policy, enacted for protection of employees generally As such, it is not to be avoided by the terms of a private agreement. (Civ. Code, § 3513; *Benane* v. *Internat. Harvester Co.*, 142 Cal.App.2d Supp. 874, 878-879 [299 P.2d 750].) The parties were therefore without authority to agree to any provision in violation of the statute.[2]

IV

(6) The final question presented, then, is whether section 50 of the collective bargaining agreement was contrary to Labor Code section 2928. The court below held that "Plainly, if Labor Code § 2928 applies to § 50, the latter must be declared void." With this we must agree.

Respondent argues, as it did below, that Labor Code section 2928 applies only to "deductions from wages," and, giving those words their ordinary meanings, section 50 of the agreement does not fall within the prohibition because (1) sitting penalty point is not working; (2) therefore, no wages were earned; and (3) there is thus no deduction from wages. Respondent urges that the oversleep provisions are "properly characterized as requiring a late employee to wait for further employment (as in a hiring hall). . . ."

This argument is without merit. Employees of the Transit District who are not sitting penalty point are paid full compensation for performing the same duties, namely, waiting for assignment at the dispatching area in full uniform. Respondent thus recognizes that such duties constitute compensable work, and it is undisputed that the employees sitting penalty point do so at the requirement of the Transit District. In the absence of section 50 of the agreement, employees waiting for assignments at the Transit District's behest would be compensated for such work. The effect of section 50, therefore, is to withhold wages for work actually performed. Such a provision violates the plain prohibition of Labor Code section 2928, and constitutes a deduction from wages, as found by the trial court.

[2]*United Air Lines, Inc.* v. *Industrial Welfare Com.*, 211 Cal.App.2d 729 [28 Cal.Rptr. 238], is cited by respondent in support of its argument that the terms of the collective bargaining agreement, negotiated pursuant to Public Utilities Code section 25051, should control over conflicting state law. However, the case is not persuasive, as it involved federal preemption of state law, not at issue here.

Section 50 was therefore invalid, and the affected employees are entitled to the wages withheld by the Transit District for time spent sitting penalty point without pay. The precise amounts due to particular employees are to be determined by the trial court on remand.

The judgment is reversed and the cause remanded to the superior court to determine damages in accordance with this opinion.

Rattigan, J., and Christian, J., concurred.

[S.F. No. 23241. In Bank. Sept. 16, 1975.]

JOHN F. SKELLY, Plaintiff and Appellant, v.
STATE PERSONNEL BOARD et al., Defendants and Respondents.

SUMMARY

After receiving a written notice from the State Department of Health Care Services terminating his employment on the grounds of intemperance, inexcusable absences and other failures, a physician with the status of a permanent civil service employee was accorded a hearing before a representative of the State Personnel Board which adopted the representative's recommendation and dismissed the physician from employment. The trial court denied the physician's application for a writ of mandate to compel the Board to set aside the dismissal. (Superior Court of Sacramento County, No. 232477, Lloyd A. Phillips, Judge.)

The Supreme Court reversed and remanded for further proceedings. Preliminarily, it was noted that the state statutory scheme regulating civil service employment confers on a permanent civil service employee a property interest in continuation of his employment and that this interest is protected by due process. Concluding, from the record, that the basis of the dismissal had been the physician's conduct in extending his alloted lunch time by five to fifteen minutes and in twice leaving his office for several hours without permission, the court held that the dismissal constituted an abuse of discretion in view of the record's failure to show that these deviations adversely affected public service. Further, it was held that provisions of the Civil Service Act (Gov. Code, § 18500 et seq.), including, in particular, Gov. Code, § 19574, relating to punitive action against a permanent employee, violate federal and state constitutional due process provisions. Thus, the dismissal had been improper as excessive punishment, and as having been effectuated under procedures which denied the physician due process. (Opinion by Sullivan, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Civil Service § 7—Discharge, Demotion, Suspension, and Dismissal —Permanent Employee Status as Protected by Due Process.**—The California statutory scheme regulating civil service employment confers on an individual who achieves the status of "permanent employee" a property interest in the continuation of his employment which is protected by due process.

(2) **Constitutional Law § 102—Due Process—Right to Governmental Benefit as Protected by Due Process.**—A person's legally enforcible right to receive a government benefit in the event that certain facts exist constitutes a property interest protected by due process.

(3) **Civil Service § 7—Discharge, Demotion, Suspension, and Dismissal—Due Process.**—Due process does not require the state to provide a permanent civil service employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action, but does require, as minimum preremoval safeguards, a notice of the proposed action, the reasons therefor, a copy of the charges and materials on which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.

(4) **Civil Service § 7—Discharge, Demotion, Suspension, and Dismissal —Statutes—Constitutionality.**—Provisions of the State Civil Service Act (Gov. Code, § 18500 et seq.), including, in particular, Gov. Code, § 19574, concerning the taking of punitive action against a permanent civil service employee, violate the due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution, and of Cal. Const., art. I, §§7, 15.

(5) **Administrative Law § 114—Judicial Review—Limited Nature—Review of State Personnel Board's Findings.**—Inasmuch as the State Personnel Board is a statewide agency deriving its adjudicating powers from the state Constitution, the Board's factual determinations are not subject to re-examination in a trial de novo, but are to be upheld by a reviewing court if supported by substantial evidence.

[See Cal.Jur.3d, Administrative Law, § 287; Am.Jur.2d, Administrative Law, § 659.]

(6) **Civil Service § 11—Discharge, Demotion, Suspension, and Dismissal—Judicial Review—Sufficiency of Evidence.**—The State Personnel Board's findings that certain of a permanent civil service employee's absences on certain working days were due to his drinking of intoxicating liquors, rather than due to illness, were sustained by testimony of two apparently credible witnesses that they had seen him at a bar drinking on those days, and by his own testimony that at lunch on one of those days, he had consumed two martinis despite his assertions of illness.

(7) **Public Officers and Employees § 27—Duration and Termination of Tenure—Administrative Body's Discretion.**—Although an administrative body has broad discretion as to imposition of discipline it must exercise legal discretion which, in the circumstances, is judicial discretion. And in determining whether such discretion has been abused in the context of public employee discipline, the overriding consideration is the extent to which his conduct resulted in, or if repeated is likely to result in, harm to the public service. Other relevant factors include the circumstances surrounding the misconduct and the likelihood of recurrence.

(8) **Civil Service § 11—Discharge, Demotion, Suspension, and Dismissal—Judicial Review—Abuse of Discretion.**—In dismissing a physician with the status of a permanent civil service employee on the basis of his extension of his alloted lunch time by five to fifteen minutes, and in twice leaving his office for several hours without permission, the State Personnel Board abused its discretion, where the record failed to show that such deviations adversely affected the public service, but did disclose that he more than made up the lost time by working during nonworking periods, and that he was informative, cooperative, helpful, extremely thorough, and productive.

COUNSEL

Loren E. McMaster and Allen R. Link for Plaintiff and Appellant.

Evelle J. Younger, Attorney General, and Joel S. Primes, Deputy Attorney General, for Defendant and Respondent.

OPINION

SULLIVAN, J.—Plaintiff John F. Skelly, M.D. (hereafter petitioner) appeals from a judgment denying his petition for writ of mandate to compel defendants State Personnel Board (Board) and its members to set aside his allegedly wrongful dismissal from employment by the State Department of Health Care Services (Department).[1] In challenging his removal, petitioner asserts, among other things, that California's statutory scheme regulating the taking of punitive action against permanent civil service employees violates the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 7 and 15, of the California Constitution.

In July 1972 petitioner was employed by the Department as a medical consultant.[2] He held that position for about seven years and was a permanent civil service employee of the state. (See Gov. Code, § 18528.)[3] About that time the Department, through its personnel officer Wade Williams, gave petitioner written notice that he was terminated from his position as medical consultant, effective 5 p.m., July 11, 1972. The notice specified three causes for the dismissal: (1) Intemperance, (2) inexcusable absence without leave, and (3) other failure of good behavior during duty hours which caused discredit to the Department.[4] It further described petitioner's alleged acts and omissions which formed the basis of these charges, and notified him that to secure a hearing in the matter, he would be required to file a written answer with the Board within 20 days, and that in the event of his failure to do so, the punitive action

[1]Petitioner also named as defendants the Department and its director.

[2]Petitioner graduated from George Washington University Medical School, Washington, D.C. in 1934. He was licensed to practice medicine in California the same year and, after a three-year residency, entered private practice in 1937, specializing in ear, nose and throat problems. During 13 of his 28 years in private practice, he taught at the University of California Medical Center. Cataract surgery and resulting nerve degeneration in his eyes forced petitioner to cease private practice in 1965. He commenced employment as a medical consultant with the State Welfare Department, which became part of the State Department of Health Care Services in 1969.

[3]Government Code section 18528 provides: "'Permanent employee' means an employee who has permanent status. 'Permanent status' means the status of an employee who is lawfully retained in his position after the completion of the probationary period provided in this part and by board rule." The "probationary period" is the initial period of employment and generally lasts for six months unless the Board establishes a longer period not exceeding one year. (Gov. Code, § 19170.)

Hereafter, unless otherwise indicated, all section references are to the Government Code.

[4]Each of these causes provides a basis for punitive action against a permanent civil service employee under section 19572, subdivisions (h), (j), and (t).

would be final. On July 12, 1972, petitioner filed an answer, and on September 15, 1972, a hearing was held before an authorized representative of the Board.

At the hearing, the Department introduced the testimony of Philip L. Philippe, Gerald R. Green and Bernard V. Moore, three successive district administrators of the Department's Sacramento office to which petitioner had been assigned. Their testimony was corroborated in part by written documents from the Department files, and disclosed the following facts: Philippe met with petitioner on November 17, 1970, to discuss the latter's unexcused absences, apparent drinking on the job and failure to comply with Department work hour requirements. This meeting was held at the insistence of several staff members who had complained to Philippe about petitioner's conduct. The doctor was admonished to comply with pertinent Department rules and regulations.

Nevertheless, despite further warnings given petitioner and efforts made to accommodate him by extending his lunch break from the usual 45 minutes to one hour, he persisted in his unexplained absences and failure to observe work hours and as a result on February 28, 1972, received a letter of reprimand and a one-day suspension.

This punitive action had little effect on petitioner who continued to take excessive lunch periods. On March 3, 1972, Gerald Green, then district administrator, and Doris Soderberg, regional administrator, met with petitioner and discussed his refusal to obey work rules, but apparently to no avail. He took lengthy lunch breaks on March 13, 14, 15 and 16. Green again met with petitioner on March 16 in an effort to resolve the problem. When asked why he had taken 35 extra minutes for lunch that day, petitioner claimed to be sick. Green responded that on the day in question he had observed the doctor drinking and talking at a restaurant and bar. Green then suggested that petitioner, for his own convenience, change from full-time to part-time status at an adjusted compensation. Petitioner declined to do so and Green admonished him that further violations of work rules would result in disciplinary action and even dismissal.

In the early afternoon of June 26, Bernard Moore, who succeeded Green as district administrator, attempted but without success to see petitioner in the latter's office. Moore found him at a local bar laughing and talking, with a drink in front of him, his hair somewhat disheveled, and his arm around a companion. Petitioner later left the bar but did not

return to his office that day. Nor did he notify Moore of his proposed absence as required by Department rules. Subsequently petitioner attempted to have Moore record his absence as "sick leave."

In his defense, petitioner testified that he had in fact been sick on the afternoon of June 26, and that after an unsuccessful attempt to telephone his wife, he had informed a co-worker that he was going home.[5] He then went to a local bar and, after requesting a friend to call his wife, remained at the bar until she picked him up. Petitioner's version of the events was corroborated by his wife, a cocktail waitress, and the friend who had placed the call. Petitioner admitted, however, that despite his illness, he had had two martinis at lunch.

Petitioner further testified that his longer lunch periods involved no more than 5 to 15 extra minutes. In justification of this, he stated that he had more than made up for the time missed by skipping his morning and afternoon coffee breaks, by working more than his allotted time over holidays and by occasionally taking work home with him. He denied having a drinking problem and stated that his alcoholic intake during working hours was limited to an occasional drink or two at lunch.

Three co-workers, including Dr. F. Audley Hale, the senior medical consultant and petitioner's immediate supervisor for 13 months, confirmed petitioner's testimony that he rarely took coffee breaks. They described him as efficient, productive and extremely helpful and cooperative, and stated that his work had never appeared to be affected by alcoholic consumption. Dr. Hale rated petitioner's work as good to superior[6] and assessed him as "our right hand man as far as information concerning ear, nose and throat problems not only for the District Office but for the Region as well." He stated that the Department definitely needed someone with the doctor's skills.

The Department introduced no evidence to show, and indeed did not claim, that the quality or quantity of petitioner's work was in any way inadequate; his failure to comply with the prescribed time schedule did not impede the effective performance of his own duties or those of his fellow workers. Although petitioner was handicapped by relatively serious sight and speech impediments, the Department did not rely upon these physical deficiencies as grounds for dismissal; nor did it appear that these difficulties affected his work performance.

[5] Moore apparently was not available at that particular time.

[6] The reports prepared during petitioner's probationary period similarly rated his work.

On September 19, 1972, the hearing officer submitted to the Board a proposed decision recommending that the punitive action against petitioner be sustained without modification. He made findings of fact in substance as follows: (1) That on February 28, 1972, petitioner suffered a one-day suspension for a four-hour unexcused absence on January 10, 1972, for excessive lunch periods on January 11 and 19, 1972, and for a lengthy afternoon break spent at a bar on February 25, 1972; (2) that despite efforts to accommodate petitioner by extending his lunch break to one hour, he continued to exceed the prescribed period by five to ten minutes for the four days following his suspension and again on March 13, 14 and 15, 1972; (3) that on March 16, 1972, petitioner took 1 hour and 35 minutes for lunch and claimed that this was due to illness when in fact he had been drinking; (4) that on the afternoon of June 26, 1972, the district administrator found petitioner at a bar during work hours, with his hair disheveled, his arm around another patron and a drink in front of him; and (5) that the petitioner's unexcused absence on June 26, 1972, was not due to illness.

The hearing officer found that these facts constituted grounds for punitive action under section 19572, subdivision (j) (inexcusable absence without leave). In considering whether dismissal was the appropriate discipline, the officer noted that "[a]ppellant is 64 years old, has had a long and honorable medical career and is now handicapped by serious sight and speech difficulties. Also, the Senior Medical Consultant has no complaints about appellant's work." On the other hand, he pointed out that the Department's problems with petitioner dated back to 1970, that he had been warned, formally as well as informally, that compliance with Department rules was required, and that he had nevertheless persisted in his pattern of misconduct. On this basis, the hearing officer concluded that there was no reason to anticipate improvement if petitioner were restored to his position and recommended that the Department's punitive action be affirmed. The Board approved and adopted the hearing officer's proposed decision in its entirety and denied a petition for rehearing.[1] These proceedings followed.

Petitioner urges both procedural and substantive grounds for annulling the Board's decision. As to the procedural ground, he contends that the provisions of the State Civil Service Act (Act) governing the taking of punitive action against permanent civil service employees, without

[1]The foregoing administrative actions conformed with the procedure prescribed by sections 19574-19588 for the dismissal of a permanent civil service employee.

requiring a prior hearing, violate due process of law as guaranteed by both the United States Constitution and the California Constitution. As to the substantive grounds, he attacks the Board's decision on two bases: First, he argues that the Board's findings are not supported by substantial evidence; second, he asserts that the Board abused its discretion in approving petitioner's dismissal which, he claims, is unduly harsh and disproportionate to his allegedly wrongful conduct.

I

Turning first to petitioner's claims of denial of due process, we initially describe the pertinent statutory disciplinary procedure here under attack.

The California system of civil service employment has its roots in the state Constitution. Article XXIV, section 1, subdivision (b), describes the overriding goal of this program of state employment: "In the civil service permanent appointment and promotion shall be made under a general system based on *merit* . . . ."[8] (Italics added.) (See also Assem. Interim Com. Rep., Civil Service and State Personnel (1957-1959) Civil Service and Personnel Management, 1 Appendix to Assem. J. (1959 Reg. Sess.) p. 21.) The use of merit as the guiding principle in the appointment and promotion of civil service employees serves a two-fold purpose. It at once " 'abolish[es] the so-called spoils system, and [at the same time] . . . increase[s] the efficiency of the service by assuring the employees of continuance in office regardless of what party may then be in power. Efficiency is secured by the knowledge on the part of the employee that promotion to higher positions when vacancies occur will be the reward of faithful and honest service' [citation] . . . ." (*Steen* v. *Board of Civil Service Commrs.* (1945) 26 Cal.2d 716, 722 [160 P.2d 816].) The State Personnel Board is the administrative body charged with the enforcement of the Civil Service Act, including the review of punitive action taken against employees.[9]

[8]Under the prescribed constitutional scheme, "[t]he civil service includes every officer and employee of the state except as otherwise provided in this Constitution." (Cal. Const., art. XXIV, § 1, subd. (a).) Article XXIV, section 4, lists those categories of officers and employees who are exempt from the civil service.

[9]The composition of the Board is described in article XXIV, section 2, subdivision (a), of the California Constitution as follows: "There is a Personnel Board of 5 members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for 10-year terms and until their successors are appointed and qualified. Appointment to fill a vacancy is for the unexpired portion of the term. A member may be removed by concurrent resolution adopted by each house, two-thirds of the membership of each house concurring."

The Board's duties are set forth in article XXIV, section 3, subdivision (a), as follows: "The Board shall enforce the civil service statutes and, by majority vote of all of its

To help insure that the goals of civil service are not thwarted by those in power, the statutory provisions implementing the constitutional mandate of article XXIV, section 1, invest employees with substantive and procedural protections against punitive actions by their superiors.[10] Under section 19500, "[t]he tenure of every permanent employee holding a position is *during good behavior.* Any such employee may be . . . permanently separated [from the state civil service] through resignation or *removal for cause* . . . or terminated for medical reasons . . . ." (Italics added.) The "causes" which may justify such removal, or a less severe form of punitive action,[11] are statutorily defined. (§ 19572.)

The procedure by which a permanent employee may be dismissed or otherwise disciplined is described in sections 19574 through 19588. Under section 19574,[12] the "appointing power"[13] or its authorized representative may effectively take punitive action against an employee by simply notifying him of the action taken.[14] (*California Sch. Employees Assn.* v. *Personnel Commission* (1970) 3 Cal.3d 139, 144, fn. 2 [89 Cal.Rptr. 620, 474 P.2d 436]; Personnel Transactions Man., March 1972.)

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members, shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions."

[10]In the instant case, we are concerned only with provisions of the Act insofar as they govern the disciplining of permanent employees (see fn. 3, *ante*) and we limit our discussion accordingly.

[11]Section 19570 provides: "As used in this article, 'punitive action' means dismissal, demotion, suspension, or other disciplinary action." The Board has defined "other disciplinary action" to include, among other things, official reprimand and reduction in salary. (Personnel Transactions Man., March 1972.)

Section 19571 is the provision establishing general authority to take punitive action: "In conformity with this article and board rule, punitive action may be taken against any employee, or person whose name appears on any employment list for any cause for discipline specified in this article."

[12]Section 19574 provides as follows: "The appointing power, or any person authorized by him, may take punitive action against an employee for one or more of the causes for discipline specified in this article by notifying the employee of the action, pending the service upon him of a written notice. Punitive action is valid only if a written notice is served on the employee and filed with the board not later than 15 calendar days after the effective date of the punitive action. The notice shall be served upon the employee either personally or by mail and shall include: (a) a statement of the nature of the punitive action; (b) the effective date of the action; (c) a statement of the causes therefor; (d) a statement in ordinary and concise language of the acts or omissions upon which the causes are based; and (e) a statement advising the employee of his right to answer the notice and the time within which that must be done if the answer is to constitute an appeal."

[13]Under section 18524, " '[a]ppointing power' means a person or group having authority to make appointments to positions in the State civil service."

[14]For the procedure regulating discipline where charges against the employee are filed by a third party with the consent of the Board or the appointing power, see section 19583.5.

No particular form of notice is required. (29 Ops.Cal.Atty.Gen. 115, 120 (1957); Personnel Transactions Man., March 1972.) However, within 15 days *after* the effective date of the action, the appointing power *must* serve upon the employee and file with the Board a written notice specifying: (1) the nature of the punishment, (2) its effective date, (3) the causes therefor, (4) the employee's acts or omissions upon which the charges are based, and (5) the employee's right to appeal. (§ 19574.)[15]

Except in cases involving minor disciplinary matters,[16] the employee has a right to an evidentiary hearing to challenge the action taken against him.[17] To obtain such a hearing, the employee must file with the Board a written answer to the notice of punitive action within 20 days after service thereof.[18] The answer is deemed to constitute a denial of all allegations contained in the notice which are not expressly admitted as well as a request for a hearing or investigation. (§ 19575; see fn. 18, *ante*.) Failure to file an answer within the specified time period results in the punitive action becoming final. (§ 19575.)

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[15]See footnote 12, *ante*.

In an opinion issued on March 26, 1953, the Attorney General described the "statement of causes" as follows: "Such statement of causes is not merely a statement of the statutory grounds for punitive action set forth in section 19572 but is a factual statement of the grounds of discipline which, although not necessarily pleaded with all the niceties of a complaint in a civil action or of an information or indictment in a criminal action, should be detailed enough to permit the employee to identify the transaction, to understand the nature of the alleged offense and to obtain and produce the facts in opposition [citations]." (See 21 Ops.Cal.Atty.Gen. 132, 137 (1953).)

[16]Such minor disciplinary matters generally include those cases in which the discipline imposed is suspension without pay for 10 days or less. Section 19576 describes the procedural rights of an employee subjected to this form of discipline.

[17]Section 19578 provides that "[w]henever an answer is filed to a punitive action other than a suspension without pay for 10 days or less, the board or its authorized representative shall within a reasonable time hold a hearing. The board shall notify the parties of the time and place of the hearing. Such hearing shall be conducted in accordance with the provisions of Section 11513 of the Government Code, except that the employee and other persons may be examined as provided in Section 19580, and the parties may submit all proper and competent evidence against or in support of the causes."

[18]Section 19575 describes the procedure to be followed by an employee in answering a notice of punitive action: "No later than 20 calendar days after service of the notice of punitive action, the employee may file with the board a written answer to the notice, which answer shall be deemed to be a denial of all of the allegations of the notice of punitive action not expressly admitted and a request for hearing or investigation as provided in this article. With the consent of the board or its authorized representative an amended answer may subsequently be filed. If the employee fails to answer within the time specified or after answer withdraws his appeal the punitive action taken by the appointing power shall be final. A copy of the employee's answer and of any amended answer shall promptly be given by the board to the appointing power."

In cases where the affected employee files an answer within the prescribed period, the Board, or its authorized representative, must hold a hearing within a reasonable time. (§ 19578; see fn. 17, *ante*.) As a general rule, the case is referred to the Board's hearing officer who conducts a hearing[19] and prepares a proposed decision which may be adopted, modified or rejected by the Board. (§ 19582.) The Board must render its decision within a reasonable time after the hearing. (§ 19583.)[20] If the Board determines that the cause or causes for which the employee was disciplined were insufficient or not sustained by the employee's acts or omissions, or that the employee was justified in engaging in the conduct which formed the basis of the charges against him, it may modify or revoke the punitive action and order the employee reinstated to his position as of the effective date of the action or some later specified date. (§ 19583; see fn. 20, *ante*.) The employee is entitled to the payment of salary for any period of time during which the punitive action was improperly in effect. (§ 19584.)[21]

In the case of an adverse decision by the Board, the employee may petition that body for a rehearing. (§ 19586.)[22] As an alternative or in addition to the rehearing procedure, the employee may seek review of

[19]At such hearing, the appointing power has the burden of proving by a preponderance of the evidence the acts or omissions of the employee upon which the charges are based and of establishing that these acts constitute cause for discipline under the relevant statutes. (§§ 19572, 19573.) The employee may try to avoid the consequences of his actions by showing that he was justified in engaging in the conduct upon which the charges are based. (See 21 Ops.Cal.Atty.Gen. 132, 139 (1953).)

[20]Under the terms of section 19583, "[t]he board shall render a decision within a reasonable time after the hearing or investigation. The punitive action taken by the appointing power shall stand unless modified or revoked by the board. If the board finds that the cause or causes for which the punitive action was imposed were insufficient or not sustained, or that the employee was justified in the course of conduct upon which the causes were based, it may modify or revoke the punitive action and it may order the employee returned to his position either as of the date of the punitive action or as of such later date as it may specify. The decision of the board shall be entered upon the minutes of the board and the official roster."

[21]Section 19584 provides: "Whenever the board revokes or modifies a punitive action and orders that the employee be returned to his position it shall direct the payment of salary to the employee for such period of time as the board finds the punitive action was improperly in effect.

"Salary shall not be authorized or paid for any portion of a period of punitive action that the employee was not ready, able, and willing to perform the duties of his position, whether such punitive action is valid or not or the causes on which it is based state facts sufficient to constitute cause for discipline.

"From any such salary due there shall be deducted compensation that the employee earned, or might reasonably have earned, during any period commencing more than six months after the initial date of the suspension."

[22]Section 19586 provides in pertinent part that "[w]ithin thirty days after receipt of a copy of the decision rendered by the board in a proceeding under this article, the

the Board's action by means of a petition for writ of administrative mandamus filed in the superior court. (§ 19588; *Boren* v. *State Personnel Board* (1951) 37 Cal.2d 634, 637 [234 P.2d 981].)[23]

As previously indicated, petitioner asserts that this statutory procedure for taking punitive action against a permanent civil service employee violates due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 7 and 15 of the California Constitution. His contention is that these provisions authorize a deprivation of property without a *prior* hearing or, for that matter, without any of the *prior* procedural safeguards required by due process before a person may be subjected to such a taking at the hands of the state. As it is clear that California's statutory scheme does provide for an evidentiary hearing after the discipline is imposed (§§ 19578, 19580, 19581), we view the petitioner's constitutional attack as directed against that section which permits the punitive action to take effect without according the employee any prior procedural rights. (§ 19574; see fn. 12, *ante*.)

Our analysis of petitioner's contention proceeds in the light of a recent decision of the United States Supreme Court dealing with a substantially identical issue. In *Arnett* v. *Kennedy* (1974) 416 U.S. 134 [40 L.Ed.2d 15, 94 S.Ct. 1633], the high court was faced with a due process challenge to the provisions of the federal civil service act, entitled the Lloyd-LaFollette Act, regulating the disciplining of nonprobationary government employees. (5 U.S.C. § 7501.) Under that statutory scheme, a nonprobationary employee may be "removed or suspended without pay only for such cause as will promote the efficiency of the service." (5 U.S.C. § 7501 (a).) The same statute granting this substantive right to continued employment absent cause sets forth the procedural rights of an employee prior to discharge or suspension.

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employee or the appointing power may apply for a rehearing by filing with the board a written petition therefor. Within thirty days after such filing, the board shall cause notice thereof to be served upon the other parties to the proceedings by mailing to each a copy of the petition for rehearing, in the same manner as prescribed for notice of hearing.

"Within sixty days after service of notice of filing of a petition for rehearing, the board shall either grant or deny the petition in whole or in part. Failure to act upon a petition for rehearing within this sixty-day period is a denial of the petition."

[23]Section 19588 provides: "The right to petition a court for writ of mandate, or to bring or maintain any action or proceeding based on or related to any civil service law of this State or the administration thereof shall not be affected by the failure to apply for rehearing by filing written petition therefor with the board."

The judicial review proceedings are governed by Code of Civil Procedure section 1094.5. (*Boren* v. *State Personnel Board, supra*, at p. 637.)

Pursuant to this statute and the regulations promulgated under it, the employee is entitled to 30 days advance written notice of the proposed action, including a detailed statement of the reasons therefor, the right to examine all materials relied upon to support the charges, the opportunity to respond either orally or in writing or both (with affidavits) before a representative of the employing agency with authority to make or recommend a final decision, and written notice of the agency's decision on or before the effective date of the action. (5 U.S.C. § 7501 (b); 5 C.F.R. § 752.202 (a), (b), (f).) The employee is not entitled to an evidentiary trial-type hearing until the appeal stage of the proceedings. (5 C.F.R. §§ 752.202 (b), 752.203, 771.205, 771.208, 771.210-771.212, 772.305 (c).) The timing of this hearing—*after*, rather than *before* the removal decision becomes effective—constituted the basis for the employee's due process attack upon the disciplinary procedure.

In a six to three decision, the court found the above procedure to be constitutional. However, the court's full decision is embodied in five opinions which reveal varying points of view among the different justices. As we proceed to consider petitioner's contention, we will attempt to identify the general principles which emerge from these opinions as well as from the other recent decisions of the court in the area of procedural due process and which are determinative of the matter before us.

(1) We begin our analysis in the instant case by observing that the California statutory scheme regulating civil service employment confers upon an individual who achieves the status of "permanent employee" a property interest in the continuation of his employment which is protected by due process. In *Board of Regents* v. *Roth* (1972) 408 U.S. 564 [33 L.Ed.2d 548, 92 S.Ct. 2701], the United States Supreme Court "made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. [Fn. omitted.]" (*Id.* at pp. 571-572 [33 L.Ed.2d at p. 557].) Rather, "[t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms." (*Id.* at p. 576 [33 L.Ed.2d at p. 560].)

Expanding upon its explanation, the *Roth* court noted: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitle-

ment to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

"Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (*Id.* at p. 577 [33 L.Ed.2d at p. 561].)

(2) Thus, when a person has a legally enforceable right to receive a government benefit provided certain facts exist, this right constitutes a property interest protected by due process. (*Goldberg* v. *Kelly* (1970) 397 U.S. 254, 261-262 [25 L.Ed.2d 287, 295-296, 90 S.Ct. 1011]; see *Geneva Towers Tenants Org.* v. *Federated Mortgage Inv.* (9th Cir. 1974) 504 F.2d 483, 495-496 (Hufstedler, J. dissenting).) Applying these principles, the high court has held that a teacher establishing "the existence of rules and understandings, promulgated and fostered by state officials, that . . . justify his legitimate claim of entitlement to continued employment absent 'sufficient cause'," has a property interest in such continued employment within the purview of the due process clause. (*Perry* v. *Sindermann* (1972) 408 U.S. 593, 602-603 [33 L.Ed.2d 570, 580, 92 S.Ct. 2694]; see also *Board of Regents* v. *Roth, supra,* 408 U.S. at pp. 576-578 [33 L.Ed.2d at pp. 560-562].) And, in *Arnett* v. *Kennedy, supra,* 416 U.S. 134, six members of the court, relying upon the principles set forth in *Roth,* concluded that due process protected the statutory right of a nonprobationary federal civil service employee to continue in his position absent cause justifying his dismissal. (*Id.* at p. 167 [40 L.Ed.2d at pp. 40-41] (concurring opn., Justice Powell); *id.* at p. 185 [40 L.Ed.2d at p. 51] (concurring and dissenting opn., Justice White); *id.* at p. 203 [40 L.Ed.2d at p. 61] (dissenting opn., Justice Douglas); *id.* at p. 211 [40 L.Ed.2d at p. 66] (dissenting opn., Justice Marshall).)

The California Act endows state employees who attain permanent status with a substantially identical property interest. Such employees may not be dismissed or subjected to other disciplinary measures unless facts exist constituting "cause" for such discipline as defined in sections 19572 and 19573. In the absence of sufficient cause, the permanent employee has a statutory right to continued employment free of these

punitive measures. (§ 19500.) This statutory right constitutes "a legitimate claim of entitlement" to a government benefit within the meaning of *Roth*. Therefore, the state must comply with procedural due process requirements before it may deprive its permanent employee of this property interest by punitive action.

We therefore proceed to determine whether California's statutes governing such punitive action provide the minimum procedural safeguards mandated by the state and federal Constitutions. In the course of our inquiry, we will discuss recent developments in the area of procedural due process which outline a modified approach for dealing with such questions.

Until last year, the line of United States Supreme Court discussions beginning with *Sniadach* v. *Family Finance Corp.* (1969) 395 U.S. 337 [23 L.Ed.2d 349, 89 S.Ct. 1820], and continuing with *Fuentes* v. *Shevin* (1972) 407 U.S. 67 [32 L.Ed.2d 556, 92 S.Ct. 1983], and the line of California decisions following *Sniadach* and *Fuentes* adhered to a rather rigid and mechanical interpretation of the due process clause. Under these decisions, every significant deprivation—permanent or merely temporary—of an interest which qualified as "property" was required under the mandate of due process to be *preceded* by notice and a hearing absent "extraordinary" or "truly unusual" circumstances. (*Fuentes* v. *Shevin*, *supra*, 407 U.S. 67, 82, 88, 90-91 [32 L.Ed.2d 556, 570-571, 574-576]; *Bell* v. *Burson* (1971) 402 U.S. 535, 542 [29 L.Ed.2d 90, 96, 91 S.Ct. 1586]; *Boddie* v. *Connecticut* (1971) 401 U.S. 371, 378-379 [28 L.Ed.2d 113, 119-120, 91 S.Ct. 780]; *Adams* v. *Department of Motor Vehicles* (1974) 11 Cal.3d 146, 155 [113 Cal.Rptr. 145, 520 P.2d 961]; *Brooks* v. *Small Claims Court* (1973) 8 Cal.3d 661, 667-668 [105 Cal.Rptr. 785, 504 P.2d 1249]; *Randone* v. *Appellate Department* (1971) 5 Cal.3d 536, 547 [96 Cal.Rptr. 709, 488 P.2d 13]; *Blair* v. *Pitchess* (1971) 5 Cal.3d 258, 277 [96 Cal.Rptr. 42, 486 P.2d 1242, 45 A.L.R.3d 1206]; *McCallop* v. *Carberry* (1970) 1 Cal.3d 903, 907 [83 Cal.Rptr. 666, 464 P.2d 122].) These authorities uniformly held that such hearing must meet certain minimum procedural requirements including the right to appear personally before an impartial official, to confront and cross-examine adverse witnesses, to present favorable evidence and to be represented by counsel. (*Brooks* v. *Small Claims Court*, *supra*, 8 Cal.3d at pp. 667-668; *Rios* v. *Cozens* (1972) 7 Cal.3d 792, 798-799 [103 Cal.Rptr. 299, 499 P.2d 979], vacated *sub nom. Dept. Motor Vehicles of California* v. *Rios* (1973) 410 U.S. 425 [35 L.Ed.2d 398, 93 S.Ct. 1019], new dec. *Rios* v. *Cozens* (1973) 9 Cal.3d 454 [107 Cal.Rptr. 784, 509 P.2d 696]; see also *Goldberg* v. *Kelly* (1970) 397 U.S. 254, 267-271 [25 L.Ed.2d 287, 298-301, 90 S.Ct. 1011].)

However, as we noted a short time ago in *Beaudreau* v. *Superior Court* (1975) 14 Cal.3d 448 [121 Cal.Rptr. 585, 535 P.2d 713], more recent decisions of the high court have regarded the above due process requirements as being somewhat less inflexible and as not necessitating an evidentiary trial-type hearing at the preliminary stage in every situation involving a taking of property. Although it would appear that a majority of the members of the high court adhere to the principle that some form of notice and hearing must precede a final deprivation of property (*North Georgia Finishing, Inc.* v. *Di-Chem, Inc.* (1975) 419 U.S. 601, 606 [42 L.Ed.2d 751, 757, — S.Ct. —]; *Goss* v. *Lopez* (1975) 419 U.S. 565, 579 [42 L.Ed.2d 725, 737-738, — S.Ct. —]; *Mitchell* v. *W. T. Grant Co.* (1974) 416 U.S. 600, 611-612 [40 L.Ed.2d 406, 415-416, 94 S.Ct. 1895]; *Arnett* v. *Kennedy, supra*, 416 U.S. 134, 164 [40 L.Ed.2d 15, 39] (concurring opn., Justice Powell), p. 178 [40 L.Ed.2d pp. 46-47] (concurring and dissenting opn., Justice White), p. 212 [40 L.Ed.2d pp. 66-67] (dissenting opn., Justice Marshall)), nevertheless the court has made clear that "the *timing* and *content* of the notice and *the nature of the hearing* will depend on an appropriate accommodation of the competing interests involved." (*Goss* v. *Lopez, supra*, 419 U.S. 565, 579 [42 L.Ed.2d 725, 737], italics added; see also *Mitchell* v. *W. T. Grant Co., supra*, 416 U.S. at pp. 607-610 [40 L.Ed.2d at pp. 413-415]; *Arnett* v. *Kennedy, supra*, 416 U.S. at pp. 167-171 [40 L.Ed.2d at pp. 40-43] (concurring opn., Justice Powell), p. 188 [40 L.Ed.2d pp. 52-53] (concurring and dissenting opn., Justice White).) In balancing such "competing interests involved" so as to determine whether a particular procedure permitting a taking of property without a *prior* hearing satisfies due process, the high court has taken into account a number of factors. Of significance among them are the following: whether predeprivation safeguards minimize the risk of error in the initial taking decision, whether the surrounding circumstances necessitate quick action, whether the postdeprivation hearing is sufficiently prompt, whether the interim loss incurred by the person affected is substantial, and whether such person will be entitled to adequate compensation in the event the deprivation of his property interest proves to have been wrongful. (*Mitchell* v. *W. T. Grant Co., supra*, 416 U.S. at pp. 607-610; *Arnett* v. *Kennedy, supra*, 416 U.S. at pp. 167-171 (concurring opn., Justice Powell), pp. 188-193 [40 L.Ed.2d pp. 52-56] (concurring and dissenting opn., Justice White); see *Beaudreau* v. *Superior Court, supra*, 14 Cal.3d 448, 463-464.)

These principles have been applied by the high court to measure the constitutional validity of state statutes granting creditors certain prejudgment summary remedies. In *Mitchell* v. *W. T. Grant Co., supra*, 416 U.S.

600, the court upheld against due process attack a Louisiana statute authorizing a state trial judge to order sequestration of a debtor's personal property upon the creditor's ex parte application, noting that both the creditor and the debtor had interests in the particular property seized,[24] that the creditor's interest might be seriously jeopardized by preseizure notice and hearing,[25] and that adequate alternative procedural safeguards, including an immediate postdeprivation hearing, were accorded the debtor.[26] On the other hand, the high court struck down a Georgia statute permitting garnishment of a debtor's property pending litigation on the alleged debt "without notice or opportunity for an early hearing and without participation by a judicial officer." (*North Georgia Finishing, Inc.* v. *Di-Chem, Inc., supra*, 419 U.S. 601, 606 [42 L.Ed.2d 751, 757].) In reaching its decision, the court emphasized that "[t]he Georgia garnishment statute has none of the saving characteristics of the Louisiana statute." (*Id.* at p. 607 [42 L.Ed.2d at p. 757].)

This modified position of the United States Supreme Court regarding such due process questions has also extended to the form of the hearing required. In *Goss* v. *Lopez, supra*, 419 U.S. 565, the court held that Ohio public school students had a property as well as a liberty interest in their education and that they were therefore entitled to notice and hearing before they could be suspended or expelled from school. (*Id.* at pp. 574-581 [42 L.Ed.2d at pp. 734-739].) However, where the suspension was short, the court concluded that the required "hearing" need be only an informal discussion between student and disciplinarian, at which the student should be informed of his alleged misconduct and permitted to explain his version of the events. (*Id.* at pp. 581-582 [42 L.Ed.2d at pp. 738-739].) Such a procedure, the court reasoned, "will provide a meaningful hedge against erroneous action." (*Id.* at p. 583 [42 L.Ed.2d at p. 740].) On the other hand, the court carefully pointed out the limitations on its holding: "We stop short of construing the Due Process

[24] Under the terms of the statute, the trial judge could order sequestration only if the creditor proved by affidavit that he had a vendor's lien on the property and that the debtor had defaulted in making the required payments, thereby entitling the creditor to immediate possession. (*Id.* at pp. 605-606 [40 L.Ed.2d at pp. 412-413].)

[25] The court noted that the debtor might abscond with the property and that in any event the debtor's continued use thereof would decrease the property's value. (*Id.* at pp. 608-609 [40 L.Ed.2d at pp. 413-415].)

[26] The creditor was required to post a bond to cover the debtor's potential damages in the event of a wrongful taking. At the postdeprivation hearing which was immediately available to the debtor, the creditor had the burden of making a prima facie showing of entitlement to the property. If he failed to do so, the debtor was entitled to return of his property and to an award of any damages. (*Id.* at pp. 606-610 [40 L.Ed.2d at pp. 412-415].)

Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process." (*Id.* at p. 583 [42 L.Ed.2d at p. 740].)

Our present task of determining the requirements of due process under the particular circumstances of the case at bench is made easier by the Supreme Court's decision in *Arnett* v. *Kennedy, supra,* 416 U.S. 134, upholding against constitutional attack the statutory procedure for the disciplining of nonprobationary federal civil service employees. Initially, we note that the rationale adopted by the plurality opinion of Justice Rehnquist, joined by the Chief Justice and Justice Stewart, would obviate the need for any balancing of competing interests. This rationale would apparently permit a state to narrowly circumscribe the procedures for depriving an individual of a statutorily created property right by simply establishing in the statute a procedural mechanism for its enforcement. (*Id.* at pp. 153-155 [40 L.Ed.2d at pp. 32-34].) In such instances, it is reasoned, the individual "must take the bitter with the sweet," that is, the substantive benefit of the statute together with the procedural mechanism it prescribes to safeguard that benefit. (*Id.* at pp. 153-154 [40 L.Ed.2d at pp. 32-33].) Under this rationale, it is arguable that California's procedure for disciplining civil service employees would withstand petitioner's due process attack, since the substantive right of a permanent state worker to continued employment absent cause (§ 19500) may be "inextricably intertwined [in the same set of statutes] with the limitations on the procedures which are to be employed in determining that right . . . ." (*Id.* at pp. 153-154 [40 L.Ed.2d at p. 33].)

However, this theory was unequivocally rejected by the remaining six justices and indeed described by the dissenters as "a return, albeit in somewhat different verbal garb, to the thoroughly discredited distinction between rights and privileges which once seemed to govern the applicability of procedural due process. [Fn. omitted.]" (See Justice Marshall's dissenting opn. at p. 211 [40 L.Ed.2d at p. 66]; see also Justice

Powell's concurring opn. at pp. 165-167 [40 L.Ed.2d at pp. 39-41], and Justice White's concurring and dissenting opn. at pp. 177-178, 185 [40 L.Ed.2d at pp. 46-47, 51].)

Where state procedures governing the taking of a property interest are at issue, all six justices were of the view that the existence of the interest is to be determined in the first place under applicable state law, but that the adequacy of the procedures is to be measured in the final analysis by applicable constitutional requirements of due process. (*Id.* at p. 167 [40 L.Ed.2d at pp. 40-41] (concurring opn., Justice Powell), p. 185 [40 L.Ed.2d p. 51] (concurring and dissenting opn., Justice White), p. 211 [40 L.Ed.2d p. 66] (dissenting opn., Justice Marshall).) "While the legislature may elect not to confer a property interest in . . . [civil service] employment [fn. omitted], it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." (*Id.* at p. 167 [40 L.Ed.2d at pp. 40-41] (concurring opn., Justice Powell); see also Justice White's concurring and dissenting opn. at p. 185 [40 L.Ed.2d at p. 51], and Justice Marshall's dissenting opn. at p. 211 [40 L.Ed.2d at p. 66].)

In *Arnett*, the remaining six justices were of the opinion that a full evidentiary "hearing must be held at some time before a competitive civil service employee may be *finally* terminated for misconduct." (*Id.* at p. 185 [40 L.Ed.2d at p. 51], italics added (concurring and dissenting opn., Justice White); see also, Justice Powell's concurring opn. at p. 167 [40 L.Ed.2d at pp. 40-41], and Justice Marshall's dissenting opn. at p. 212 [40 L.Ed.2d at pp. 66-67].) The question then narrowed to whether such a hearing had to be afforded *prior* to the time that the *initial* removal decision became effective. (*Id.* at p. 167 [40 L.Ed.2d at pp. 40-41] (concurring opn., Justice Powell), p. 186 [40 L.Ed.2d at pp. 51-52] (concurring and dissenting opn., Justice White), p. 217 [40 L.Ed.2d at pp. 69-70] (dissenting opn., Justice Marshall).)

In resolving this question, the above justices utilized a balancing test, weighing "the Government's interest in expeditious removal of an unsatisfactory employee . . . against the interest of the affected employee in continued public employment." (*Id.* at pp. 167-168 [40 L.Ed.2d at p. 41] (concurring opn., Justice Powell); see also Justice White's concurring and dissenting opn. at p. 188 [40 L.Ed.2d at pp. 52-53], and Justice Marshall's dissenting opn. at p. 212 [40 L.Ed.2d at pp. 66-67].) On one side was the government's interest in "the maintenance of employee efficiency and discipline. Such factors are essential if the Government is

to perform its responsibilities effectively and economically. To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial. [Fn. omitted.]" (*Id.* at p. 168 [40 L.Ed.2d at p. 41] (concurring opn., Justice Powell); see also Justice White's concurring and dissenting opn. at pp. 193-194 [40 L.Ed.2d at pp. 55-56] and Justice Marshall's dissenting opn. at pp. 223-225 [40 L.Ed.2d at pp. 73-74].)

Balanced against this interest of the government was the employee's countervailing interest in the continuation of his public employment pending an evidentiary hearing: "During the period of delay, the employee is off the Government payroll. His ability to secure other employment to tide himself over may be significantly hindered by the outstanding charges against him. [Fn. omitted.] Even aside from the stigma that attends a dismissal for cause, few employers will be willing to hire and train a new employee knowing that he will return to a former Government position as soon as an appeal is successful. [Fn. omitted.] And in many States, . . . a worker discharged for cause is not even eligible for unemployment compensation. [Fn. omitted.]"[27] (*Id.* at pp. 219-220 [40 L.Ed.2d at p. 71] (dissenting opn., Justice Marshall); see also, Justice White's concurring and dissenting opn. at pp. 194-195 [40 L.Ed.2d at pp. 56-57] and Justice Powell's concurring opn. at p. 169 [40 L.Ed.2d at p. 42].)

The justices reached varying conclusions in resolving this balancing process. Justice Powell, joined by Justice Blackmun, concluded that the federal discharge procedures comported with due process requirements. In reaching this result, however, he emphasized the numerous preremoval safeguards accorded the employee as well as the right to compensa-

[27]Under California law, "[a]n individual is disqualified for unemployment compensation benefits if the director finds that . . . . he has been discharged for misconduct connected with his most recent work." (Unemp. Ins. Code, § 1256.) Thus, a state civil service employee who has been discharged for cause may be disqualified from receiving unemployment compensation in some circumstances.

tion guaranteed the latter if he prevailed at the subsequent evidentiary hearing: "The affected employee is provided with 30 days' advance written notice of the reasons for his proposed discharge and the materials on which the notice is based. He is accorded the right to respond to the charges both orally and in writing, including the submission of affidavits. Upon request, he is entitled to an opportunity to appear personally before the official having the authority to make or recommend the final decision. Although an evidentiary hearing is not held, the employee may make any representations he believes relevant to his case. After removal, the employee receives a full evidentiary hearing, and is awarded backpay if reinstated. See 5 CFR §§ 771.208 and 772.305; 5 U.S.C. § 5596. These procedures minimize the risk of error in the initial removal decision and provide for compensation for the affected employee should that decision eventually prove wrongful. [Fn. omitted.]" (*Id.* at p. 170 [40 L.Ed.2d at p. 42].)

Justice White, concurring in part and dissenting in part, agreed that due process mandated some sort of preliminary notice and hearing, and similarly "conclude[d] that the statute and regulations provisions to the extent they require 30 days' advance notice and a right to make a written presentation satisfy minimum constitutional requirements." (*Id.* at pp. 195-196 [40 L.Ed.2d at p. 57].)[28]

Justice Marshall, joined by Justices Douglas and Brennan, dissented, apparently adhering to the "former due process test" requiring an "unusually important governmental need to outweigh the right to a prior hearing."[29] (*Id.* at p. 222 [40 L.Ed.2d at pp. 72-73], quoting from *Fuentes* v. *Shevin*, *supra*, 407 U.S. at p. 91, fn. 23 [32 L.Ed.2d at p. 576]; see also Justice Marshall's dissenting opn. at pp. 217-218, 223 [40 L.Ed.2d at pp. 69-70, 73].) Finding that the government's interest in prompt removal of an unsatisfactory employee was not the sort of vital concern justifying resort to summary procedures, the dissenters concluded that a nonprobationary employee was entitled to a full evidentiary hearing prior to discharge, at which he could appear before an independent, unbiased decisionmaker and confront and cross-examine adverse witnesses. (*Id.* at pp. 214-216, 226-227 [40 L.Ed.2d at pp. 67-69, 74-75].)

[28]Justice White's dissent was based upon his view that the employee in *Arnett* had not been accorded an impartial hearing officer in the pretermination proceeding, which he found was required by both due process and the federal statutes. (*Id.* at p. 199 [40 L.Ed.2d at p. 59].)

[29]Justice Douglas also wrote a separate dissenting opinion in which he concluded that the employee in *Arnett* had been fired for exercising his right of free speech, and therefore that the discharge violated the First Amendment to the United States Constitution. (*Id.* at pp. 203-206 [40 L.Ed.2d at pp. 61-63].)

Applying the general principles we are able to distill from these various opinions, we are convinced that the provisions of the California Act concerning the taking of punitive action against a permanent civil service employee do not fulfill minimum constitutional demands. (3) It is clear that due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However, at least six justices on the high court agree that due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.

California statutes governing punitive action provide the permanent employee with none of these prior precedural rights. Under section 19574, the appointing power is authorized to take punitive action against a permanent civil service employee by simply notifying him thereof. The statute specifies no particular form of notice, nor does it require advance warning. Thus, oral notification at the time of the discipline is apparently sufficient. (See 29 Ops.Cal.Atty.Gen. 115, 120 (1957), and Personnel Transactions Man., March 1972.) The employee need not be informed of the reasons for the discipline or of his right to a hearing until 15 days *after* the effective date of the punitive action. (§ 19574.) It is true that the employee is entitled to a full evidentiary hearing within a reasonable time thereafter (§ 19578), and is compensated for lost wages if the Board determines that the punitive action was improper. (§ 19584.) However, these postremoval safeguards do nothing to protect the employee who is wrongfully disciplined against the temporary deprivation of property to which he is subjected pending a hearing. (4) Because of this failure to accord the employee any prior procedural protections to "minimize the risk of error in the initial removal decision" (*Arnett* v. *Kennedy, supra,* 416 U.S. at p. 170 [40 L.Ed.2d at p. 42] (concurring opn., Justice Powell), we hold that the provisions of the State Civil Service Act, including in particular section 19574, governing the taking of punitive action against a permanent civil service employee violate the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and of article I, sections 7 and 15 of the California Constitution.

Defendants fail to persuade us to the contrary. Relying upon cases which antedate *Arnett* v. *Kennedy, supra,* 416 U.S. 134, defendants first contend that we must apply a different and less stringent standard of due

process in judging the state's exercise of a "proprietary" as opposed to a "regulatory" function. Where the state is acting as an "employer," so the argument goes, the balancing process must be more heavily weighted in favor of insuring flexibility in its operation; therefore, due process is satisfied as long as a hearing is provided at some stage of the proceedings. The Supreme Court's decision in *Arnett* v. *Kennedy, supra,* 416 U.S. 134, adequately disposes of this argument. In view of our extensive analysis of this decision we need not say anything further except to observe that nowhere in that case does any member of the high court advocate the distinction advanced by defendants.

Defendants further contend that emergency circumstances may arise in which the immediate removal of an employee is essential to avert harm to the state or to the public. Adverting to section 19574.5,[30] which permits the appointing power to order an employee on leave of absence for a limited period of time, defendants argue that situations not covered by this statute but necessitating similar prompt action may conceivably arise under section 19574 (see fn. 12, *ante*). In answering this argument, we need only point out that section 19574 is not limited to the extraordinary circumstances which defendants conjure up. (*Sniadach* v. *Family Finance Corp., supra,* 395 U.S. 337, 339 [23 L.Ed.2d 349, 352]; *Randone* v. *Appellate Department, supra,* 5 Cal.3d at pp. 541, 553; *Blair* v. *Pitchess, supra,* 5 Cal.3d at p. 279.) Indeed, the instant case presents an example of the statute's operation in a situation requiring no special protection of the state's interest in prompt removal. (*Sniadach, supra,* 395 U.S. at p. 339 [23 L.Ed.2d at p. 352].) Thus, since the statute "does not narrowly draw into focus those 'extraordinary circumstances' in which [immediate action] may be actually required," we remain convinced that the California procedure governing punitive action fails to satisfy either federal or state due process standards. (*Randone* v. *Appellate Department, supra,* 5 Cal.3d at p. 541.)

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[30]Section 19574.5 provides: "Pending investigation by the appointing power of accusations against an employee involving misappropriation of public funds or property, drug addiction, mistreatment of persons in a state institution, immorality, or acts which would constitute a felony or a misdemeanor involving moral turpitude, the appointing power may order the employee on leave of absence for not to exceed 15 days. The leave may be terminated by the appointing power by giving 48 hours' notice in writing to the employee.

"If punitive action is not taken on or before the date such a leave is terminated, the leave shall be with pay.

"If punitive action is taken on or before the date such leave is terminated, the punitive action may be taken retroactive to any date on or after the date the employee went on leave. Notwithstanding the provisions of Section 19574, the punitive action, under such circumstances, shall be valid if written notice is served upon the employee and filed with the board not later than 15 calendar days after the employee is notified of the punitive action."

II

(5) (See fn. 31.) Having determined that the procedure used to dismiss petitioner denied him due process of law as guaranteed by both the United States Constitution and the California Constitution, we proceed to examine under the well established standards of review[31] the Board's action taken against petitioner. Petitioner first contends that the Board's findings are not supported by substantial evidence. Specifically he disputes the Board's determination that his absences on March 16 and June 26, 1972, were due to his drinking rather than to illness.

(6) The findings challenged are based upon the testimony of two apparently credible witnesses, Gerald Green and Bernard Moore, who stated that they personally observed petitioner at a bar drinking on the dates in question. With respect to the June 26th incident, petitioner himself testified that he had consumed two martinis at lunch, despite his illness. Clearly this evidence is sufficient to support the Board's findings with respect to the cause of petitioner's absences on these two occasions.

III

Petitioner finally contends that the penalty of dismissal is clearly excessive and disproportionate to his alleged wrong. We agree.

Generally speaking, "[i]n a mandamus proceeding to review an administrative order, the determination of the penalty by the administrative body will not be disturbed unless there has been an abuse of its discretion." (*Magit* v. *Board of Medical Examiners* (1961) 57 Cal.2d 74, 87 [17 Cal.Rptr. 488, 366 P.2d 816]; see also *Nightingale* v. *State Personnel Board* (1972) 7 Cal.3d 507, 514-516 [102 Cal.Rptr. 758, 498 P.2d 1006]; *Harris* v. *Alcoholic Bev. etc. Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633, 400 P.2d 745]; *Martin* v. *Alcoholic Bev. etc. Appeals Bd.* (1961) 55 Cal.2d 867, 876 [13 Cal.Rptr. 513, 362 P.2d 337].) (7) Nevertheless, while the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, "it does not have absolute and unlimited power. It is bound to exercise legal

[31]The Board is "a statewide administrative agency which derives [its] adjudicating power from [article XXIV, section 3, of] the Constitution . . . [; therefore, its factual determinations] are not subject to re-examination in a trial de novo but are to be upheld by a reviewing court if they are supported by substantial evidence. [Citations.]" (*Shepherd* v. *State Personnel Board* (1957) 48 Cal.2d 41, 46 [307 P.2d 4]; see also *Strumsky* v. *San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 35-36 [112 Cal.Rptr. 805, 520 P.2d 29].)

discretion, which is, in the circumstances, judicial discretion." (*Harris, supra*, citing *Martin, supra*, and *Bailey* v. *Taaffe* (1866) 29 Cal. 422, 424.) In considering whether such abuse occurred in the context of public employee discipline, we note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, "[h]arm to the public service." (*Shepherd* v. *State Personnel Board, supra*, 48 Cal.2d 41, 51; see also *Blake* v. *State Personnel Board* (1972) 25 Cal.App.3d 541, 550-551, 554 [102 Cal.Rptr. 50].) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. (*Blake, supra*, at p. 554.)

(8) Consideration of these principles in the instant case leads us to conclude that the discipline imposed was clearly excessive. The evidence adduced at the hearing and the hearing officer's findings, adopted by the Board, establish that the punitive dismissal was based upon the doctor's conduct in extending his lunch break beyond his allotted one hour on numerous occasions, generally by five to fifteen minutes, and in twice leaving the office for several hours without permission. It is true that these transgressions continued after repeated warnings and admonitions by administrative officials, who made reasonable efforts to accommodate petitioner's needs. It is also noteworthy that petitioner had previously suffered a one-day suspension for similar misconduct.

However, the record is devoid of evidence directly showing how petitioner's minor deviations from the prescribed time schedule adversely affected the public service.[32] To the contrary, the undisputed evidence indicates that he more than made up for the excess lunch time by working through coffee breaks as well as on some evenings and holidays. With perhaps one or two isolated exceptions,[33] it was not shown that his conduct in any way inconvenienced those with whom he worked or prevented him from effectively performing his duties.

Dr. Hale, senior medical consultant and petitioner's immediate supervisor for about 13 months, rated his work as good to superior, compared it favorably with that of other physicians in the office, and described him as efficient, productive, and the region's "right hand man" on ear, nose and throat problems. Two other employees who worked with petitioner testified that he was informative, cooperative, helpful,

[32]Mr. Green testified on cross-examination that there was some latitude with respect to the hours kept by professional people in the office, as long as they worked 40 hours per week and received Green's approval.

[33]Apparently, petitioner's unexcused absence on the afternoon of June 26, 1972, inconvenienced Moore who wished to see him on a routine business matter.

extremely thorough and productive. No contrary evidence was presented by or on behalf of the Department of Health Care Services.

In his proposed decision, adopted by the Board, the hearing officer stated: "Appellant is 64 years old, has had a long and honorable medical career and is now handicapped by serious sight and speech difficulties. Also, the Senior Medical Consultant has no complaints about appellant's work. [¶] Consideration of appellant's age, his physical problems, the lack of any apparent affect on his work and sympathy for the man and his family are all persuasive arguments in favor of finding that appellant be given just one more chance." In testifying, petitioner apologized for his conduct and promised to adhere strictly to the rules if given another opportunity to do so.

Our views on this issue should not be deemed, nor are they intended, to denigrate or belittle administrative interest in requiring strict compliance with work hour requirements. The fact that an employee puts in his 40 hours per week by rearranging his breaks to suit his personal convenience is not enough. An administrator may properly insist upon adherence to a prescribed time schedule, as this may well be essential to the maintenance of an efficient and productive office. Nor do we imply that an employee's failure to comply with the rules regulating office hours may not warrant punitive action, possibly in the form of dismissal, under the appropriate circumstances. Indeed, in the instant case, a less severe discipline is clearly justified; and we do not rule out the possibility of future dismissal if petitioner's transgressions persist.

However, considering all relevant factors in light of the overriding concern for averting harm to the public service, we are of the opinion that the Board clearly abused its discretion in subjecting petitioner to the most severe punitive action possible for his misconduct.

In sum, we conclude that the dismissal of petitioner was improper for two reasons: First, the procedure by which the discharge was effectuated denied him due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and article I, sections 7 and 15, of the California Constitution; second, the penalty of dismissal was clearly excessive and disproportionate to the misconduct on which it was based.

Therefore, upon remand the trial court should issue a peremptory writ of mandate directing the State Personnel Board to annul and set aside its

decision sustaining without modification the punitive action of dismissal taken by the State Department of Health Care Services against petitioner John F. Skelly, M.D., and to reconsider petitioner's appeal in light of this opinion.[34]

The judgment is reversed and the cause is remanded to the trial court for further proceedings in conformity with this opinion.

Wright, C. J., McComb, J., Tobriner, J., Mosk, J., Clark, J., and Molinari, J.,* concurred.

[34]As petitioner has heretofore been accorded a full evidentiary hearing in this matter, it is unnecessary for the Board to order the Department to reinstitute new proceedings against him in order to impose an appropriate discipline in respect to the conduct involved herein.

*Assigned by the Chairman of the Judicial Council.

B

TAB B

CONTRACT ADMINISTRATION:

ITS PARTIES AND INTERVENORS

As a continuation of the bilateral representational process, contract administration necessarily involves the constituent groups of those charged with the duty of actual administration--the public legislative body and the membership of the labor organization. Scrutinized by these constituencies, the administrative process is continually affected by their political and organizational direction. Others are also involved in or affected by the outcome of an agreement's administration. The involvement of these "other" parties in the bilateral relationship constitutes third-party intervention.

I. SOLICITED AND UNSOLICITED INTERVENTION

An intervention in the contract administration process may, in some cases, be welcomed or even solicited by one or both of the parties to the agreement. Arbitrators and the courts are two of the more familiar sources of this type of intervention. As interpretors of the agreement, they may be considered by some to be part of the process. In a sense, this is true. By definition, however, they are third parties to the bilateral relationship. Unlike the parties to the agreement, their responsibility is to render an interpretation of the contract, not to administer it. Accordingly they may, in their independence, rule in a fashion neither desired nor envisioned by the parties to the agreement.

One possible source of unsolicited intervention in the administrative process is the individual employee covered by the agreement. As a member of a constituent group in the bargaining relationship, the employee may attempt to direct the administration of the contract via political activity in his or her labor organization. Apart from this, however, the employee may also intervene as an individual through third-party legal action. One such cause of action could be filed as a "fair representation" suit.

In another section of this manual, the duty of fair representation is discussed at length. It must be noted here, however, that both the labor organization and the employer are liable to legal action in this regard. The employer's liability arises when there is some denial of right or benefit, constituting a breach of contract. The labor organization is held liable should it fail to fairly represent the employee in obtaining relief from the employer's action.

In addition, a covered employee may have a second basis of intervention, namely, when there is a violation of an employee's civil rights.

II. CIVIL RIGHTS INTERVENTIONS

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, sex, religion, and national origin. Groups who have suffered discrimination under these criteria are commonly referred to as "protected classes." As with <u>any</u> affected

member of the public who also falls in a "protected class," an employee may file an action for any violation of these rights. Historically such actions have been brought against the employer, but the labor organization, too, is liable for any overt violations which it may commit. And recent decisions indicate that a union may also be named defendant in such suits when it is demonstrated that it tolerated an employer's overt or covert discriminatory actions.[1/] In the civil rights area, the administrative responsibilities are truly shared.

III. THE PRIVATE CITIZEN AS INTERVENOR

Finally, and in a manner unique to the public sector, the private citizen may also intervene in the administrative/collective bargaining process either as a taxpayer or a voter.[2/]

Although the California Supreme Court has ruled in *Bangs v City and County of San Francisco*[3/] that the courts may not be used by taxpayers to "second guess" a local legislative body in its employer-employee relations, recent events in that city have demonstrated that the

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[1]See: "Equal Employment Opportunity and Affirmative Action in Labor-Management Relations--A Primer," by Geraldine Leshin, Institute of Industrial Relations, UCLA 1976, D-3, D-9, H-7, I-7.

[2]See: California Code of Civil Procedure, Sec. 526 et seq.

[3]See Appendix: *Bangs v City and County of San Francisco.*

reaction of the taxpayer/voter can be both swift and substantial when they are denied legal redress with regard to bargaining matters.[4] Armed with the ballot, the private citizen may obtain in the voting booth what the courts deny.

The adoption of the "sunshine" amendment in the Educational Employment Relations Act (EERA)[5] further underscores the potential significance of citizen intervention. The amendment requires a public reading of collective bargaining proposals and counter proposals in K-14 school district negotiations. In effect, it institutionalizes a channel for taxpayer/citizen intervention and, as such, provides more than a means by which a school board may democratically be held accountable for its actions after the fact. The process provides for political intervention in the negotiating process before the parties themselves have fully discussed or finalized their positions. It is, then, a limited form of direct participation, rather than a simple process of accountability.

SUMMARY

In this section we have stressed that contract administration is a continuation of the bilateral representational process. As it is not

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[4] Reference is made to the voter's repeal of the charter provision which set police and fire salaries in a highly favorable fashion. This and certain provisions relating to crafts pay were struck down following the controversial San Francisco strike of police and fire personnel in 1975.

[5] See: EERA, Article 8, Section 3547, et seq. in appendix, Tab A

immune to other forces, however, we have pointed out that this bilateral process may be impinged upon by solicited and unsolicited third-party intervention.

Public sector contract administration is not unique in being subject to the intervention of third parties. In fact, one of the forms discussed here--arbitration--originated in private sector labor relations. And private-sector contract administration is also subject to review and intervention under the provisions of the 1964 Civil Rights Act. Public sector labor relations are unique, however, in the degree to which they are subject to the intervention of the private citizen.

Without question, public-sector collective bargaining should be accountable to the citizens in all its aspects. But it can be questioned, whether the so-called "sunshine" amendment of the EERA will serve this end. It may merely thwart the process it is designed to monitor. In any event, public managers and labor organizations should be alert to the fact that further extension of such forms of intervention from whatever source could well destroy the bilateral concept which is fundamental to the collective bargaining process.

APPENDIX TO TAB B

City & County of San Francisco
v. Cooper and Bangs

Documents

State Supreme Court on S.F. Pay Case

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, IN BANK

CITY AND COUNTY OF SAN FRANCISCO et al., Petitioners,

v.

NATHAN B. COOPER, as Controller, etc., Respondent;

GEORGE A. BANGS, et al., Real Parties in Interest.

S.F. 23210
Filed: April 4, 1975

[Editor's note: *Due to the length of this opinion, part of the text and most of the footnotes are not reprinted here. Care was taken not to detract from the basic holdings or discussion of the issues.*]

In March 1974 numerous workers employed by the City and County of San Francisco and a large number of school teachers employed by the San Francisco Unified School District went on strike in protest of salary and fringe benefit proposals then under consideration for the upcoming 1974-1975 fiscal year. During the course of the two strikes, discussions were undertaken between employee association representatives and representatives of the two municipal employers, the city and the school district. Ultimately these "meet and confer" or negotiating sessions culminated in the adoption of separate legislative measures by the board of supervisors and the governing board of the school district.

Shortly after the enactment of these measures, real party in interest, George Bangs, filed two taxpayer actions in the superior court challenging, on a variety of grounds, the validity of both the city's salary standardization ordinance and the school district's salary schedule resolution. After determining that these taxpayer actions raised substantial questions as to the validity of the challenged ordinance and resolution, respondent, Nathan Cooper, Controller of the City and County of San Francisco, refused to implement the newly enacted measures at the commencement of the 1974-1975 fiscal year and continued to authorize salary warrants only on the basis of the 1973-1974 pay rates. The city and the school district then filed the instant proceeding seeking a writ of mandate to compel the controller to draw and deliver warrants reflecting the salary increases granted by the new ordinance and resolution. The taxpayer, in his return to the alternative writ, opposes the requested relief, arguing that both the city ordinance and school district resolution are invalid for a number of distinct reasons.[1]

As discussed at length below, we have concluded that although portions of both the challenged ordinance and resolution are invalid, the present pleadings do not demonstrate that either measure fails in its entirety and, in particular, do not establish that the basic salary schedules which lie at the heart of the legislative enactments are invalid. Accordingly, we have determined that a writ of mandate should issue compelling the controller to draw and deliver salary warrants reflecting the newly adopted salary schedules.

As we explain initially, although the taxpayer claims that both legislative measures are invalid in their entirety because they were adopted "as a result of," and "under the coercion of," an illegal public employee strike, the controlling authorities clearly establish that such a contention does not constitute a permissible basis for invalidating duly enacted legislation. In the absence of a constitutional, statutory or charter provision prohibiting a local legislative body from exercising its legislative power to settle an "illegal" strike, the judiciary has no authority to withdraw the legislative prerogative on the basis of allegedly improper influences brought to bear upon individual legislators. In this realm, legislative judgment and wisdom are reviewable only by the electorate, not by the courts.

Second, we shall explain that the taxpayer has not established that the challenged ordinance conflicts with the controlling "prevailing wage" provisions of the city charter. Although the taxpayer alleges that the salary schedule is "arbitrary, palpably unreasonable and constitutes an abuse of discretion," these conclusory allegations are inadequate in themselves to demonstrate the invalidity of the ordinance, and they are not sufficiently substantiated by the taxpayer's more specific averments. We do, however, agree with the taxpayer's contention that the board of supervisors was without authority to adopt a separate portion of the ordinance establishing a city-financed employee dental plan, in light of a specific city charter provision delegating authority for the establishment of such a plan to a separately constituted health service board.

Finally, we shall point out that the school board resolution is not invalid under the Winton Act (Ed. Code, § 13080 et seq.), even though it was enacted subsequent to, and adopted the substance of, a written "agreement," prepared as a result of numerous "meet and confer" sessions between employee and employer representatives. As we explain, although the Winton Act withholds binding legal effect from any agreement entered into by meeting and conferring representatives, the school board itself, through a formal resolution, adopted the measure at issue here. Since the Winton Act, by its own terms, defines the objective of the meet and confer process to be a "written resolution . . . of the governing board effectuating [the] recommendations [of the conferring representatives]" (Ed. Code, § 13081, subd. (d)), the fact that the school board decided to adopt the recommendations emerging from the meet and confer sessions obviously represents no violation of the act. Although we do find that one portion of the resolution, purporting to grant employee association representatives a "veto" power over subsequent changes in school board policy, constitutes an invalid delegation of power, this provision is severable from the remainder of the resolution and does not taint the salary increase.

1. [Discussion of facts and city ordinances omitted.]

2. *In the absence of applicable constitutional, legislative, or charter proscriptions, a duly enacted legislative measure cannot be invalidated on the ground that it was enacted as a result of an illegal strike.*

Our analysis must begin with the recognition that the ordinance and resolution at issue here are clearly legislative in nature. (See, e.g., Kugler v. Yocum (1968) 69 Cal.2d 371, 374; City and County of S.F. v. Boyd, *supra*, 22 Cal. 2d 685, 689.) The taxpayer's initial challenge to these legislative measures rests upon the contention that both measures were enacted under the coercive influence of an "illegal" public employee strike.

In characterizing the employee work stoppage at issue as "illegal," the taxpayer relies on a series of Court of Appeal decisions which have concluded that under the present state of California law public employees do not have the right to strike.[4] The return filed by the various real party in interest employee associations contests this conclusion, arguing both that present state statutes implicitly authorize strikes by some categories of public employees,[5] and also that by the very legislative measures challenged in this action the City of San Francisco has impliedly sanctioned public employee strikes.

We have no occasion to resolve this controversy in the present action, however, for even if we assume that all public employee strikes are illegal, and may properly be enjoined under a court's equity power (see, e.g., City of San Diego v. American Federation of State etc. Employees, *supra*, 8 Cal. App.3d 308, 317; School District for City of Holland v. Holland Educ. Assn. (1968) 380 Mich. 314 [157 N.W.2d 206, 210] ; Timberlane Reg. Sch. Dist. v. Timberlane Reg. Ed. Ass'n (1974) ___ N.H. ___ [317 A.2d 555, 558-559]) or may subject striking employees to a variety of administrative sanctions including dismissal (see Almond v. County of Sacramento, *supra*, 276 Cal.App.2d 32, 34-35), it does not follow that legislative enactments which "result from" such illegal strikes are therefore invalid. On the contrary, as we discuss below, a firmly established judicial principle decrees that "a legislative act cannot be [nullified] because, in the opinion of a court, it was or might have been the result of improper considerations." (People v. County of Glenn (1893) 100 Cal. 419, 423.)

Unlike several of our sister states,[6] California has no constitutional or legislative provisions prescribing mandatory sanctions for striking public employees. Similarly, the San Francisco city charter contains no such provisions. Thus, as the taxpayer apparently concedes, when the board of supervisors and the board of education enacted the measures at issue here, there was no constitutional, statutory or charter provision which barred either body from enacting legislation in response to, or as a result of, an "illegal" public employee strike.

The taxpayer asserts, however, that despite the absence of any applicable constitutional, statutory or charter limitation, this court can and should void these legislative measures because the enactments were "caused" by illegal influences, namely, an illegal strike. The taxpayer's theory founders on the "wise and ancient doctrine" (United States v. Constantine (1935) 296 U.S. 287, 299 (dissenting opn. by Cardozo, J.) that the validity of legislative acts must be measured by the terms of the legislation itself, and not by the motives of, or influences upon, the legislators who enacted the measure. As we observed in Wilke & Holzheiser Inc. v. Dept. of Alcholic Bev. Control (1966) 65 Cal.2d 349, 364: " '[A] judiciary must judge by results, not by the varied factors which may have determined legislators' votes. . . .' [Citation.]"

This principle was articulated and explained by Chief Justice Marshall in the seminal decision of Fletcher v. Peck (1810) 10 U.S. (6 Cranch) 87. [Discussion omitted.]

As this passage from *Fletcher* suggests, any judicial attempt to determine the validity of legislation upon the basis of the motives of, or influences upon, particular legislators must inevitably prove a hazardous and largely futile task. Because the enactment of legislation is a collective process in which numerous individually motivated legislators participate, it is impossible to determine with certainty whether a particular "improper influence" or "motive" was "actually" responsible for the enactment of a law; moreover, the practical difficulties are compounded by the fact that each individual legislator will often, if not always, act out of a variety of motives and under a diverse set of influences. Thus, any attempt to determine the "actual" effect of the allegedly illegal strike on the minds of the legislators would hardly be a sound basis for invalidating legislation.

Moreover, in several respects judicial nonintervention is more appropriate in the instant case than in either *Fletcher* or much of *Fletcher's* progeny. Unlike *Fletcher*, there are no allegations here that the legislators acted from corrupt or fraudulent motives; thus, this is not a case in which the judiciary finds itself in the position of affirming the personal aggrandizement of lawmakers at the expense of the public. (Cf. Maxwell v. City of Santa Rosa (1959) 53 Cal.2d 274; Nickerson v. San Bernardino (1918) 179 Cal. 518, 522-523 (dictum).) Nor is this a case in which legislators are alleged to have enacted legislation for a constitutionally impermissible reason, such as the promotion or establishment of religion (cf. Board of Education v. Allen (1968) 392 U.S. 236, 243), although even in such circumstances it is far from clear that the legislation would be invalid. (See, e.g., Palmer v. Thompson (1971) 403 U.S. 217, 224-225; United States v. O'Brien (1968) 391 U.S. 367, 383-384; but cf. Parr v. Municipal Court (1971) 3 Cal.3d 861, 865-868.)

Instead, the taxpayer's present argument reduces to a contention that even though no corruption, fraud or unconstitutional purpose taints a legislative measure, the enactment may still be struck down because some of the proponents and benefactors of the measure have engaged in improper activity. The present instance is by no means the first time legislation has been challenged on the basis of allegedly improper or coercive tactics used to secure its passage. In no case to date, however, has such an attack been successful.

People v. Bigler (1855) 5 Cal. 23 is an early California case in point. In *Bigler* an act of the Legislature moving the state capitol from San Jose to Vallejo was attacked on the ground that General Vallejo's payment of a large sum of money to the state brought about the legislation and that such conduct amounted to an improper "sale of the Seat of Government." (5 Cal. at p. 26.) The *Bigler* court

rejected the challenge and held that even if General Vallejo's action could be considered improper that conclusion would not deprive the Legislature of its constitutional authority to transfer the seat of government.

Justice Holmes' opinion for the United States Supreme Court in Calder v. Michigan (1910) 218 U.S. 591 confirms *Bigler's* analysis. In *Calder*, a repeal of legislation was challenged on the ground that a mayor and other city officials "had carried out an unfair scheme for getting the repeal hurried through the [state] legislature without notice to the [complaining] company." Justice Holmes rejected the argument out of hand, emphasizing that "we do not inquire into the knowledge, negligence, methods or motives of the Legislature if, as in this case, the repeal was passed in due form. [Citation.] The only question that we can consider is whether there is anything relevant to the present case in the terms or effect of the repeal that goes beyond the power [of the legislative body]." (218 U.S. at p. 598.)

At the heart of the decision in *Bigler* and *Calder* lies the separation of powers doctrine, the fundamental doctrine which recognizes that in the absence of some overriding constitutional, statutory or charter proscription, the judiciary has no authority to invalidate duly enacted legislation.[7] The taxpayer's contention flies in the face of this fundamental principle, asserting that even if no constitutional, statutory or charter provision precludes a local legislative body from enacting particular legislation, the judiciary can still void such legislation if it finds that the measure "resulted from" certain illegal conduct, for example, an illegal strike. In the absence of constitutional, statutory or charter limitations, however, it is the legislative body, and not the courts, which retains the ultimate authority to decide whether certain "illegal" conduct warrants the withholding of beneficial legislation. In other words, although the judiciary may administer various equitable sanctions – such as a restraining injunction – in response to "illegal" conduct, courts simply lack the authority to invoke the sanction of withholding legislative power.

The taxpayer argues, however, that if public employees cannot legally strike, then it follows that any settlement which permits striking employees to secure any benefits resulting from their unlawful conduct would violate public policy and, accordingly, would be void. In support of this argument, the taxpayer relies heavily on the Court of Appeal decision in Grasko v. Los Angeles City Board of Education (1973) 31 Cal.App.3d 290, 297-298. In the first portion of the *Grasko* decision (a later section of the opinion will be discussed below), the Court of Appeal held that an employment agreement, entered into by the city board of education in response to an illegal public employee strike, was void as against public policy, because the termination of the illegal strike "formed a substantial part of the consideration" for the agreement. Under the *Grasko* court's reasoning, virtually every agreement entered into by a public entity to settle an "illegal strike" would be void and unenforceable. In reaching this conclusion, the *Grasko* court did not cite or consider the earlier Court of Appeal decision of East Bay Mun. Employees Union v. County of Alameda (1970) 3 Cal.App.3d 578, 584, which had explicitly affirmed the validity of an agreement entered into by a public employer in the course of a strike settlement.

We cannot subscribe to the *Grasko* court's conclusion that the illegality of a strike necessarily taints any agreement entered into by a public employer to end the strike. (See Social Workers Union Local 535 v. County of Los Angeles (1969) 270 Cal.App.2d 65, 77, fn. 12.) The question as to what sanctions should appropriately be imposed on public employees who engage in illegal strike activity is a complex one which, in itself, raises significant issues of public policy.[8] In the past, several states have attempted to deter public employee strikes by imposing mandatory, draconian statutory sanctions on striking employees; experience has all too frequently demonstrated, however, that such harsh, automatic sanctions do not prevent strikes but instead are counterproductive, exacerbating employer-employee friction and prolonging work stoppages.[9] As a consequence, recent advisory reports prepared by labor relations experts in a number of jurisdictions have uniformly recommended the abandonment of such "automatic" sanctions and have urged the adoption of a variety of discretionary sanctions which provide the public employer a measure of flexibility necessary to meet varying negotiating situations. (See Smith, *State and Local Advisory Reports on Public Employee Labor Relation Legislation: A Comparative Analysis* (1969) 67 Mich.L.Rev. 891, 910-914.)

To date, the California Legislature has declined to prescribe any specific sanctions for public employee strikes. Although the taxpayer argues that public employee strikes will not occur if public employers lack the power to grant any benefits to striking employees, recent events throughout the nation belie any such notion. (See authorities cited at fns. 8-9, *supra*.) Under the circumstances, we believe it would be entirely inappropriate for the judiciary to strip from public employers all authority to negotiate a settlement of any illegal strike. (Cf. Board of Ed. v. Associated Teachers (1972) 30 N.Y.2d 130 [282 N.E.2d 109; 331 N.Y.S.2d 17, 23].)

Moreover, even if we were persuaded of the validity of the *Grasko* "public policy" analysis – which we are not – the legislative measures at issue in this case as explained above could not be invalidated on such a basis. In the absence of controlling constitutional, statutory or charter limitations, local legislators retain authority to determine the appropriate legislative response to an allegedly illegal strike. Some legislators may conclude that it is unwise to respond to any demands voiced through an illegal strike on the ground that such consideration might encourage similar strikes in the future; others may decide that the public interest requries legislative action that recognizes the practical realities of the strike and attempts to ameliorate the underlying dispute. It is, of course, a legislator's prime function to choose between such conflicting policy judgments; in so doing, he or she is directly responsible to the electorate, not to the judiciary. That legislative role signifies the essence of the doctrine of the separation of powers.

Thus, even if we assume the illegality of the public employee strike, such illegality affords no basis for invalidating either the salary ordinance or salary resolution at issue in the case at bar. Accordingly, insofar as the taxpayer's attack rests upon the occurrence of an "illegal strike," the challenge fails.

3. *Although the portion of ordinance No. 152-74 establishing a dental plan conflicts with the city charter and is invalid, the return fails to demonstrate that the salary schedule of the ordinance violates the charter's "prevailing wage" provisions.*

The taxpayer additionally contends that, without regard to the "illegal" strike, ordinance No. 152-74 is invalid under several distinct provisions of the San Francisco city charter. As we explain below, although we recognize the illegality of one provision of the ordinance, we conclude that the bulk of the ordinance, and particularly the salary schedule, does not succumb to the taxpayer's present attack.

The taxpayer initially asserts that the ordinance fails because the salaries fixed by the enactment's across-the-board $50 per month increase do not "accord with the prevailing rates of wages" as required by section 8.401 of the city charter.[10] Although past California decisions establish that such a charter provision does constitute "a positive limitation on the [board of supervisors'] exercise of discretionary authority in fixing compensation for municipal employees" (Walker v. County of Los Angeles (1961) 55 Cal.2d 626, 634), the authorities make it equally clear that the legislative body retains a considerable degree of discretion in establishing compensation pursuant to such a "prevailing wage" mandate. (See, e.g., Alameda County Employees' Assn. v. County of Alameda (1973) 30 Cal.App.3d 518, 530; Collins v. City & Co. of S.F. (1952) 112 Cal.App. 2d 719, 730-731; Goodrich v. City of Fresno (1946) 74 Cal.App.2d 31, 36-37.)

As the decisions have recognized, some discretionary latitude is implicit in the nature of the "prevailing wage" standard itself; as a rule, such charter provisions do not set forth any specific formula by which the prevailing wage is to be determined, but instead leave to the legislating body the choice between the various reasonable alternative means of calculating "prevailing wages." In addition, because a fair prevailing wage determination may take into account many component elements – such as various fringe benefits – which are frequently not susceptible to precise appraisal, a substantial measure of legislative discretion is inevitable. (See, e.g., Anderson v. Board of Supervisors (1964) 229 Cal. App.2d 796, 800.)

Moreover, the charter provision at issue here simply directs the board of supervisors to fix compensation "in accord with" the generally prevailing rates of wages. In City and County of S.F. v. Boyd, *supra*, 22 Cal.2d 685, 690, we explained that such a provision does "not require that the rates of wages . . . fixed by the board be identical with or not higher than the generally prevailing rates, but rather that there be a reasonable or just correspondence between the rate established and those elsewhere prevailing, i.e., that they be in harmony with and substantially conform to such other rates." Moreover, we held in *Boyd* that under such a charter provision, "[t]he determination whether proposed rates of compensation are in accord or in harmony with generally prevailing rates is within the discretion of the rate-making authority. The courts will not interfere with that determination unless the action is fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law." (*Id.*) In emphasizing the limited nature of the judicial review appropriate in such cases, the *Boyd* court declared "that a writ of mandate should issue [compelling the controller to comply with a duly enacted ordinance] unless it is concluded '*that upon no conceivable basis under all of the evidence . . . can the rates as fixed be brought within the charter limitation.*' " (*Id.*) (Emphasis added.)

Although the return in the instant case does allege that ordinance No. 152-74 is "arbitrary, palpably unreasonable and constitutes an abuse of discretion," such conclusory allegations do not, of course, in themselves suffice to meet the heavy burden required to invalidate a salary ordinance under the principles of *Boyd*. (See, e.g., Lagis v. County of Contra Costa (1963) 223 Cal.App.2d 77, 93; People v. Lagis (1958) 160 Cal.App.2d 28, 33.)

To bolster the return's conclusory allegations, the taxpayer's brief proffers two more specific allegations which assertedly demonstrate that the salary schedule adopted by the present ordinance does not accord with prevailing rates. First, the taxpayer points out not only that the $50 per month across-the-board increase differs fundamentally from the three-tier recommendation submitted by the civil service commission on the basis of its salary surveys but also that it is much more costly than the commission proposal. Second, the taxpayer emphasizes that the terms of the ordinance were reached as a result of a series of negotiating sessions with employee representatives. Although the taxpayer argues that these two circumstances adequately demonstrate that the salaries adopted by the ordinance do not satisfy the charter requirements, we cannot agree.

In the first place, the fact that the salary schedule ultimately adopted by the board differs significantly from that recommended by the commission in no manner demonstrates that the ordinance's pay rates are not in accord with prevailing rates. As this court has only recently emphasized: "It should be kept in mind that it is the function of the board, not the commission, to fix and pay wages and salaries." (Los Angeles City etc. Employees Union v. Los Angeles City Bd. of Education (1974) 12 Cal.3d 851, 856.) Although the commission plays a valuable and important role in gathering data and formulating initial recommendations, both the charter provisions and controlling authorities make clear that "the rates of compensation are fixed by the board of supervisors and involve an exercise of the independent judgment of that body." (City and County of S.F. v. Boyd, *supra*, 22 Cal.2d 685, 692.) Thus, the fact that the board chose to implement a substantially different form of pay increase than the commission had recommended does not in itself establish that the salaries authorized by the ordinance are not in accord with prevailing wages.

The case of San Francisco Chamber of Commerce v. City etc. of S. F., *supra*, 275 Cal.App.2d 499 is directly in point. In the *Chamber of Commerce* case the civil service commission recommended the adoption of a four-tiered salary increase (ranging from no increase to a 7 percent increase) to satisfy the charter's prevailing wage provision but the board of supervisors amended the proposed schedule by adopting a 5 percent across-the-board raise. The Chamber of Commerce thereafter attacked the city ordinance as incompatible with the charter's prevailing wage requirements, but the Court of

Appeal rejected the challenge, pointing out that in light of numerous factors (e.g., the cost of living in the San Francisco area, comparable pay raises by other California public employers) the 5 percent across-the-board increase did not constitute the type of "clear-cut abuse of legislative discretion" which would warrant judicial intervention. (275 Cal. App.2d at pp. 504-506.)

Similar considerations pertain here. Although the ordinance's $50 per month across-the-board approach unquestionably differs from the commission's recommendation, the returns before this court fail to demonstrate, or even allege, with any specificity exactly which salary levels fixed by the ordinance do not ostensibly accord with prevailing rates. In this regard, the showing made by the instant taxpayer falls far short of that presented – without success – in the *Chamber of Commerce* litigation, and surely fails to meet the heavy burden placed on the taxpayer by *Boyd*.

The taxpayer also claims that the invalidity of the $50 per month increase is established by the fact that the figure was allegedly agreed upon in the course of a series of negotiating sessions between several members of the board of supervisors and representatives of various employee organizations. This contention appears to rest upon an erroneous assumption that the application of the charter's "prevailing wage" standard inherently conflicts with any "meet and confer" or negotiating process.

As explained above, while the charter's prevailing wage provisions do establish limits within which the board of supervisors must act, the board enjoys a considerable degree of discretion both in determining the prevailing wage standards and in fixing compensation "in accord with" such standards. The "meet and confer" procedure sanctioned by the Meyers-Milias-Brown (MMB) Act (Gov. Code, § 3505; see also San Francisco Charter, §§ 16.200-16.222) can provide a useful channel through which employee representatives may voice suggestions as to how the board's discretion should be exercised. This, of course, does not mean that the "meet and confer" process may supplant the charter's prevailing wage guidelines; the MMB Act itself recognizes the continued validity of such charter provisions. (Gov. Code, § 3500; see San Francisco Charter, § 16.201.) So long as the ordinance which is ultimately adopted conforms to the charter restrictions, however, the board's participation in "meet and confer" sessions constitutes no basis for voiding a subsequent enactment. (Cf. Alameda County Employees' Assn. v. County of Alameda (1973) 30 Cal.App.3d 518.)

In sum, we conclude that the taxpayer has failed to sustain his considerable burden of demonstrating that " 'upon no conceivable basis under all the evidence ' . . . can the rates as fixed be brought within the charter limitation.' " (City and and County of S.F. v. Boyd, *supra*, 22 Cal.2d 685, 690.) Unlike Walker v. County of Los Angeles, *supra*, 55 Cal.2d 626, this is not a case in which the official record of the board itself unequivocally demonstrates that the legislative body did not comply with the charter provision. And unlike Sanders v. City of Los Angeles (1967) 252 Cal.App.2d 488, this is not a case in which the legislative body has been led astray by a deceptive report prepared by a city administrative officer. Upon the present record, we are not prepared to hold that the wage increases of $50 per month per employee are so out of line as to constitute "palpably unreasonable and arbitrary" legislative action.[11]

We do agree, however, with the taxpayer's further contention that under the city charter the board of supervisors lacked authority to enact section XII of the ordinance,[12] which purports to establish a city-financed dental plan.[13] Section 8.420 of the charter establishes a distinct San Francisco Health Service Board to oversee the establishment and administration of all "medical care" plans for city employees. Sections 8.421 and 8.422, in turn, delegate to this health service board the initial authority for developing new "medical care" plans; the sections also provide that after a proposed plan has been adopted by two-thirds of the health service board, such plan is then transmitted to the board of supervisors where it may be enacted into law if it gains the approval of three-fourths of the boards' members.[14] Although section 8.430 of the charter leaves to the health service board the precise definition of "medical care," the legislative history of the provision and other sections of the charter indicate quite clearly that the city's health service system was intended to encompass dental care plans.[15]

In its present petition and replication, the city has made no attempt to defend the board of supervisors' entry into a field which the charter appears clearly to have delegated to the city health service board. Accordingly, we conclude that section XII of the ordinance is invalid.

The invalidity of the dental plan provision of the ordinance, however, does not taint the remainder of the legislation. Section XII of the ordinance is clearly distinct and severable from the salary schedule authorized by the ordinance; the taxpayer does not contend otherwise. Accordingly, we conclude that with the exception of section XII, ordinance No. 152-74 is valid.

4. *Resolution No. 44-9-Sp 1 was not adopted in violation of the Winton Act or the city charter. Although a portion of the resolution purporting to grant the Certificated Employee Council a veto over future changes in school board policy is invalid, that provision is severable and does not taint the entire resolution.*

As we have already discussed, the school board resolution at issue here cannot be overturned on the ground that it resulted from an illegal strike. The taxpayer, however, raises a series of additional objections to the resolution which we must now address. As we shall explain, although one of the taxpayer's criticisms is well taken, that single defect does not invalidate the entire enactment and does not taint the salary schedule.

The taxpayer initially argues that the instant school board resolution was adopted in violation of several provisions of the Winton Act (Ed. Code, § 13080 et seq.). From 1961 to 1965, the labor relations of public school employees and employers were governed by the terms of the Brown Act (Gov. Code. § 3525 et seq.), an enactment which applied to most public employees throughout the state.[16] In 1965, the Legislature enacted the Winton Act which established a separate labor relations framework for employees and employers in the state public school system.

The Winton Act, while preserving many of the basic concepts of the original Brown Act, also introduced several innovative features into the public school labor relations process. Two of the innovations have drawn particular attention: first, the act rejected the traditional concept of a single employee "bargaining agent" and established a "negotiating council" (now termed the "certificated employee council") based on proportional representation among all employee organizations which represent certificated employees within a district (Ed. Code, § 13085; see California Federation of Teachers v. Oxnard Elementary Sch. (1969) 272 Cal.App.2d 514); second, the act expanded the scope of the matters on which employees have a right to "meet and confer" with their employers beyond the traditional "wages, hours and working conditions" to encompass issues of broad educational policy as well. (Ed. Code, §§ 13080, 13085; see San Juan Teachers Assn. v. San Juan Unified Sch. Dist. (1974) 44 Cal. App.3d 232.) This latter innovation has been explained as "a recognition that school teachers, because of their expertise and dedication to the welfare of the school and their pupils, are particularly well suited to make a constructive contribution to the formulation of policy." (Grasko v. Los Angeles City Board of Education (1973) 31 Cal.App.3d 290, 302.)

The controversy in the instant case, however, does not directly involve either of these innovative features of the Winton Act, but rather concerns the proper interpretation of two separate sections of the act relating to the "meet and confer" process established by the legislation. The specific provisions at issue are Education Code section 13081, subdivision (d) and section 13088. Section 13081, subdivision (d) provides: " 'Meet and confer' means that a public school employer, or such representative as it may designate, and representatives of employee organizations shall have the mutual obligation to exchange freely information, opinions and proposals; and to make and consider recommendations under orderly procedures *in a conscientious effort to reach agreement by written resolution, regulation or policy of the school board effectuating such recommendations.*" (Emphasis added.) Section 13088 provides in relevant part: "The enactment of this article . . . shall not be construed as prohibiting a public school employer from making the final decision with regard to all matters specified under section 13085."

As our earlier discussion of the facts indicates, in the instant case the school board, by formal resolution, adopted the provisions of a written memorandum of understanding to which representatives of the school district and the certificated employee council had agreed after a series of "meet and confer" sessions. The taxpayer now contends that this school board resolution fails in its entirety because it allegedly rests upon a purportedly "binding" agreement which the school board or its representatives had no authority to execute. In support of this contention, the taxpayer relies heavily on a portion of the Court of Appeal decision of Grasko v. Los Angeles City Board of Education, *supra*, 31 Cal.App.3d 290, 300-307. As we explain, however, *Grasko* does not support the contention that the school board resolution is invalid.

In *Grasko*, the issue before the court did not turn upon whether a resolution, formally adopted by a board of education, was valid or not under the Winton Act, but rather whether, in the absence of such a resolution, a school board or its representatives had the authority to enter into a *binding written agreement* with representatives of employee associations. The *Grasko* court resolved this latter question in the negative, concluding that under the act a written agreement, though executed by representatives of both the employer and employees, could not, *in itself*, legally bind the school board. We agree with this conclusion. By the specific terms of section 13081, subdivision (d), the Winton Act provides that binding decisions arising out of the "meet and confer" process must be culminated "*by written resolution, regulation or policy of the governing board* effectuating [the negotiators'] recommendations." This language leaves no doubt that the Legislature intended to require the members of the school board themselves to approve, by formal board action, any "recommendations" before they became legally binding upon the district. Section 13088, quoted above, simply reinforces this conclusion. For this reason, the written memorandum of understanding executed by the meeting and conferring representatives in the present case in itself creates no legally binding rights against the school district.

The legal duty sought to be enforced in the case at bar, however, does not arise from the contractual memorandum of understanding, but rather from resolution No. 44-9-Sp 1, a formal school board resolution adopted at an official meeting by the governing board of the school district. Far from supporting the taxpayer's challenge to this resolution, the *Grasko* decision makes clear that such a formal resolution is entirely consistent with, and, in fact, contemplated by, the Winton Act. As the *Grasko* court observed: "[U]nder the Winton Act any agreements reached as a result of the meet and confer sessions must be implemented in the form of *resolutions*, regulations or policies of the governing board of the public school employer. . . ." (Emphasis added.) (31 Cal. App. 2d at p. 303.)

The taxpayer further contends, however, that the resolution at issue here is "tainted" by the "invalidity" of the preceding memorandum of understanding. The taxpayer appears to find three separate defects in the adopted procedure. In our view, the Winton Act fails to sustain any of the three objections.

First, the taxpayer points out that the resolution of the board simply incorporated the substantive terms of the memorandum of understanding; if the memorandum cannot stand, the taxpayer argues, neither can the resolution. This reasoning is simply a non sequitur. The memorandum of understanding is "invalid," or, more precisely unenforceable, simply because the Winton Act provides that binding agreements in this context can only be implemented through formal board action. The fact that the board, by formal resolution, chose to *adopt* completely the recommendations resulting from the "meet and confer" process certainly does not invalidate the resolution, for the Winton Act specifically authorizes board resolutions "*effectuating* [the negotiators'] recommendations." (Emphasis added.) (Ed. Code, § 13081, subd. (d).)

The taxpayer next objects to the written nature of the memorandum of understanding. Although the Winton Act

contains no specific provision authorizing meeting and conferring representatives to commit their "recommendations" to writing (cf. Gov. Code, § 3505.1), such authorization may fairly be implied from the terms of the act. In defining the "meet and confer" process, section 13081, subdivision (d) explicitly authorizes the respective representatives to agree on "recommendations" which may be effectuated by formal school board action. Thus, this section contemplates that such "recommendations" will be communicated to the school board, and since the section does not provide otherwise we see no reason why such communication cannot be accomplished through a written document, as well as through oral presentation.

Thirdly, the taxpayer argues that the ostensible "binding" nature of the memorandum of understanding necessarily taints the subsequent board resolution, contending that in light of this "binding agreement" the school board failed to exercise its legislative discretion when it subsequently incorporated the memorandum into its resolution. In the first place, however, it is not at all clear from the terms of the document that the memorandum was intended to preclude the school board's exercise of its own discretion. Although one passage of the memorandum does state that the memorandum shall be "binding and effective" from July 1, 1974, to June 30, 1975, and another section provides that "the Board will amend its policies . . . to give full force and effect" to the memorandum, the initial paragraph of the document conditions the entire agreement upon the *"adoption and ratification by [the representatives'] respective principals."* (Emphasis added.) This provision appears to leave the ultimate decision of adopting or rejecting the memorandum of understanding to the full school board.

Moreover, even if the memorandum had purported to be binding on the board without the board's formal affirmance by "written resolution, regulation or policy," the taxpayer has not established that the members of the board of education treated the memorandum as such. As we have explained, under the Winton Act the meeting and conferring representatives of the school board do not have authority to bind the board by signing a written agreement; the board retains the ultimate decision-making authority. Under well recognized legal principles, we must presume, in the absence of a contrary showing not demonstrated by the instant record, that the members of the school board complied with their official duty and exercised discretion in enacting the resolution at issue here. (Evid. Code, § 664; see, e.g., McGowan v. Ford (1895) 107 Cal. 177, 186-187.) Thus, even if the meeting and conferring representatives of the board did exceed the bounds of their authority in executing a "binding" agreement, such improper action of the board's agents does not suffice to vitiate the duly enacted resolution at issue here.

Accordingly, we conclude that the existence of the March 29 memorandum of agreement provides no basis for invalidating resolution No. 44-9-Sp 1.

In addition to challenging the process by which resolution No. 44-9-Sp 1 was adopted, the taxpayer also attacks one particular section of the resolution, which purports to preclude the board from subsequently revising or altering any of the other provisions of the resolution without the approval of the certificated employee council.[17] The taxpayer contends that this clause represents an improper limitation on subsequent board action and affects a delegation of the board's ultimate decision-making authority which is incompatible with the Winton Act. We believe the taxpayer's objections are well taken and we therefore conclude that the challenged portion of the resolution is invalid.

It is a familiar principle of law that no legislative board, by normal legislative enactment, may divest itself or future boards of the power to enact legislation within its competence. (See, e.g., Thompson v. Board of Trustees (1904) 144 Cal. 281, 283; McNeil v. City of South Pasadena (1913) 166 Cal. 153, 155-156; In re Collie (1952) 38 Cal.2d 396, 398.) Thus, a school board cannot, by resolution, bar itself or future boards from adopting subsequent resolutions which may alter earlier established policies. Yet the portion of the resolution presently at issue purports to effectuate just such a result; it seeks to place all the terms of the present resolution beyond the reach of future board action, except as the certificated employee council agrees to such future action. Under the authorities cited above, such a provision cannot stand.

Moreover, the challenged provision exhibits the additional defect of delegating the board's ultimate policy-making authority to private parties in contravention of the Winton Act. Resolution No. 44-9 Sp 1 deals with a wide variety of matters within the board's competence: among other subjects, it fixes the compensation for school board employees, allocates funds between different educational programs, and establishes the district policy on class size goals. The authority exercised by the board in passing on these matters has been specifically granted *to the school board* by various provisions of the Education Code and the San Francisco city charter (e.g., Ed. Code, §§ 931, 939, 1001, 1051, 1052, 9316, 13502 and 15801; San Francisco Charter, § 5.101); section 13088 of the Education Code contemplates that the board itself will retain the authority to make "the final decision" with respect to such matters. Undoubtedly the provision at issue here, granting the employee council a broad veto power within the board's policy-making domain, conflicts with this legislative mandate. (See Grasko v. Los Angeles City Board of Education, *supra*, 31 Cal.App.3d 290, 303; San Juan Teachers Assn. v. San Juan Unified Sch. Dist., *supra*, 44 Cal. App.3d 232, 253.) Accordingly, this portion of the resolution is invalid.[18]

Although the taxpayer further asserts that the invalidity of this segment of the resolution taints the entire resolution, in our view the provision is clearly severable. As this court has recently reiterated: " '[I]n considering the issue of severability it must be recognized that the general presumption of constitutionality, fortified by the express statement of a severability clause, normally calls for the sustaining of any valid portion of a statute unconstitutional in part. This is possible and proper where the language of the statute is mechanically severable, that is, where the valid and invalid parts can be separated by paragraph, sentence, clause, phrase or even single words. . . .' " (Emphasis deleted.) (Santa Barbara Sch. Dist. v. Superior Court (1975) 13 Cal.3d 315, 330 (quoting In re Blaney (1947) 30 Cal.2d 643, 655).)

Resolution No. 44-9-Sp 1 does contain a severability clause[19] and the invalid provision discussed above is unquestionably "mechanically severable" from the remainder of the resolution, being contained entirely in a separate paragraph.

"The final determination depends on whether 'the remainder . . . is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute' [citation] or 'constitutes a completely operative expression of the legislative intent . . . [and] [is] [not] so connected with the rest of the statute as to be inseparable.' [Citation.]" (Santa Barbara Sch. Dist. v. Superior Court, *supra*, 13 Cal.3d at p. 331.) In the instant case, the additional substantive portions of the resolution can without question stand without the challenged provision, and we have little doubt that the school board did not consider the private "veto" power such an inseparable part of the resolution that it would have declined to enact the resolution in its absence.[20] Under these circumstances, we conclude that the invalid provision is severable and does not taint the entire enactment.

Finally, we reach the taxpayer's concluding contention, in which he asserts that the school board resolution is invalid under section 5.101 of the San Francisco city charter. Section 5.101 provides in part that the school board shall adopt a schedule of salaries for the next ensuing year "between the 1st and 21st day of May of each year." Resolution No. 44-9-Sp 1, however, was adopted on April 9, and the taxpayer contends that this early enactment voids the entire resolution.

As a general rule, an ordinance or resolution of an inferior legislative body is invalid if the mandatory prerequisites to its enactment are not *substantially* observed. (See. e.g., Walker v. County of Los Angeles, *supra*, 55 Cal.2d 626, 639; City and County of S.F. v. Boyd, *supra*, 22 Cal.2d 685, 692.) As far as we have been able to ascertain, section 5.101's "May 1-May 21" requirement was intended to ensure that the school board's salary schedule would be prepared in ample time to be included in the city budget and in the annual determination of the city and county tax rate, and to afford school district employees fair notice of their forthcoming salaries prior to the beginning of the new school year. These purposes were obviously fulfilled in the instant case, since the resolution was adopted well before the May 21 deadline specified by the charter. Under these circumstances, we think it would be entirely improper to void this legislative measure for the technical, insubstantial noncompliance with the city charter provision. The taxpayer has cited no case in which a court has overturned legislation on such an inconsequential basis.

5. *Conclusion*

We briefly recapitulate the conclusions we have reached in this opinion. Initially, we hold that neither the ordinance nor the resolution may be invalidated on the basis that it was enacted as a result of an illegal strike. Second, we have determined that although the portion of the ordinance establishing a dental plan is invalid, the present pleadings do not demonstrate that the ordinance's salary schedule conflicts with the city charter's prevailing wage provisions. Finally, we have concluded that the school board resolution was not adopted in violation of the Winton Act, but that a severable portion of the resolution, purporting to grant the certificated employee council a veto over future board decisions, is invalid.

Let a writ of mandate issue, compelling the respondent controller to draw and deliver warrants reflecting the salary increases granted by ordinance No. 152-74 and resolution No. 44-9-Sp 1.

TOBRINER, J.

WE CONCUR:

WRIGHT, C.J.

McCOMB, J.

MOSK, J.

SULLIVAN, J.

CLARK, J.

RICHARDSON, J.

[Campanion case, *City and County of San Francisco et., v. Superior Court of the City and County of San Francisco*, S.F. 23211, Super. Ct. No. 672921, not reprinted.]

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[1] [Omitted.]

[2] [Omitted.]

[3] [Omitted.]

[4] See Los Angeles Unified School Dist. v. United Teachers (1972) 24 Cal.App.3d 142; Trustees of Cal. State Colleges v. Local 1352, S.F. State etc. Teachers (1970) 13 Cal.App.3d 863; City of San Diego v. American Federation of State etc. Employees (1970) 8 Cal.App.3d 308; Almond v. County of Sacramento (1969) 276 Cal.App.2d 32.

[5] The only general state statute which specifically speaks to the public employee strike issue is Labor Code section 1962, which prohibits strikes by firefighters. The employee associations argue that the absence of a similar statutory prohibition of other public employee strikes represents an implicit authorization of such action. (Cf. Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen (1960) 54 Cal. 2d 684, 687-691.)

[6] [Omitted.]

[7] We explained in our recent decision in County of Los Angeles v. Superior Court (1975) ____ Cal. 3d ____, ____ and footnote 5, that this principle fully applies to legislative action of local legislative bodies. (See, e.g., Nickerson v. San Bernardino, *supra*, 179 Cal. 518, 522-524; Hadacheck v. Alexander (1915) 169 Cal. 616, 617; 5 McQuillen, Municipal Corporations (3d ed. 1969) § 16.90, pp. 287-290.) As the *Nickerson* court observed: "When the legislature has committed to a municipal body the power to legislate on given subjects . . ., courts of equity have no power to interfere with such a body in the exercise of its legislative functions. . . . Whether, in the exercise of legislative powers, a board acts wisely or unwisely is no concern of the courts. They cannot enter the board room and substitute their judgment for that of the board

nor interfere at all with its action unless the board is exceeding its legislative powers, or its judgment or discretion is being fraudulently or corruptly exercised."

Although petitioner here, like the taxpayer in the *County of Los Angeles* case, relies heavily upon language in our recent decision in Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal. 3d 28, 36 to the effect that "the separation of powers doctrine is inapplicable to government below the state level," "the context of *Strumsky* reveals [that] the quoted statement related only to the question of whether local governmental bodies could exercise both judicial and legislative functions. . . ." (County of Los Angeles v. Superior Court, *supra*, _____Cal.3d at p. _____, fn. 5.)**

*Slip opinion at pages 8-9 and footnote 5.

**Slip opinion at page 9, footnote 5.

[8][Omitted.]

[9][Omitted.]

[10]Although the city asserts that the taxpayer lacks "standing" to rely on the charter's prevailing wage provisions, arguing that such provisions are basically "minimum wage" laws which can only be enforced at the behest of employees, numerous California decisions have entertained challenges brought by taxpayers claiming that a given wage exceeds prevailing wages. (See, e.g., City and County of S.F. v. Boyd, *supra*, 22 Cal.2d 685, 693; San Francisco Chamber of Commerce v. City etc. of S.F. (1969) 275 Cal.App.2d 499, 500.)

[11][Omitted.]

[12][Omitted.]

[13]Although the city contends that the validity of the dental plan provision is not properly at issue in the present proceeding, we do not agree. It has long been clear, of course, that fringe benefits, such as the challenged dental plan, form an integral part of an employee's compensation or "full salary" (see, e.g., Mass. v. Board of Education (1964) 61 Cal.2d 612, 623) and we believe that under the present pleadings the controller's obligation to pay all compensation authorized by the ordinance has properly been brought into question.

[14][Omitted.]

[15][Omitted.]

[16][Omitted.]

[17]The second numbered paragraph of the memorandum, incorporated into the resolution, provides: "No change, revision, alteration or modification of this Memorandum of Understanding shall be valid unless the same is ratified by the Board and by action of the constituent organizations of the Certificated Employees Council under the internal rules of the Council, and endorsed in writing by the Board's representative and the chairman of the Certificated Employees Council."

[18]It should be noted, however, that our voiding of this portion of the resolution does not leave the school board free to alter all of the provisions of resolution No. 44-9-Sp 1 at will. Past cases clearly indicate, for example, that a school board may not lower salaries fixed by its salary schedule after the beginning of the school year. (See, e.g., Rible v. Hughes (1944) 24 Cal.2d 437, 444; Abraham v. Sims (1935) 2 Cal.2d 698, 711; Aebli v. Board of Education (1944) 62 Cal.App.2d 706, 748-751; cf. Ed. Code, § 13510.) This proposition follows from the fact that such salary schedules become an integral part of each teacher's employment contract. (See, e.g., Holbrook v. Board of Education (1951) 37 Cal.2d 316, 331-332; Rible v. Hughes, *supra*, 24 Cal.2d 437, 443.) To date, however, the cases have not defined to what extent the principle reflected in the above cited cases would apply to the more general matters of "educational policy," as contrasted with matters of "wages, hours and working conditions," covered by the instant resolution.

[19][Omitted.]

[20]The possibility that the employee organizations may have declined to agree to the *memorandum of understanding* without the inclusion of such a clause is, of course, entirely irrelevant to the question of the validity of the *resolution*, adopted pursuant to the independent discretion of the board.

C

TAB C

CONTRACT ADMINISTRATION: THE PROCESS AND ITS TOOLS

The process of contract administration can be divided into three distinct functions: 1) *Interpretation* of contract provisions; 2) *Implementation* of contract provisions; and 3) *Incorporation* into the contract of the precedents set by interpretation and implementation. These may be referred to as the "three I's" of contract administration.

Complex in nature, contract administration is a process in which these functions interrelate and feed back into one another. The execution of these functions calls for the utilization of most, if not all, of the various methods, structures, and tools familiar to the collective bargaining process. In the public sector, methods such as the marshalling of public opinion through media campaigns or the politicking of an agency's legislative body, are frequently employed to obtain collective bargaining goals, and they may be used as well in matters relating to contract administration. In a formal sense, however, such tactics must be considered "end runs" around the bilateral administrative process.

As noted earlier, the approach taken in this manual is to view contract administration as a continuation of the bilateral collective bargaining relationship. This section focuses on those methods,

structures, and tools which require the bilateral involvement of the parties in their administrative functions. Before doing so, however, we will more fully discuss the first of the functions of these "three I's."

I. INTERPRETIVE FUNCTION

The term contract interpretation in this context, means the understanding of a contractural provision which is enforceable by the parties to the agreement. The interpretive function is shared by the parties, not in the sense that it may be equally agreeable to them, but in the sense that it is binding upon them. Interpreting the agreement, then, is the process through which the provisions of the contract obtain their legal definition.

In their highly valuable work, Arbitration and Collective Bargaining,[1/] Dr. Paul Prasow and Edward Peters analyze the types of interpretive decisions which are confronted in the contract administration process. The two arbitrators view the written terms and conditions of the collective agreement as falling into two basic categories, that is, into "substantive issues" and recurrent issues" requiring "modes of procedure" for their adjustment.

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[1]Paul Prasow and Edward Peters, Arbitration and Collective Bargaining: Conflict Resolution in Labor Relations, McGraw-Hill Book Company, New York, 1970.

II. SUBSTANTIVE ISSUES

In defining the substantive issue, Prasow and Peters refer to those types of issues where " . . . once negotiated, they cannot be unilaterally changed until the contract is open for negotiation." These are the fixed or one-time issues such as wage rates, vacations, or absolute seniority systems. If a question arises over such an issue, the substance of the issue is dealt with definitively and it is unlikely to arise again during the contract's term.

An example of a substantive issue might be whether premium shift pay should be given to those employees who begin work one hour before the start of a normal swing shift. Whether the answer is yes or no, the interpretation as to the proper rate of pay will apply to all employees working those hours for the duration of the agreement. The question is settled. It has been dealt with substantively.

III. RECURRENT ISSUES AND MODES OF PROCEDURES

The second type of issue faced by the parties in administering their contract can be categorized as "recurrent" issues. Such issues generally arise from the use of relative--as opposed to absolute--language in the contract. Each such issue must be judged individually on its merits. Once a decision is arrived at by the parties, it may lend meaning to the intent of a contract provision. However, all similar cases still require individual determination.

Examples of recurrent issues would be questions of whether an employer was "arbitrary and capricious" in a disciplinary matter; did a steward abuse "reasonable time off" provisions; or, in a modified seniority system, is the junior employee "head and shoulders" above the senior employee in terms of ability to perform the higher rated job.

In dealing with recurrent issues, the parties to the agreement can hope only to arrive at a "mode of procedure" in resolving the issue. The mode of procedure is simply an agreed upon means by which the dispute will be settled, taking the form of informal negotiations, grievance arbitration, or some other means of conflict resolution. It is likely, however, that attention to such procedures will occupy much of the time and resources of the parties in their administrative efforts.

As the foregoing discussion suggests, a contract may be interpreted through agreement of the parties themselves or, as noted earlier, through third-party intervention. Mutual agreement becomes binding upon the parties for the duration of the agreement, if such agreement of intent can be demonstrated through practice of the parties or through other demonstrable forms of evidence.[2/] Third party interpretation develops its binding nature through such contractural provisions as arbitration, or through direct court interpretation of the contract. These are, in effect, tools of the interpretation process.

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[2]See sections of this manual relating to past practice and precontract negotiation.

IV. TOOLS OF INTERPRETATION

The grievance procedure is the primary tool by which the collective bargaining contract is interpreted. However, since few agreements are tested through this process in each and every clause, other methods are needed as well to determine contract meaning. Discussed below are the tools available for interpreting the agreement and how they may be used.

A. Negotiations: Many, if not most, issues of contract interpretation are resolved through negotiations of the parties. Included here are those negotiations preceding the adoption of the agreement, as well as the formal and informal negotiations regarding contract interpretation which are conducted during the life of the contract. In some cases these negotiations will be carried on within the grievance process.[3/] In others, negotiations take place apart from this process. Four methods can be used to confirm agreement on contract interpretation reached in negotiations:

1. Evidentiary proof through witnesses, memoranda, notes, etc.
2. Informal, but knowing, acquiescence to practices engaged in by the parties in implementing the agreement.

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[3]For a full description and analysis of this subject the reader is referred to "Grievance Handling and Preparing for Arbitration," by John Spitz, Institute of Industrial Relations, UCLA, 1976.

3. Formal stipulation through the use of "side letters"[4/] exchanged by the parties.

4. Agreement addendum serving to clarify ambiguous terminology.

B. Fact Finding/Advisory Arbitration: As with binding arbitration, the parties to a contract may agree to submit an issue to third party fact-finding or advisory arbitration for interpretation, with or without first processing the matter through the grievance procedure. Fact-finding has been found to be especially useful in situations in which there is a good-faith disagreement over objective data.[5/]

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[4]A "side letter" is a letter either jointly signed or exchanged by the parties stipulating to a given point of interpretation. This method is particularly useful for interpreting politically sensitive matters. An example of the latter might be found in an agency in which a number of unions represent different units. In such a situation, and out of deference to past practice, the employer may be willing to agree to a given interpretation of a clause for one union which he would not be willing to extend to the other units. By its semi-confidential nature, the "side letter" provides an excellent mechanism for such agreements.

[5]Mediation is not listed here as an interpretive tool since it can be viewed as a form of "assisted" negotiations. It should be noted, however, that under Section 3548 of the EERA, either party may declare an impasse over any matter "within the scope of representation" and request mediation through the EERB. If deemed appropriate, the mediator may then call for fact finding, with the "costs for the services of the panel chairman ... (being) borne by the (Educational Employee Relations) board." Those covered by the Meyers-Milias-Brown Act or the PUC Code do not enjoy such state-assisted services, although fact finding is not precluded. See Appendix: Meyers-Milias-Brown Act in the preceding section.

A typical issue in this context might be one involving the prevailing rate of pay in comparable agencies to be used for salary-setting purposes in a mid-contract wage adjustment. Since this approach is limited to "finding of facts," however, it is not particularly useful for determining questions of equity (i.e., fairness of application), unless recommendations are permitted. Where the fact finder's authority does allow for recommendations the process becomes all but indistinguishable from advisory arbitration. In either case, it must be remembered that the process is "advisory." The advisory award must therefore be interpreted through the use of one of the other tools outlined here in order to become binding. Most generally, it is referred back to negotiations.

C. Binding Arbitration: Binding arbitration is used almost universally in private-sector labor relations for settling disputes over contract interpretation. In the public sector, under the EERA, it is a negotiable item. Also, a growing number of local agencies governed by the MMBA have adopted agreements in which binding arbitration is the final step of the grievance procedure.[6/] As an interpretive tool binding arbitration has the following advantages:

a. It brings to the dispute a neutral third party experienced and competent to judge labor relations matters.

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[6]"Rights" arbitration refers to the arbitration of interpretations of an agreement or its disciplinary functions. "Interest" arbitration refers to the arbitration of issues to be included in a contract.

b. It is expeditious. Compared to time-consuming court proceedings, most arbitrations can be readily scheduled and decision rendered within 30 days of the hearing.

c. The decision is enforceable in the courts.[7]

d. Compared to court proceedings, arbitration involves much less of a financial burden. Lay representatives can be used by the parties in the proceedings, thereby limiting costs to that of the arbitrator's fee, which is normally shared by the parties.[8]

D. Legal Action: As a legally binding contract, the collective bargaining agreement is enforceable in the courts.[9] However, by virtue of its decision in upholding or rejecting the claim of the plaintiff, the court also serves the function of interpreting--as well as that of implementing--the provision in question. When there

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[7]The view of the U.S. Supreme court on arbitration, and its enforceability were put forward in three cases known as the "Steel Workers Trilogy." The most representative of these cases, *Steelworkers v. Warrior and Gulf Navigation Co.*, is included in the appendix of this section. The views of the California Supreme Court on the subject of arbitration are expressed in the Vallejo decision. Included in appendix to Tab A. Also see note Tab A re: Charter Cities and Counties.

[8]Selection of a "competent" arbitrator is fundamental to this process in all of its aspects and implications. Assistance in this regard is available from the state Department of Industrial Relations, Conciliation Service; or the American Arbitration Association offices in San Francisco or Los Angeles.

[9]See Appendix: *Glendale City Employees Association v. City of Glendale*, in Tab A.

is a violation of an agreement, the aggrieved party may sue for breach of contract. Where irrevocable harm may be suffered, more speedy relief may be available through the use of writs of mandate or prohibition. In *Steelworkers v. Warrior and Gulf Navigation*[10/] it was established in the private sector that suit may be filed to enforce an agreement to arbitrate. This principle was upheld in testing a city charter amendment in regard to arbitration in the Vallejo Fire Fighters decision by the California Supreme Court.[11/]

Moreover, if an arbitrator is alleged to have violated his or her authority, propriety, or technical procedure, a petition may be filed with the court to vacate the award interpreting the agreement. It should be noted, however, that disagreement with the interpretation is not sufficient cause to seek vacation of an arbitration award. The basis of such action is limited to those factors set forth in the California Code of Civil Procedure (California Arbitration Law).[12/]

V. IMPLEMENTATION

It has frequently been said of American labor relations that "management acts and labor re-acts." While in the volatile field of public

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[10]See Supra Note 7.

[11]See Appendix to Tab A: *Firefighters Union Local 1186 v. City of Vallejo.*

[12]California Code of Civil Procedure, Section 1280-1292.2. Also, see *Steelworkers v. Warrior Navigation Co.*

sector labor relations this view has been known to be questioned, its validity is nowhere more evident than in contract implementation.

By definition, it is management who manages an agency. Arbitrators may determine what is appropriate to be implemented in a collective bargaining contract, but cannot enforce implementation. The courts may order implementation, but are in reality limited to making non-compliance painful. Thus, whether implementation involves issuing of checks containing a raise, granting a higher number of vacation days, or ordering a lay-off according to the seniority provisions of an agreement, it is the employer who implements the majority of a given contract's provisions.

During the implementation of a contract, the labor organization is largely placed in a position of responding to the employer's actions. In common parlance the union "polices" the contract, making sure that its provisions are observed. In addition, there are some actions of contract implementation for which the union as well as the employer can be held responsible. They fall into three categories: mandated, permitted, or prohibited activities. Examples of these activities for both management and labor are outlined below:

A. Mandated Activity: The granting of a pay raise by a certain date would be a typical mandated management act. The submission of proposals for a wage reopener by a certain deadline date would be a typical mandated activity by labor.

B. Permitted Activity: This would include all those normal management activities which are not specifically governed by the contract or past practices of the parties. A typical example in the public sector would be drawing up of civil service exams, or the determination of the agency's mission or organization. For the labor organization a key example would be the training and designation of shop stewards.[13/] Another permitted activity would be exercising its right to visit work sections to observe the implementation of the contract.

C. Prohibited Activity: This includes all the "thou shalt not" sections of the contract. For the employer, an example would be the prohibition of discriminating against employees because of union membership or activity. For the labor organization, it might include prohibitions against picketing, striking, or other concerted activity during the agreement's term.

As these activities have been described here, either party would have ground to seek legal action when there was a violation by the other of a mandated or prohibited activity under the contract. In some cases, such as the union's failure to submit contract proposals by

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[13] An employer may be mandated by the contract to recognize properly appointed stewards. In such situations, however, it is the responsibility of the union to see that stewards are trained and so designated.

by a certain deadline, the violation may simply have the effect of insulating one party from the actions of the other; the union could then lose its rights to negotiate a wage reopener. Another example of a prohibited activity would be the employer's failure to take proper disciplinary action against an employee during the mandated time limits prescribed by the contract. In that case the employer loses the right to proceed due to procedural violation. When an action is permissive, of course, neither party could force the other to exercise its rights.

It must be emphasized that the contract presents the most immediate--but not the sole--source of rights and obligations of the parties during its implementation. As a private agreement between the parties, it will be interpreted by the courts and by arbitrators in the context of statutory, constitutional and common law understandings. In the latter case, it should be re-emphasized that the very actions of the parties in implementing the agreement become part of this "common law" to the extent that they become recognized past practices.[14/] In this sense, contract implementation interacts directly with contract interpretation.

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[14]See: Comments of Archibald Cox quoted by the U.S. Supreme Court under "Collective Agreement" in *Steelworkers v. Warrior Navigation Co.* in appendix.

VI. INCORPORATION: AN INTEGRATIVE FUNCTION

The third of the three I's of contract administration is incorporation. Basically an integrative function, it is the means by which interpretation and implementation are added to the understandings known as the contract.

Incorporation can perhaps be viewed as an abstract function, but it is much more a process of information dissemination.

As we have indicated, contract administration does not only involve those who may be officially designated as responsible for this process. Interpretations and acts of implementation by those governed by the contract will not only affect its application, but its real meaning as well. Contract administration, then involves, all those who are governed by the contract.

Against this background, the incorporation function is seen as a three-part procedure:

(1) Incorporation adds to the agreement those understandings which result from the functions of interpretation and implementation.

(2) Incorporation requires an analysis of the agreement to determine what effect a specific act of interpretation or implementation may have on the entire contract.

(3) Incorporation requires that this integrated understanding be disseminated to all those affected by it who will, in turn, have an effect upon it. If new ambiguities or misunderstandings are raised by this three-part incorporation process, then they feed back to the interpretive--or first--function of contract administration.

SUMMARY

In this section contract administration has been considered an on-going, bilateral process. While other activities, such as political action, may be necessary or desirable to advance a given party's interest in the administration process, they have not been dealt with since they are optional, unilateral initiatives. The key to the approach taken here is the bilateral nature of contract administration.

Contract administration deals with two types of issues in the agreement: (1) substantive issues, and (2) recurrent issues. Substantive issues are governed by definitive decisions. While recurrent issues are dealt with only individually through "modes of procedures" effected by the parties.

As a process, contract administration consists of three functions, called here "three I's". These involve the procedures of Interpretation, Implementation, and Incorporation of contract provisions.

Interpretation refers to the "enforceable" definitions of the agreement, not necessarily the viewpoint taken by the parties. Implementation, refers to the types of provisions set forth in the contract (i.e., Mandated, Permissive, and Prohibited) and stresses that the manner in which these provisions are observed will further define or interpret the agreement. In addition, it has been indicated that in incorporating these interpretations and acts of implementation, new ambiguities or misunderstandings may arise which "feed back" into the process of contract administration.

In brief, the elements of the contract administration process are viewed here not only as being interrelated, but as part of a circular process.

APPENDIX TO TAB C

Steelworkers v. Warrior and Gulf Navigation

STEELWORKERS v. WARRIOR NAVIGATION CO.

Supreme Court of the United States

UNITED STEELWORKERS OF AMERICA v. WARRIOR AND GULF NAVIGATION COMPANY, No. 443. June 20, 1960

LABOR - MANAGEMENT RELATIONS ACT

—Arbitration agreement — Enforcement—Role of courts ▶94.09 ▶94.750

In suits under Section 301 of LMRA for specific performance of collectively-bargained arbitration agreements, arbitration should be ordered unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

—Arbitration agreement—Arbitrable issue—Subcontracting of work ▶94.166 ▶2.01 ▶117.38

Union is entitled, in action brought under Section 301 of LMRA, to an order requiring employer to arbitrate grievance alleging that its contracting-out of work violated collective bargaining agreement, notwithstanding provision excluding from arbitration matters which are "strictly a function of management." Such phrase must be interpreted as excluding only matters over which contract gives management complete control and unfettered discretion, and contracting-out of work does not fall within this category. Grievance therefore involves a dispute as to contract's meaning and application which the parties had agreed would be determined by arbitration.

On writ of certiorari to the U.S. Court of Appeals for the Fifth Circuit (44 LRRM 2567, 269 F.2d 633). Reversed.

David E. Feller (Arthur J. Goldberg, Elliot Bredhoff, and Jerry D. Anker with him on the brief), Washington, D.C., for petitioner.

Samuel Lang, New Orleans, La. (Richard C. Keenan, New Orleans, La., and T. K. Jackson, Jr., Mobile, Ala., with him on the brief), for respondent.

Respondent transports steel and steel products by barge and maintains a terminal at Chickasaw, Alabama, where it performs maintenance and repair work on its barges. The employees at that terminal constitute a bargaining unit covered by a collective bargaining agreement negotiated by petitioner union. Respondent between 1956 and 1958 laid off some employees, reducing the bargaining unit from 42 to 23 men. This reduction was due in part to respondent contracting maintenance work, previously done by its employees, to other companies. The latter used respondent's supervisors to lay out the work and hired some of the laid-off employees of respondent (at reduced wages). Some were in fact assigned to work on respondent's barges. A number of employees signed a grievance which petitioner presented to respondent, the grievance reading:

"We are hereby protesting the Company's actions, of arbitrarily and unreasonably contracting out work to other concerns, that could and previously has been performed by Company employees.

"This practice becomes unreasonable, unjust and discriminatory in view of the fact that at present there are a number of employees that have been laid off for about 1 and ½ years or more for allegedly lack of work.

"Confronted with these facts we charge that the Company is in violation of the contract by inducing a partial lockout, of a number of the employees who would otherwise be working were if not for this unfair practice."

[GRIEVANCE PROCEDURE]

The collective agreement had both a "no strike" and a "no lockout" provision. It also had a grievance procedure which provided in relevant part as follows:

"Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.

"Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences but an earnest effort shall be made to settle such differences immediately in the following manner:

"A. For Maintenance Employees:

"First, between the aggrieved employees, and the Foreman involved; Second, between a member or members of the Grievance Committee designated by the Union,

and the Foreman and Master Mechanic."

* * *

"Fifth. If agreement has not been reached the matter shall be referred to an impartial umpire for decision. The parties shall meet to decide on an umpire acceptable to both. If no agreement on selection of an umpire is reached, the parties shall jointly petition the United States Conciliation Service for suggestion of a list of umpires from which selection will be made. The decision of the umpire shall be final."

Settlement of this grievance was not had and respondent refused arbitration. This suit was then commenced by the union to compel it.[1]

[THEORY OF COURTS BELOW]

The District Court granted respondent's motion to dismiss the complaint. 163 F. Supp. 702, 43 LRRM 2328. It held after hearing evidence, much of which went to the merits of the grievance, that the agreement did not "confide in an arbitrator the right to review the defendant's business judgment in contracting out work." Id., at 705. It further held that "the contracting out of repair and maintenance work, as well as construction work, is strictly a function of management not limited in any respect by the labor agreement involved here." Ibid. The Court of Appeals affirmed by a divided vote, 269 F.2d 633, 44 LRRM 2567, the majority holding that the collective agreement had withdrawn from the grievance procedure "matters which are strictly a function of management" and that contracting out fell in that exception. The case is here on a writ of certiorari. 361 U.S. 912.

We held in Textile Workers v. Lincoln Mills, 353 U.S. 448, 40 LRRM 2113, 2120, that a grievance arbitration provision in a collective agreement could be enforced by reason of § 301(a) of the Labor Management Relations Act[2] and that the policy to be applied in enforcing this type of arbitration was that reflected in our national labor laws. Id., at 456-457. The present federal policy is to promote industrial stabilization through the collective bargaining agreement.[3] Id., at 453-454. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.[4]

Thus the run of arbitration cases, illustrated by Wilko v. Swan, 346 U.S. 427, become irrelevant to our problem. There the choice is between the adjudication of cases or controversies in courts with established procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal arbitration tribunal on the other. In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.

[COLLECTIVE AGREEMENT]

The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. See Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999, 1004-1005. The collective agreement covers the whole employment relationship.[5] It calls into being a new

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1 Section 301(a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. § 185 (a), provides:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." See Textile Workers v. Lincoln Mills, 353 U.S. 448, 40 LRRM 2113, 2120.

2 Note 1, supra.

3 In § 8(d) of the 1947 Act, 29 U.S.C. § 158 (d), Congress indeed provided that where there was a collective agreement for a fixed term the duty to bargain did not require either party "to discuss or agree to any modification of the terms and conditions contained in" the contract. And see Labor Board v. Sands Mfg. Co., 306 U.S. 332, 4 LRRM 530.

4 Complete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement being the *"quid pro quo"* for the agreement not to strike. Textile Workers v. Lincoln Mills, 353 U.S. 448, 455, 40 LRRM 2113, 2120.

5 "Contracts which ban strikes often provide for lifting the ban under certain conditions. Unconditional pledges against strikes are, however, somewhat more frequent than conditional ones. Where conditions are attached to no-strike pledges, one or both of two approaches may be used: certain *subjects* may be exempted from the scope of the pledge, or the pledge may be lifted after certain *procedures* are followed by the union. (Similar qualifications may be made in pledges against lockouts.)

"Most frequent conditions for lifting no-strike pledges are: (1) The occurrence of a

common law—the common law of a particular industry or of a particular plant. As one observer has put it:[6]

"* * * [I]t is not unqualifiedly true that a collective-bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded. There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words."

A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability pre-exists the negotiations. Rather it is between having that relationship governed by an agreed upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces. The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time. Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is, in the words of the late Dean Shulman, "a compilation of diverse provisions; some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith." Shulman, supra, at 1005. Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators. Courts and arbitration in the context of most commercial contracts are resorted to because there has been a breakdown in the working relationship of the parties; such resort is the unwanted exception. But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement.

[SCOPE OF ARBITRATION CLAUSE]

Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement. The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement.

"A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. * * *" Shulman, supra, at 1016.

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deadlock in wage reopening negotiations; and (2) violation of the contract, especially noncompliance with the grievance procedure and failure to abide by an arbitration award.

"No-strike pledges may also be lifted after compliance with specified procedures. Some contracts permit the union to strike after the grievance procedure has been exhausted without a settlement, and where arbitration is not prescribed as the final recourse. Other contracts permit a strike if mediation efforts fail, or after a specified cooling-off period." Collective Bargaining Negotiations and Contracts, Bureau of National Affairs, Inc., 77:101.

6 Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1498-1499 (1959).

The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

[JUDICIAL INQUIRY]

The Congress, however, has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or agreed to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.[7]

We do not agree with the lower courts that contracting-out grievances were necessarily excepted from the grievance procedure of this agreement. To be sure the agreement provides that "matters which are strictly a function of management shall not be subject to arbitration." But it goes on to say that if "differences" arise or if "any local trouble of any kind" arises, the grievance procedure shall be applicable.

Collective bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from the performance of them. Management hires and fires, pays and promotes, supervises and plans. All these are part of its function, and absent a collective bargaining agreement, it may be exercised freely except as limited by public law and by the willingness of employees to work under the particular, unilaterally imposed conditions. A collective bargaining agreement may treat only with certain specific practices, leaving the rest to management but subject to the possibility of work stoppages. When, however, an absolute no-strike clause is included in the agreement, then in a very real sense everything that management does is subject to the agreement, for either management is prohibited or limited in the action it takes, or if not, it is protected from interference by strikes. This comprehensive reach of the collective bargaining agreement does not mean, however, that the language, "strictly a function of management" has no meaning.

"Strictly a function of management" might be thought to refer to any practice of management in which, under particular circumstances prescribed by the agreement, it is permitted to indulge. But if courts, in order to determine arbitrability, were allowed to determine what is permitted and what is not, the arbitration clause would be swallowed up by the excep-

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7 It is clear that under both the agreement in this case and that involved in American Manufacturing Co., ante, p.—, 46 LRRM 2414, the question of arbitrability is for the courts to decide. Cf. Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1508-1509. Where the assertion by the claimant is that the parties excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator, the claimant must bear the burden of a clear demonstration of that purpose.

tion. Every grievance in a sense involves a claim that management has violated some provision of the agreement.

[FUNCTION OF MANAGEMENT]

Accordingly, "strictly a function of management" must be interpreted as referring only to that over which the contract gives management complete control and unfettered discretion. Respondent claims that the contracting-out of work falls within this category. Contracting-out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators.[8] A specific collective bargaining agreement may exclude contracting-out from the grievance procedure. Or a written collateral agreement may make clear that contracting-out was not a matter for arbitration. In such a case a grievance based solely on contracting-out would not be arbitrable. Here, however, there is no such provision. Nor is there any showing that the parties designed the phrase "strictly a function of management" to encompass any and all forms of contracting-out. In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator.

The grievance alleged that the contracting-out was a violation of the collective bargaining agreement. There was, therefore, a dispute "as to the meaning and application of the provisions of this Agreement" which the parties had agreed would be determined by arbitration.

The judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict. Whether contracting-out in the present case violated the agreement is the question. It is a question for the arbiter, not for the courts.

Reversed.

Mr. Justice FRANKFURTER concurs in the result.

Mr. Justice BLACK took no part in the consideration or decision of this case.

Dissenting Opinion

Mr. Justice WHITTAKER, dissenting.

Until today, I have understood it to be the unquestioned law, as this Court has consistently held, that arbitrators are private judges chosen by the parties to decide particular matters specifically submitted;[1] that the contract under which matters are submitted to arbitrators is at once the source and limit of their authority and power;[2] and that their power to decide issues with finality, thus ousting the normal functions of the courts, must rest upon a clear, definitive agreement of the parties, as such powers can never be implied. United States v. Moorman, 338 U.S. 457, 462;[3] Mercantile Trust Co. v. Hensey, 205 U.S. 298, 309.[4] See also Fernandez & Hnos v. Rickert Mills, 119 F.2d 809, 815 (C.A. 1st Cir.);[5] Marchant v. Mead-Morrison Mfg. Co., 252 N.Y. 284, 299, 169 N.E. 386, 391;[6] Continental

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8 See Celanese Corp. of America, 33 LA 925, 941 (1959), where the arbiter in a grievance growing out of contracting-out work said:

"In my research I have located 64 published decisions which have been concerned with this issue covering a wide range of factual situations but all of them with the common characteristic—i. e., the contracting-out of work involved occurred under an Agreement that contained no provision that specifically mentioned contracting-out of work."

1 "Arbitrators are judges chosen by the parties to decide the matter submitted to them." Burchell v. Marsh, 17 How. 334, 349.

2 "The agreement under which [the arbitrators] were selected *was at once the source and limit of their authority*, and the award, to be binding, must, in substance and form, conform to the submission." Continental Ins. Co. v. Garrett, 125 F. 589, 590 (C.A. 6th Cir.)—Opinion by Judge, later Mr. Justice, Lurton. (Emphasis added.)

3 "It is true that *the intention of the parties to submit their contractual disputes to final determination outside the courts should be made manifest by plain language.*" United States v. Moorman, 338 U.S. 457, 462. (Emphasis added.)

4 "To make such [an arbitrator's] certificate conclusive *requires plain language in the contract*. It is not to be implied." Mercantile Trust Co. v. Hensey, 205 U. S. 298, 309. (Emphasis added.)

5 "A party is never required to submit to arbitration any question which he has not agreed so to submit, and contracts providing for arbitration *will be carefully construed in order not to force a party to submit to arbitration a question which he did not intend to be submitted.*" Fernandez & Hnos v. Rickert Rice Mills, 119 F. 2d 809, 815 (C. A. 1st Cir.). (Emphasis added.)

6 In this leading case, Judge, later Mr. Justice, Cardozo said:

Milling & Feed Co. v. Doughnut Corp., 186 Md. 669, 48 A.2d 447, 450;[7] Jacob v. Weisser, 207 Pa. 484, 56 A. 1065, 1067.[8] I believe that the Court today departs the established principles announced in these decisions.

Here, the employer operates a shop for the normal maintenance of its barges, but it is not equipped to make major repairs, and accordingly the employer has, from the beginning of its operations more than 19 years ago, contracted out its major work. During most, if not all, of this time the union has represented the employees in that unit. The District Court found that "[t]hroughout the successive labor agreements between these parties, including the present one, * * * [the union] has unsuccessfully sought to negotiate changes in the labor contract, and particularly during the negotiation of the present labor agreement, * * * which would have limited the right of the [employer] to continue the practice of contracting out such work." 168 F.Supp. 702, 704-705, 43 LRRM 2328.

[ARBITRATION CLAUSE]

The labor agreement involved here provides for arbitration of disputes respecting the interpretation and application of the agreement and, arguably, also some other things. But the first paragraph of the arbitration section says: [M]atters which are strictly a function of management shall not be subject to arbitration under this section." Although acquiescing for 19 years in the employer's interpretation that contracting out work was "strictly a function of management," and having repeatedly tried—particularly in the negotiation of the agreement involved here—but unsuccessfully, to induce the employer to agree to a covenant that would prohibit it from contracting out work, the union, after having agreed to and signed the contract involved, presented a "grievance" on the ground that the employer's contracting out work, at a time when some employees in the unit were laid off for lack of work, constituted a partial "lockout" of employees in violation of the antilockout provision of the agreement.

Being unable to persuade the employer to agree to cease contracting out work or to agree to arbitrate the "grievance," the union brought this action in the District Court, under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, for a decree compelling the employer to submit the "grievance" to arbitration. The District Court, holding that the contracting out of work was, and over a long course of dealings had been interpreted and understood by the parties to be, "strictly a function of management," and was therefore specifically excluded from arbitration by the terms of the contract, denied the relief prayed. 168 F.Supp. 702, 43 LRRM 2328. The Court of Appeals affirmed, 269 F.2d 633, 44 LRRM 2567, and we granted certiorari. 361 U.S. 912.

The Court now reverses the judgment of the Court of Appeals. It holds that the arbitrator's source of law is "not confined to the express provisions of the contract," that arbitration should be ordered "unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute," that "[d]oubts [of arbitrability] should be resolved in favor of coverage," and that when, as here, "a no-strike clause is included in the agreement, then * * * everything that management does is subject to [arbitration]." I understand the Court thus to hold that the arbitrators are not confined to the express provisions of the contract, that arbitration is to be ordered unless it may be said with positive assurance that arbitration of a particular dispute is excluded by

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"The question is one of intention, to be ascertained by the same tests that are applied to contracts generally. * * * No one is under a duty to resort to these conventional tribunals, however helpful their processes, *except to the extent that he has signified his willingness.* Our own favor or disfavor of the cause of arbitration is not to count as a factor in the appraisal of the thought of others." Marchant v. Mead-Morrison Mfg. Co., 252 N.Y. 284, 299, 169 N.E. 386, 391. (Emphasis added.)

[7] In this case, the Court, after quoting Judge Cardozo's language in Marchant, supra, saying that "the question is one of intention," said:

"Sound policy demands that the terms of an arbitration *must not be strained to discover power to pass upon matters in dispute, but the terms must be clear and unmistakable to oust the jurisdiction of the Court, for trial by jury cannot be taken away in any case merely by implication.*" Continental Milling & Feed Co. v. Doughnut Corp., 186 Md. 669, 676, 48 A.2d 447, 450. (Emphasis added.)

[8] "But, under any circumstances, before the decision of an arbitrator can be held final and conclusive, it must appear, as was said in Chandley Bros. v. Cambridge Springs, 200 Pa. 230, 49 Atl. 772, *that power to pass upon the subject-matter, is clearly given to him. 'The terms of the agreement are not to be strained to discover it. They must be clear and unmistakable to oust the jurisdiction of the courts; for trial by jury cannot be taken away by implication merely in any case.'*" Jacob v. Weisser, 207 Pa. 484, 489, 56 A. 1065, 1067. (Emphasis added.)

the contract, that doubts of arbitrability are to be resolved in favor of arbitration, and that when, as here, the contract contains a no-strike clause, everything that management does is subject to arbitration.

[STRANGE DOCTRINE]

This is an entirely new and strange doctrine to me. I suggest, with deference, that it departs both the contract of the parties and the controlling decisions of this Court. I find nothing in the contract that purports to confer upon arbitrators any such general breadth of private judicial power. The Court cites no legislative or judicial authority that creates for or gives to arbitrators such broad general powers. And I respectfully submit that today's decision cannot be squared with the statement of Judge, later Mr. Justice, Cardozo in Marchant that "no one is under a duty to resort to these conventional tribunals, however helpful their process, *except to the extent that he has signified his willingness.* Our own favor or disfavor of the cause of arbitration is not to count as a factor in the appraisal of the thoughts of others," 252 N.Y., at 299, 169 N.E., at 391 (emphasis added); nor with his statement in that case that "[t]he question is one of intention, to be ascertained by the same tests that are applied to contracts generally," id., nor with this Court's statement in Moorman, "that the intention of the parties to submit their contractual disputes to final determination outside the courts *should be made manifest by plain language.*" 338 U.S., at 462 (emphasis added); nor with this Court's statement in Hensey that: "To make such [an arbitrator's] certificate conclusive *requires plain language in the contract.* It is not to be implied." 205 U.S., at 309. (Emphasis added.) "A party is never required to submit to arbitration any question which he has not agreed so to submit, and *contracts providing for arbitration will be carefully construed in order not to force a party to submit to arbitration a question which he did not intend to be submitted.*" Fernandez & Hnos v. Rickert Rice Mills, supra, 119 F.2d, at 815 (C. A. 1st Cir). (Emphasis added.)

With respect, I submit that there is nothing in the contract here to indicate that the employer "signified [its] willingness" (Marchant, supra, at 391) to submit to arbitrators whether it must cease contracting out work. Certainly no such intention is "made manifest by plain language" (Moorman, supra, at 462), as the law "requires," because such consent "is not to be implied." (Hensley, supra, at 309). To the contrary, the parties by their conduct over many years interpreted the contracting out of major repair work to be "strictly a function of management," and if, as the concurring opinion suggests, the words of the contract can "be understood only by reference to the background which gave rise to their inclusion," then the interpretation given by the parties over 19 years to the phrase "matters which are strictly a function of management" should logically have some significance here. By their contract, the parties agreed that "matters which are strictly a function of management shall not be subject to arbitration." The union over the course of many years repeatedly tried to induce the employer to agree to a covenant prohibiting the contracting out of work, but was never successful. The union again made such an effort in negotiating the very contract involved here, and, failing of success, signed the contract, knowing, of course, that it did not contain any such covenant, but that, to the contrary, it contained, just as had the former contracts, a covenant that "matters which are strictly a function of management shall not be subject to arbitration." Does not this show that, instead of signifying a willingness to submit to arbitration the matter of whether the employer might continue to contract out work, the parties fairly agreed to exclude at least that matter from arbitration? Surely it cannot be said that the parties agreed to such a submission by any "plain language." Moorman, supra, at 462, and Hensey, supra, at 309. Does not then the Court's opinion compel the employer "to submit to arbitration [a] question which [it] has not agreed so to submit"? (Fernández & Hnos, supra, at 815.)

[JUDICIAL QUESTION]

Surely the question whether a particular subject or class of subjects are or are not made arbitrable by a contract is a judicial question, and if, as the concurring opinion suggests, "the Court may conclude that [the contract] commits to arbitration any [subject or class of subjects]," it may likewise conclude that the contract does not commit such subject or class of subjects to arbitration, and "[w]ith

that finding the Court will have exhausted its function" no more nor less by denying arbitration than by ordering it. Here the District Court found, and the Court of Appeals approved its finding, that by the terms of the contract, as interpreted by the parties over 19 years, the contracting out of work was "strictly a function of management" and "not subject to arbitration." That finding, I think, should be accepted here. Acceptance of it requires affirmance of the judgment.

I agree with the Court that courts have no proper concern with the "merits" of claims which by contract the parties have agreed to submit to the exclusive jurisdiction of arbitrators. But the question is one of jurisdiction. Neither may entrench upon the jurisdiction of the other. The test is: Did the parties in their contract "manifest by plain language" (Moorman, supra, at 462) their willingness to submit the issue in controversy to arbitrators? If they did, then the arbitrators have exclusive jurisdiction of it, and the courts, absent fraud or the like, must respect that exclusive jurisdiction and cannot interfere. But if they did not, then the courts must exercise their jurisdiction, when properly invoked, to protect the citizen against the attempted use by arbitrators of pretended powers actually never conferred. That question always is, and from its very nature must be, a judicial one. Such was the question presented to the District Court and the Court of Appeals here. They found the jurisdictional facts, properly applied the settled law to those facts, and correctly decided the case. I would therefore affirm the judgment.

D

TAB D

THE CONTINUING OBLIGATION TO BARGAIN

The existence of the collective bargaining agreement does not, in itself, relieve the parties of their obligation to bargain during the contract's term. As the Supreme Court states in *Conley vs. Gibson*,[1] "collective bargaining is a continuing process. Among other things it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by the existing agreements, and the protection of employee rights already secured by contract." In taking this view of collective bargaining as an on-going process, the Court has also recognized the varying degrees of formality in the collective bargaining process.

The practitioner will be quick to note that informal bargaining is essential to grievance handling and day-to-day interpretation of the contract. In the terminology of arbitrators, this would generally involve the interpretation of "rights" issues under the contract. In addition, bargaining may also involve the resumption of formal negotiations over "interest" issues not covered by the contract.[2]

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[1] *Conley et al v. Gibson*, 355 US 41, 46, 41 LRRM 2089 (1957).

[2] *Ibid.*

As discussed in detail in this section, there are two general obligations which can require the parties to resume bargaining during the term of the agreement, namely, contractual and statutory duties to bargain.

I. CONTRACTUAL OBLIGATION TO BARGAIN

Multi-year agreements frequently contain contractual provisions which require re-opening of negotiations on specific issues. This type of provision is normally referred to as a "limited" re-opener. In other agreements the parties may expressly reserve the right to re-open the contract on unspecified matters not previously negotiated.

In either of the above types of clause, the authority to negotiate and require the other party to do so originates from the contract itself. It should be noted, however, that without qualifying contract language requiring specific action to be taken if agreement is not reached, the duty to bargain is simply that: as in initial contract negotiations and regardless of the forcefulness of the re-opener's stated purpose, the obligation to bargain under a re-opener". . .does not compel either party to agree to a proposal or require the making of concession."[3/]

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[3]Sec 8d LMRA, appendix Tab A. Also, for a full discussion of the requirements of good faith bargaining see The Developing Labor Law, BNA; see *NRLB v. Sands Mfg.* 306 US 332, 4 LRRM 530 (1939). Also see Appendix: *County of Los Angeles v. Employees Association* 2d CA 1973; *NLRB v. General Electric Company* 2d USCA 1969. (Bouluarism); and *Fiberboard Paper Products Corp. v. NLRB.*

II. IMPASSE PROVISIONS UNDER RE-OPENERS

In *NLRB vs. Lion Oil Company*[4/] and subsequent cases, the Supreme Court has drawn a significant distinction between mid-term bargaining when there is a "re-opener" clause and those situations in which there is no such clause.

When bargaining in the absence of a re-opener, the private sector union is governed by Section 8(d) of LMRA which prohibits strikes or any other concerted action "to modify the terms of the collective bargaining contract prior to its expiration." As a result, a union may propose a change of an existing contract provisions, but it would be guilty of an unfair labor practice or breach of contract were it to strike or take other concerted action over the matter. In short, although a matter may otherwise be a "mandatory" issue of bargaining, once contained in a contract the matter becomes a "permissive" issue which does not obligate the parties to bargain.

Where a re-opener exists, however, the Court has taken a different view. In these situations subsequent bargaining is seen as an attempt "to obtain an objective which the contract has not settled." It is not considered, therefore, a breach of contract or a violation of

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[4] *NLRB vs. Lion Oil Co.* 39 LRRM 2296

LMRA Section 8(d) to engage in strikes or other concerted activity in "re-opener" bargaining, provided"...there has been no express waiver of the right to strike."[5/]

The effect of this ruling on "re-opener" bargaining in California's public sector would vary according to the agency and its enabling collective bargaining statute. Transit workers, for example, could strike over an issue contained in a re-opener clause. Some MMB agencies could bring the matter to interest arbitration, etc. In any event, the parties have the right to demand that any available impasse procedure be exhausted in regard to the matter contained in the re-opener. Under such conditions, this demand would not be an unfair labor practice nor would concerted action be a breach of contract.

III. STATUTORY OBLIGATION TO BARGAIN

The considerable litigation under LMRA on the duty-to-bargain question has largely clarified statutory responsibilities of private sector parties in mid-contract bargaining. Higher California courts have, so far, dealt with only three questions on bargaining in the public sector. Good faith bargaining is defined in *County of Los Angeles vs. Employees Association.*[6/]

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[5] *Ibid.*

[6] Supra Note 3

Scope of bargaining is clarified in large part in *Firefighters vs. City of Vallejo.*[7] The binding nature of agreements is detailed in the Glendale case.[8] However, the courts have yet to address the duty to bargain in the public sector during a contract's term over issues not covered by the agreement.

In the absence of specific provisions in California's public sector legislation or of guiding principles stemming from subsequent litigation, we look to the LMRA and its parent Wagner Act to gain a full perspective on the statutory duty-to-bargain issue. In so doing, we find that management and labor organizations have a continuing obligation to bargain over issues not included in the contract or rejected in negotiations.

IV. FEDERAL LEGISLATION

The pioneering piece of federal legislation, the Wagner Act emphasized the overriding obligation of an employer to bargain with his employees. In interpreting the Wagner Act in the Sands Manufacturing case, the U.S. Supreme Court held that the employer was "under a duty, upon

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[7] Supra Note 8 Tab A

[8] Glendale reference

request, to bargain with the representative of his employees whether or not an existing collective bargaining agreement bound the parties as to the subject matter to be discussed."[9]

Hotly attacked by management, this provision was subsequently amended by the Taft-Hartley Act; the Act now provides that "the duty to bargain collectively. . .shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period. . .if such modification is to become effective before such terms and conditions can be re-opened under the provisions of the contract."

This amendment to the act resolved the question of the duty to bargain over issues contained within a contract. It did not, however, deal with the duty to bargain on issues on which the contract was silent or lacked specific language. These questions were eventually resolved by the Second Court of Appeals in *Jacobs Manufacturing Co. vs. NLRB.*[10]

In Jacobs Manufacturing the plaintiff argued that the intent of the Taft-Hartley Act amendments to Section 8d of the Wagner Act were to create "a static period in the entire industrial relationship between

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[9]See Appendix: Comments by the Court in *NLRB v. Jacobs Manufacturing Company* regarding the Sands precedent.

[10]*Ibid.*

the employer and employees. . .even as to aspects of. . .that relationship which was not covered by that contract." The employer concluded, therefore, that he was not required to bargain over an issue not specifically contained in a re-opener clause. But the Court disagreed.

In reviewing the statute's purpose as one which ". . .requires employers to bargain as to employee demands. . .to the end that industrial disputes may be resolved peacefully," the Court said in Jacobs that the duty to bargain "should be given effect to the extent there is no contrary provision." The language in the Taft-Hartley exception to the duty to bargain is, it said, "precise" in that it refers to "terms and conditions contained in (our emphasis) a contract for a fixed period." The Court, accordingly, concluded that the Taft-Hartley language did not relieve the employer of a "duty to bargain as to subjects which were neither discussed nor embodied in any of the terms and conditions of the contract." (emphasis added)

It should be noted that this decision did not involve the question of past practice, which is dealt with in another section of this manual. The validity of past practice has been recognized by the U.S. Supreme Court, and therefore should be considered in interpreting the Jacobs ruling.

Additionally, under certain conditions either or both parties may waive the right to bargain during a contract's term. Aside from such waivers, however, "even when an agreement is reached, the employer must continue to bargain on the interpretation and administration of the contract and on subjects not included in the contract or discussed in pre-contract negotiations."[11/]

V. EXCEPTIONS TO THE BARGAINING REQUIREMENT

As indicated, this obligation or duty to bargain during a contract's term is not absolute. Exceptions to the duty to bargain may arise in the following situations:

A. Waiver by Express Agreement: In the noted precedent of *New York Mirror vs. N.Y. Newspaper Printing Pressman Union,*[12/] the National Labor Relations Board reasoned that there is no requirement to bargain if there is clear and unmistakable language on an intended waiver. In upholding the waiver concept, it said:

> A waiver of a statutory right is not to be lightly inferred but must be clear and unmistakable. The Board will not find that contract terms of themselves confer on the employer a management right to take unilateral action on a mandatory subject of bargaining unless the contract expressly or by necessary implication confers such a right.

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[11] Para 1653. Labor Law Course, Twenty Second Edition, Commerce Clearing House, Inc., 1974. See also: Labor Relations Law Fifth Edition, Russell Smith et al Editors, Dobbs Merril Co. Inc. Copyright 1974.

[12] 58 LRRM 1467.

In short, on unspecified or so-called "zipper clause" giving management the right of unilateral action on all matters not specifically mentioned in the contract is invalid. Indeed, the waiver must specifically address the issue where the right to bargain is waived.

B. Waiver by Bargaining History: The duty to bargain may be waived on specific subjects in the course of bargaining. While management has an obligation to bargain on mandatory subjects, the courts as well as arbitrators have charged labor with the burden of exacting protective provisions from management once an issue is raised during negotiations.[13/] If the labor organization fails to obtain controlling contract language in these circumstances of announced intent, it will, in most cases, be considered to have waived its right to protest subsequent unilateral action by the employer.[14/]

C. Waiver by Inaction: The courts will protect a union's right to bargain over issues, but it will not do so when the union has been proven negligent. Once a union is notified by management that the latter intends to take some form of action regarding a bargainable matter, the union has the responsibility to demand the right to negotiate on the matter. If it does not, it thereby loses its right to negotiate on that particular issue during the term of the contract.[15/]

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[13] *Ibid*

[14] The Developing Labor Law, BNA, 1971

[15] *Ibid*

D. Mutual Waiver: In addition to the above, both bargaining parties may modify the duty to bargain by mutual waiver. In such cases action may be taken only through mutual consent.

While there are no known rulings involving this type of waiver in the private sector, a number of local governmental agencies and labor organizations in California have agreed to just such a provision. For example, Local 101 of the American Federation of State, County and Municipal Employees and the City of San Jose include the following provision in their Memorandum of Understanding:

> 6.00 d. Except as specifically otherwise provided herein, it is agreed and understood that each party hereto voluntarily and unqualifiedly waives its right, and agrees that the other shall not be required to meet and confer with respect to any subject or matter covered herein or with respect to any other matters within the scope of meeting and conferring, during the period of the terms of this Memorandum....

In the award included in the appendix of this section, arbitrator Emily Maloney upheld this waiver provision by stating in her decision that it barred referring the matter in question back to negotiations "absent a willingness on the part of the Union to meet and confer." In a subsequent decision in an arbitration between the City of San Jose and Firefighters Local 873, arbitrator William Eaton confirmed the Maloney interpretation by citing it in reversing an action of the City Civil Service Commission discontinuing seniority points in promotional exam. Seniority points, he ruled, was a "benefit subject

to the meet and confer process" and the commission action represented "a unilateral withdrawal . . . in violation of Section 6.00 d," the clause identical to the A.F.S.C.M.E. provision.

Mutual waiver is a concept peculiar to the public sector. It can only be surmised that its development might well stem, therefore, from conditions that are particularly relevant to the public sector. One such condition could be that the public sector manager is much more firmly locked into a legislatively adopted budget, rules, and regulations than his or her private sector counterpart, and therefore desires the stability of a "closed" contract. On the union's side, it relieves the union of the burden of mid-term negotiations while it is trying to "police" the balance of the agreement. Whatever the case, mutual waiver clauses have withstood successive negotiations in a number of public sector contracts in the various agencies in which they have been adopted.[16/]

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[16]Other examples are found in the agreements of: Supervisory Artisan and Blue Collar Employees Local 432, SEIU and County of Los Angeles; Probation Officers Local 685 AFSCME and County of Los Angeles.

APPENDIX TO TAB D

County of Los Angeles v. Employees Assn.
NLRB v. General Electric
Fibreboard Paper Products v. NLRB
NLRB v. Jacobs Manufacturing
City of San Jose and Municipal Employees Federation (AFSCME Local, 101)

COUNTY OF LOS ANGELES v. EMPLOYEES ASSN.

California Court of Appeal, Second District

COUNTY OF LOS ANGELES, LOS ANGELES COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, etc., et al. v. LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, and SOCIAL WORKERS UNION, LOCAL 535, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, No. 40626, June 20, 1973

GOVERNMENT EMPLOYMENT

—Mandatory subject for bargaining—Caseload of social workers—Condition of employment—California Act ▶ 100.02

Unions representing county employees are entitled to writ of mandamus compelling county government to negotiate size of caseloads handled by social workers employed by Department of Public Social Services, since size of such caseloads is a "condition of employment" and therefore a mandatory subject for bargaining under California Meyers-Milias-Brown Act (SLL 14:219) and local county employee relations ordinance.

On appeal from a judgment of the Superior Court of the County of Los Angeles. Affirmed.

John D. Maharg, County Counsel, Larry A. Curtis, Deputy County Counsel, and Daniel C. Cassidy, Deputy County Counsel, for County of Los Angeles.

Geffner & Satzman, P. C., Leo Geffner and Michael L. Posner, Los Angeles, Calif., for Los Angeles County Employees Association.

Full Text of Opinion

JEFFERSON, Justice:—Petitioners, Local 660 of the Los Angeles County Employees Association and Local 535 of the Social Workers Union, sought a peremptory writ of mandate ordering the defendant County of Los Angeles and two of its departments, the Department of Public Social Services (DPSS) and the Department of Personnel, to undertake certain negotiations with the petitioners. The trial court granted the writ, and the defendants have appealed.

[BACKGROUND]

The Factual and legal background of the dispute is: In 1968, the Los Angeles County Board of Supervisors passed Ordinance No. 9646, entitled the Employee Relations Ordinance.[1]

The county ordinance contains a comprehensive scheme for the handling of labor disputes between county management and county employees. It provides for the certification of employee representatives for the purpose of conducting negotiations with management representatives of the county. In section 3(o), the negotiation process is defined as the

"performance by duly authorized management representatives and duly author-

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1 It was passed pursuant to the Meyers-Milias-Brown Act, enacted by the state Legislature to provide "a reasonable method of resolving disputes regarding wages, hours and other terms and conditions of employment between public employees and public employee organizations." (Gov. Code § 3500.) The law empowers local governing bodies to formulate rules and regulations for the handling of labor disputes with public employees (Gov. Code § 3507). It provides for the certification of public employees, and mandates that "the governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, *shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment* with representatives of such recognized employee organizations. . . ." (Italics added.) (Gov. Code § 3505.)

ized representatives of a certified employee organization of their mutual obligation to meet at reasonable times and to confer in good faith *with respect to wages, hours, and other terms and conditions of employment. . . .*" (Italics added.)

Section 7 provides for the creation of an Employee Relations Commission to administer and implement the ordinance.[2]

Section 12 of the ordinance specifically enumerates certain practices by county management to be "unfair employee relations practices," including:

"(a) It shall be an unfair employee relations practice for the County: . . . (3) To refuse to negotiate with representatives of certified employee organizations on negotiable matters."

The ordinance does not specifically enumerate what matters are "negotiable" and what matters are not.

On December 3, 1970, the petitioner unions, having been duly certified as the majority representatives of social workers employed by the county to determine the eligibility of public assistance applicants, filed charges with the Commission alleging that the county management representatives had refused to negotiate with the unions since May 14, 1970, concerning the size of the caseloads carried by eligibility workers. The petitioners further alleged that the refusal to negotiate constituted an unfair employee relations practice on the part of the county as defined in Section 12(a)(3). Hearings were held before the Commission. The county maintained that the size of caseloads was not a "negotiable" matter; the unions contended that negotiation was mandatory as the issue related to "wages, hours, and other terms and conditions of employment."[3] On June 25, 1971, the Commission rendered its decision that the county's refusal to negotiate with the unions was a violation of section 12, and ordered the county to "cease and desist" from such refusal. The county continued to refuse, and the petitioners then sought and obtained the peremptory writ directing that the Commission's order be enforced.[4]

[2] The ordinance gives the Commission, composed of three members, the responsibility for supervision of certification procedures, the power to make suitable rules and regulations, and to conduct hearings concerning labor disputes under oath, to compel attendance therein, and to issue decisions. Section 7(g)(5) requires the Commission "To investigate charges of unfair employee relations practices or violations of this Ordinance, and to take such action as the Commission deems necessary to effectuate the policies of this Ordinance, including, but not limited to, the issuance of cease and desist orders."

[3] The duty to negotiate refers only to the necessity of meeting and conferring in good faith. There is no compulsion for either side to agree. (Section 12(o). See East Bay Mun. Employees Union v. County of Alameda, 3 Cal.App.3d 578, 584, 73 LRRM 2063.)

[4] Section 12(e) provides that "If the Commission's decision is that the County has engaged in an unfair employee relations practice or has otherwise violated this Ordinance or any rule or regulation issued thereunder, the Commission shall direct the County to take appropriate corrective action. If compliance with the Commission's decision is not obtained within the time specified by the Commission, it shall so notify the other party, which may then resort to its legal remedies."

[SIZE OF CASELOADS]

The basic issue before us is whether the size of caseloads assigned to eligibility workers at the DPSS constitutes an item within the mandatory section of the Myers-Milias-Brown Act (Gov. Code § 3505) which requires negotiation by public employers of issues relating to "wages, hours, and other terms and conditions of employment," or within the applicable provisions of the local ordinance (which shall be set forth infra).

The county contends that the mandatory negotiation provision of section 3505 must be read in conjunction with Government Code section 3504, which, the county argues, limits the application of section 3505. Section 3504 provides:

"The scope of representation [allowed to the representatives of public employees] shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, *except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.* [Added by Stats. 1961, ch. 1964 § 1; amended by Stats. 1968, ch. 1390 § 4, operative Jan. 1, 1969.]

Since the determination of the eligibility for public assistance is a service to the public for which the county is responsible pursuant to the Welfare & Institutions Code (§§ 11050-11062), it is argued, "the scope of representation" exception applies to the size of caseloads.

We do not think section 3504 limits section 3505 in this manner. The problem of interpreting these sections, and their relationship to each other, is that an argument can plausibly be made that *all* management decisions affect areas of mandatory service to the public *and* the working

conditions of public employees; or, conversely, that all decisions rendered concerning a public employee labor dispute of necessity will determine the quality of mandated public service *and* the operation of management.

Section 3505 requires the governing body of the public agency, or its representatives, to "meet and confer in good faith regarding wages, hours and other terms and conditions of employment. . . ." There is no reason why the public agency cannot discuss those aspects of the caseload problem, even though the "merits,' necessity, or organization" of the service must be outside the scope of the required discussion. Whether such limited discussion is likely to be fruitful is nothing the public agency should prejudge.

Turning to the local ordinance, its provisions concerning negotiation contain the same general approach of the state legislation. The pertinent parts of the ordinance are sections 5 and 6. Section 5:

"It is the exclusive right of the County to determine the mission of each of its . . . departments . . . set standards of services to be offered to the public, and exercise control and discretion over its organization and operations . . . to direct its employees . . . determine the methods, means and personnel by which the County's operations are to be conducted; *provided*, however, that the exercise of such rights does not preclude employees . . . from conferring or raising grievances about the practical consequences that decisions on these matters may have on wages, hours, and other terms and conditions of employment." (Italics added.)

Section 6:

"(b) The scope of negotiation between management representatives and the representatives of certified employee organizations includes wages, hours, and other terms and conditions of employment within the employee representation unit.

"(c) Negotiation shall not be required on any subject preempted by Federal or State law, or by County charter, nor shall negotiation be required on Employee or Employer Rights as defined in Sections 4 and 5 above. Proposed amendments to this Ordinance are excluded from the scope of negotiation." [5]

The defendant contends that section 6(c) prohibits negotiation concerning the management rights of the county as set forth in section 5, and that the outright prohibition governs "the scope of negotiation" described in section 6(b).

In determining the intent of the Board of Supervisors who enacted the local ordinance, it is instructive to refer to the report prepared by the committee appointed by the board to draft the local ordinance. The report was adopted as an accurate statement of the board's legislative intent as of September 3, 1968. The report contains a discussion of the nonadvisability of enumerating areas of mandatory negotiation:

"County officials have urged us to go further and to include in the recommended ordinance examples of the kinds of subjects on which negotiation is not mandatory. The difficulty we have with this approach is that topics proposed for negotiation, like words in a sentence, take on color and meaning from their surrounding context. Viewed in the abstract, the demand to negotiate over 'the level of service to be provided', for example, would seem to be a matter covered by Section 5 and therefore not negotiable except at the discretion of the County, as provided in Section 6(d). In the context of a specific situation, however, a demand for a lower maximum case load for social workers, for example, although theoretically related to the level of service to be provided, might be much more directly related to terms and conditions of employment." [6]

The ordinance commits the county to negotiate wages, hours and conditions of employment, though afffirming the exclusive right of the county to make certain management decisions. The county does not give up these management powers when it engages in the negotiations which are required by the ordinance. Granted that the subjects are interrelated, it is both possible and proper for the county to enter into discussions and receive the viewpont of the employee representatives on those aspects of the problem which are covered by the promise of negotiate.

The defendant county further contends that the decision of the Employee Relations Commission and the subsequent order to the county to "cease and desist" from the refusal to negotiate did not create a duty on the part of the county that is enforceable by mandate. We are referred to the "report of intention" adopted by the Board of Supervisors, relative to the discussion of "cease and desist" orders:

"Although it is to be hoped that the Commission's findings and orders in unfair employee practice cases will be re-

[5] Section 4 enjoins interference with the rights of public employees to participate or not in employee organizations.

[6] An Employee Relations Ordinance for Los Angeles County, Report and Recommendations for the Consultant's Committee, July 25, 1968.

spected by all parties involved, it is necessary to comment briefly on the remedies that would be available to the injured party in the event that the other party refused to abide by the Commission's order. Because of the very nature of public employment, complete mutuality of remedy would not be possible in this situation. The Commission would lack authority to compel the County to obey its orders, although it would presumably advise the Board of Supervisors of any refusal by a County agency to comply. Thus, ultimately, the issue would become whether the Board of Supervisors intended to support the Commission. Refusal by the Board to do so would, of course, endanger the continued existence of the Commission."

Section 12(c) indicates rather clearly that while the Commission was not given the power to enforce its decisions, it was foreseen that a party bringing charges before that body might have to resort to "legal remedies" to obtain enforcement of a decision made. "Legal remedies" include mandamus in the proper case.

The county argues that to enforce the Commission's order deprives the Board of Supervisors of its exclusive responsibility to exercise its discretionary governmental powers.

[DUTY TO NEGOTIATE]

The judgment of the superior court does no more than to require the county to negotiate in good faith in an effort to reach an agreement, "and in the event that an agreement is reached, that it be reduced to writing and signed by petitioners and respondents." Thus, there is no requirement that the board of supervisors give up any of its powers, or that the board or its representatives agree to anything. It is, of course, true that any discussion of "working conditions" inmpinges upon matters which are within the exclusive jurisdiction of the board of supervisors, and as to which it would be improper for the county to make binding agreement with an employee organization. But this inevitable interrelationship need not preclude negotiation as to any aspect of the caseload problem as to which the county and the employees might be able to agree without invading the subjects upon which the county is not required to negotiate.

The word "negotiation" is a term of art, specially defined in section 3(o) of Employee Relations Ordinance, and is limited to the subjects of "wages, hours, and other terms and conditions of employment." The judgment of the superior court, requiring the county to negotiate, goes no farther than to require what the ordinance promised. Section 3(o) also states "'This obligation does not compel either party to agree to a proposal or to make a concession." This saving clause relieves the county of any danger that by entering into a negotiation on "working conditions," it will be swept into an agreement covering matters upon which it is not obliged to negotiate.

While mandamus will not lie to compel governmental officials to exercise their discretionary powers in a particular manner, it will lie to compel them to exercise them in some manner. (5 Witkin, Calif. Procedure, "Extraordinary Writs," §§ 75, 76, pp. 3851, 3852.) In the instant case, mandamus is a proper method of compelling governmental officials to comply with both state and local law requiring them to negotiate on a particular subject, although the compulsion does not, of course, extend to requiring them to reach a specified result pursuant to such negotiation. The duty to negotiate is not, by itself, a discretionary act under these circumstances. Negotiation does not mean agreement; neither the state law nor the local ordinance equates negotiation with c mpulsory collective bargaining. (East Bay Mun. Employees Association, cited supra; see Sacramento County Emp. Organization, Local 22 Etc. Union v. County of Sacrament, 28 Cal.App.3d 424, 81 LRRM 2841.)

The judgment is affirmed.

We concur: FILES, Presiding Justice, and KINGSLEY, Justice.

NLRB v. GENERAL ELECTRIC CO.

U.S. Court of Appeals,
Second Circuit (New York)

NATIONAL LABOR RELATIONS BOARD v. GENERAL ELECTRIC COMPANY, and INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO, Intervenor, No. 337 and 338, October 28, 1969

LABOR MANAGEMENT RELATIONS ACT

—Refusal to bargain — Take-it-or-leave-it offer ▶54.505 ▶54.361

NLRB held warranted in finding that employer violated Section 8(a)(5) of LMRA by presenting personal accident insurance program on take-it-or-leave-it basis, even though negotiations for new collective bargaining agreement occurred before expiration of pension and insurance program, under which each party waived right to require other to bargain as to pensions or insurance matters except during stated renegotiation period, which was months off. In context of case in which employer's tactics seemed so clearly designed to show employees that union could win them no more than employer was prepared to offer, employer could not make unilateral offer and refuse to bargain about it; offer impaired union's ability to function as bargaining representative and represented rejection of collective bargaining principle.

—Refusal to bargain — Failure to provide information ▶54.5241

NLRB held warranted in finding that employer violated Section 8(a)

(5) of LMRA by failing to provide, within a reasonable time, cost-related information highly relevant to negotiations with union.

—Refusal to bargain—By-passing of international union ▶54.312 ▶54.62

NLRB held warranted in finding that employer violated Section 8(a)(5) of LMRA when, during course of national negotiations with international union, it attempted to deal with locals on matters that properly were subjects of national negotiation, since (1) in past, employer recognized international as representative of all locals; (2) employer had continuing obligation to respect international as exclusive bargaining representative; and (3) additional terms employer submitted to locals should have been offered to national negotiators beforehand or at same time. Offers themselves constituted violation of Act, irrespective of which party initiated bargaining. However, employer's letter to one local giving content of proposal previously made at national level did not violate Act, since (1) letter was only for informational purposes, and (2) interest in free speech and informed choice must prevail over slight possibility that representative's position may have been undermined.

—Refusal to bargain—Overall conduct ▶54.505 ▶54.500 ▶40.01

NLRB held warranted in finding that employer violated Section 8(a)(5) of LMRA by combining "take-it-or-leave-it" bargaining method with widely publicized stance of unbending firmness preventing employer from being able to alter position once taken. Pattern of conduct inconsistent with good faith bargaining is shown by totality of circumstances, including (1) specific violations of Act involving unilateral take-it-or-leave-it insurance offer and refusal to furnish cost information, (2) insistence on doing no more than law absolutely required, (3) disregard of legitimacy and relevance of union's position as employees' statutory representative, (4) display of patronizing attitude toward union even before general reopening of negotiations, (5) vague responses to union's detailed proposals, (6) "prepared lecture series" instead of counter-offers when union presented its plan, (7) persistent refusal after publicizing its proposal to estimate not only cost of components but total size of wage-benefit package it would consider reasonable, (8) defense of unreasonable positions with no apparent purpose other than to avoid yielding to union, (9) display of "stiff and unbending patriarchal posture" even when it had become apparent that union would have to concede to employer's terms, and (10) publicity program, such as its refusal to withhold publicizing its offer until union had opportunity to propose suggested modifications. Although absence of concessions does not prove bad faith, their presence would raise strong inference of good faith, and few of employer's alleged concessions turned out to have much substance. Section 8(c) of Act is rule of relevancy and does not eliminate all communications from Board's purview.

On petitions to review and to enforce an order of NLRB (57 LRRM 1491, 150 NLRB No. 36). Enforcement granted.

David L. Benetar, New York, N.Y. (Robert C. Isaacs, Michael I. Bernstein, Stanley Schair, Nordlinger, Riegelman, Benetar & Charney, New York, N.Y., on brief), for respondent.

Eugene B. Granoff (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Warren M. Davison, on brief), for petitioner.

Ruth Weyand, Washington, D.C. (Irving Abramson, Washington, D.C., on brief), for intervenor.

Before WATERMAN, FRIENDLY, and KAUFMAN, Circuit Judges.

Full Text of Opinion

KAUFMAN, Circuit Judge: — Almost ten years after the events that gave rise to this controversy, we are called upon to determine whether an employer may be guilty of bad faith bargaining, though he reaches an agreement with the union, albeit on the company's terms. We must also decide if the company committed three specific violations of the duty to bargain by failing to furnish information requested by the union, by attempting to deal separately with IUE locals, and by presenting a personal accident insurance program on a take-it-or-leave-it basis.

I. The Prior Proceedings

In the wake of what it regarded as unsatisfactory negotiations with the General Electric Company (GE) during the summer and fall of 1960, the International Union of Electrical, Radio and Machine Workers, AFL-CIO (IUE) filed unfair labor practice charges with the National Labor Re-

lations Board. The General Counsel, on April 12, 1961, filed a complaint alleging that GE had committeed unfair labor practices in violation of sections 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), 158(a)(3), and 158(a)(5) (1964). Hearings were held before a trial examiner between July, 1961, and January, 1963, and included testimony, oral argument, and submission of briefs. The Trial Examiner issued his Intermediate Report on April 1, 1963, which found GE guilty of several unfair labor practices. GE and the IUE filed exceptions to the Intermediate Report, and on December 16, 1964, the NLRB agreed with the Trial Examiner. 150 NLRB 192, 57 LRRM 1491 (1964).

There followed the race to the courthouse that is an unhappy feature too often encountered in these matters. See Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv. L. Rev. 542, 598-600 (1969). Since GE does business in every state, every court of appeals has jurisdiction, if GE's petition for review is first filed there. See 29 U.S.C. § 160(f) (1964); 28 U.S.C. § 2112 (1964). The IUE claimed that it filed in the District of Columbia Circuit 14 seconds before GE handed its petition to the clerk in the Seventh Circuit. GE's version of course differed. The NLRB, admitting its confusion (not without reason, it would seem), suggested that since the question of timing was incapable of rational solution, the Second Circuit, where the unfair labor practices complained of occurred, would be the logical place to begin. The District of Columbia and Seventh Circuits agreed, IUE v. NLRB, 343 F.2d 327, 58 LRRM 2369 (D.C. Cir. 1965); GE v. NLRB, 58 LRRM 2694 (7th Cir. 1965). Another year was required to determine that the Union's proper status in the action was that of intervenor. NLRB v. General Electric Co., 59 LRRM 2094, 2095 (2d Cir. 1965), vacated and remanded, IUE v. NLRB, 382 U.S. 366, 61 LRRM 2147 (1966), modified on remand: NLRB v. General Electric Co., 358 F.2d 292, (2d Cir.), cert. denied, 385 U.S. 898, 61 LRRM 2609 (1966). See International Union, Local 283 v. Scofield, 382 U.S. 205, 60 LRRM 2479 (1965)..

In order for the action to reach its present state of ripeness, this court consolidated GE's petition for review (No. 29576) with the Board's petition for enforcement (No. 29502). NLRB v. General Electric Co., 358 F.2d 292, 61 LRRM 2609 (2d Cir. 1966), cert. denied, 385 U.S. 898, 63 LRRM 2282 (1966). Another year and a half passed while the parties attempted to settle the case without recourse to further litigation. When a satisfactory settlement proved too elusive, they reentered the fray with renewed vigor, undiminished by the passage of time, two successive collective bargaining contracts (1963 and 1966), and by another suit over proper representation arising out of the 1966 negotiations. McLeod v. General Electric Co., 257 F.Supp. 690, 62 LRRM 2809 (S.D. N.Y.), rev'd 366 F.2d 847, 63 LRRM 2065 (2d Cir. 1966), remanded 385 U..S 533, (1967). See also General Electric Co. v. NLRB, No. 32867, 71 LRRM 2504 (2d Cir., June 9, 1969).

II. The Bargaining Background

General Electric, a New York corporation, is the largest and perhaps best known manufacturer of electrical equipment, appliances, and the like. Its products—manufactured in all the 50 states—range from refrigerators to atomic energy plants, from submarines to light bulbs. In 1960, it employed about 250,000 men and women; of these only 120,000 were unionized. The IUE is an international union, affiliated with the AFL-CIO, and had a total membership of about 300,000. In 1960 it represented some 70,000 of the 120,000 unionized GE employees, formally grouped in more than 105 bargaining units, and was far and away the largest single union with whom GE dealt. The next largest, the United Electrical Workers (UE), represented only 10,000 members, and the remaining 50,000 unionized employees were split among some 100-odd other unions or bargaining agents who dealt independently with GE. A high proportion of GE employees are supervisory or managerial personnel, who are available to the company in the event of a strike.

The present action has its roots deep in the history of prior negotiations and bargaining relationships. Before 1950, the major union was the UE. In 1946 negotiations reached an impasse and resulted in a serious and crippling strike. GE eventually capitulated, and agreed to a settlement that it later characterized as a "debacle," and beyond the company's ability to meet.

GE's response came in the form of a new approach to employee relations, urged by one of its vice presidents, Lemuel R. Boulware. Although GE generally objects to use of the term,

describing it as a "hostile label," the tactic of "Boulwareism" associated with his name soon became the hallmark of the company's entire attitude towards its employees.[1]

In many respects, GE's negotiating policy after the 1946 strike followed a predictable course. The Company had been concerned over the antipathy many of the employees displayed during the strike. It decided that it was no longer enough to act in a manner that it thought becoming for a "good" employer; it had to insure that the employees recognized and appreciated the Company's efforts in their behalf. The problem was perceived as a failure to apply GE's highly successful consumer product merchandising techniques to the employment relations field.

[NEW PLAN]

The new plan was threefold. GE began by soliciting comments from its local management personnel on the desires of the work force, and the type and level of benefits that they expected. These were then translated into specific proposals, and their cost and effectiveness researched, in order to formulate a "product" that would be attractive to the employees, and within the Company's means. The last step was the most important, most innovative, and most often criticized. GE took its "product"—now a series of fully-formed bargaining proposals—and "sold" it to its employees and the general public. Through a veritable avalanche of publicity, reaching awesome proportions prior to and during negotiations, GE sought to tell its side of the issues to its employees. It described its proposals as a "fair, firm offer," characteristic of its desire to "do right voluntarily," without the need for any union pressure or strike. In negotiations, GE announced that it would have nothing to do with the "blood-and-threat-and-thunder" approach, in which each side presented patently unreasonable demands, and finally chose a middle ground that both knew would be the probable outcome even before the beginning of the bargaining. The Company believed that such tactics diminished the company's credibility in the eyes of its employees, and at the same time appeared to give the union credit for wringing from the Company what it had been willing to offer all along. Henceforth GE would hold nothing back when it made its offer to the Union; it would take all the facts into consideration, and make that offer it thought right under all the circumstances. Though willing to accept Union suggestions based on facts the Company might have overlooked, once the basic outlines of the proposal had been set, the mere fact that the Union disagreed would be no ground for change. When GE said firm, it meant firm, and it denounced the traditional give and take of the so-called auction bargaining as "flea bitten eastern type of cunning and dishonest but pointless haggling."

To bring its position home to its employees, GE utilized a vast network of plant newspapers, bulletins, letters, television and radio announcements, and personal contacts through management personnel.

Side by side with its policies of "doing right voluntarily" through a "firm, fair offer," GE also pursued a policy of guaranteeing uniformity among unions, and between union and non-union employees. Thus all unions received substantially the same offer, and unrepresented employees were assured that they would gain nothing through representation that they would not have had in any case. Prior to 1960, GE held up its proposed benefits for unrepresented employees until the unions agreed, or until the old contract with the Union expired.

The IUE split off from the UE in 1950, when the UE was expelled from the CIO for alleged Communist domination. Since 1950, the IUE and GE have bargained on a multi-unit basis, despite the presence of separate unit certifications for IUE locals. The pattern was continued in successive 1951, 1952, 1954, and 1955 renewal contracts. In practice, the IUE has dealt with the company through its General Electric Conference Board composed of delegates elected from IUE locals. Under the Union constitution, the Conference Board may call strikes, make contract proposals, and conclude agreements, regardless of an individual local's consent. GE has dealt with, and recognized the status of, the

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1 Commentators are almost as widely split on the spelling of the term as they are over its merits. See, e.g., H. R. Northrup, Boulwarism (1964); Note, Boulwareism: Legality and Effect, 76 Harv. L. Rev. 807 (1963); Cooper, Boulwarism and the Duty to Bargain in Good Faith, 20 Rutgers L. Rev. 653 (1966); Gross, Cullen & Hanslowe, Good Faith in Labor Negotiations: Tests and Remedies, 53 Corn. L. Rev. 1009, 1025 (1968) ("Boulwarism"). We will follow the trial examiner in denominating the technique as "Boulwareism."

GE, while abjuring the use of the term Boulwareism, described its bargaining tactic in the early days as "the Boulware approach" in speeches to its supervisors.

Conference Board since 1950, although the national agreements frequently provided that some matters, usually minor, would be left to local agreement.

The 1955 Contract, which was to run for five years, contained a provision allowing the Union to reopen in 1958, solely on the issue of employment security. The union did so, but was unable either to gain concessions from the Company, or to elicit enough support for a strike.

III. The 1960 Negotiations

Under the 1955 Contract, the earliest date that either party could compel the beginning of negotiations was August 16, 1960, 45 days before the end of the contract. Both sides, however, were anxious to take at least some preliminary steps before they were required to.

The IUE set up a loose alliance with several other AFL-CIO unions who bargained with GE, and they jointly polled their members on proposals. Before the actual beginning of formal negotiations, the IUE also began preparing its members (through information about some of the possible demands that appeared likely to be presented to GE.

Since the linchpin of the "Boulware approach" was to bring GE's side of the story home to its employees and to the general public, it began in the latter part of 1959 to advise its Employment Relations Managers of the subjects that they should be prepared to discuss with employees. This was effected through various media, including plant publications and personal contact. General arguments in favor of keeping GE competitive through low costs, and the advantage of receiving GE benefits without having to wait for Union officials to approve them, were among the suggestions presented.

Informal meetings were first held in January, 1960, and Union and Company subsequently joined in preparing a body of information. Neither side felt any inclination to complain of want of cooperation at this stage. GE, in fact, took pains to suggest alternate information when the precise form the Union desired was unavailable.

[UNION NOTIFIED]

Before another planned informal meeting in June, 1960, GE notified the IUE by letter that as of July it would institute a contributory group accident and life insurance plan for all employees, but if the Union objected, only unrepresented employees would receive the benefits. The Union protested that the Company had to bargain before making such a unilateral change, but GE insisted that the 1955 IUE-GE Pension and Insurance agreement waived all such requirements. The Union still objected, and the program was put into effect only for unrepresented employees.

At the June meeting, the Union stated its proposals, as they then stood. Without much discussion, other than some minor clarifications, Phillip D. Moore, GE's Union Relations Service Manager and chief negotiator, called the proposals "astronomical" in cost, "ridiculous," and not designed for early settlement.

Following the presentation of these proposals, the early publicity phase of the Boulware approach swung into high gear. Employing virtually all media, from television and radio, to newspaper, plant publications and personal contact, the Company urged employees and the public to regard the Union demands as "astronomical" (then and later a favored Company term), and likely to cost many GE employees their jobs through increased foreign competition. GE, on the other hand, announced it would in time make a fair and "firm" offer that would give employees no reason to allow union leadership to impose a strike. The basic theme was that the Company, and not the Union, was the best guardian and protector of the employees' interests.

[UNION'S ATTEMPTS]

The IUE also tried its hand at publicity, including an "IUE Caravan" that travelled from city to city, and occasional articles in the International Union's newspaper. In scope and effectiveness, however, they were far outshadowed by the Company's massive campaign.

From July 19 to August 11, the Union presented its specific proposals on employment security, to which the Company replied with general expressions of disapproval, or simply rejected. GE spent the next five meetings delivering prepared presentations on the general causes of economic instability, which the Union branded as a waste of time.

In subsequent meetings, the Company's posture remained unchanged. It would comment generally on some Union demands, and consider them in formulating its offer, but would not commit itself in any way. While it

complained that the IUE proposals were excessive, it replied to Union requests for cost estimates with "we talk about the level of benefits," or that the proposals cost "a lot." GE would not indicate the total cost of a settlement it considered reasonable ("we talk level of benefits"); the Union in turn refused to rank its demands by priority, describing them all as "musts." Indeed the entire early period—and the later negotiations as well—were characterized by an air of rancor on both sides, which provided each with welcome opportunities to downgrade the other in communications to Union members.

GE finally revealed its own proposal informally on August 29. While expressing distress at some features of the offer, Union negotiators urged the Company to delay publicizing its "firm, fair" offer, so that its position would not be frozen before the IUE had an opportunity to examine it and offer changes. GE refused, agreeing only to hold up most of the prepared and packaged publicity until after formal presentation of the offer on the next day.

[REQUESTS RENEWED]

Union officials frequently renewed their requests for cost information during the ensuing month of negotiations. GE consistently refused to estimate the cost of its proposal or of any of its elements, so that the Union might reallocate its demands. When pressed for some of the highly-touted GE cost studies, Moore frequently slipped into the "level of benefits" format, and generally showed no interest in presenting alternate information that was available and would have served the Union's needs.

There were few modifications made in the original GE offer. The Company did propose an extra week's vacation after 25 years in exchange for a smaller wage increase; but Union officials had indicated at the outset that they were uninterested in paring down what they considered an already inadequate wage offer. Despite this, and in the face of the departure by Union officials for their national conference, GE publicized the "new" offer heavily in employee communications.

After declaring late in September that the "whole offer" was "on the table," GE contrary to prior practice, brought its position home by making its three per cent wage increase offer effective for unrepresented employees before the end of the contract or IUE acceptance. Two days later GE also put its pension and insurance proposals into effect, despite IUE President James Carey's complaint that this would "inhibit" any subsequent modifications.

On September 21, Federal Mediation Service officials began to sit in on the negotiations at the request of the Union. Their presence does not appear to have measurably aided the negotiations. The Union, in response to Company complaints that the IUE proposals were too costly, submitted a written request for information on the cost per employee of the GE pension and insurance plans, as well as the number of employees who could be expected to benefit from GE's vacation and income extension proposals. The request was refused in part, and the remainder was not complied with until after the strike, when the information would be of no substantial value to the Union.

[UNION'S EFFORTS]

Similar difficulties confronted the Union in its efforts to change the effective date of the pension and insurance plans. The Company proposed a January 1 date for the first increase in pension and insurance benefits; the Union in turn suggested that the increase in benefits should coincide with the beginning of the contract. GE shifted its ground back and forth: first it claimed that the earlier date would be too costly: then it said that it was talking "level of benefits" and not cost; then it argued that prior contracts had always provided for pension increases on the first of the year. When this last ground proved to be incorrect, one GE negotiator promised to "consider" the October date, although he insisted the January date was "appropriate." During that afternoon, however, even this concession was withdrawn, and later explanations included describing January again as "appropriate," and "the time that you make all the resolutions for the New Year." [2]

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[2] Without trying to follow the issue through all its permutations, some of the relevant portions of the negotiating minutes went as follows:

(September 21, 1960)

Carey (Union): . . . You change the dates of our proposal just so you wouldn't give us what we wanted.

• • •

. . . make the effective date of the Pension Plan October 2nd instead of January 1st.

Willis (Company): January 1, 1961 is all right.

Callahan (Union): You can do better than that.

• • •

[UNION'S COMPLAINT]

Union officials complained that "it is just because we request something that you would refuse to give it," and subsequent Company explanations served to support, rather than to undercut, this feeling. On September 28, with three scheduled meetings left before the end of the contract,

Willis: Talk to Mr. Moore.

* * *

(Later that day)

Moore (Company): I know you did. You would like to have it October, 1960, and we feel it should be January 1, 1961 along with the other changes.

Fitzmaurice (Union): We have people who are going to retire between October and January. They feel that they are out in limbo.

Moore: This would apply to many people any time you set a date—a particular date.

Callahan: Didn't the five-year agreement on pensions extend from the time of the agreement and not January? [The 1955 pension agreement began by the date of the overall 1955 agreement.]

* * *

(September 22, 1960)

Carey: Could you bring in for the conciliators the difference in terms of the cost between what we are proposing and what you want. You know—the cost of making the effective dates different.

* * *

. . . We are asking you to determine the costs of making the effective dates that we suggest and the difference in years.

Moore: Mr. Carey, we are talking level of benefits. You know that. We don't talk cost. We talk level of benefits.

* * *

Willis: It is the appropriate date, Mr. Carey.

Lasser (Union): Is this your idea of collective bargaining that you listen to us and then you come to a conclusion and that is it.

Hilbert (Company): No, Dave, you know that. Unless you have something to convince us differently.

Lasser: Why that date? Why April 1962? [April was the date the Company preferred to have the second step-up in pension benefits.]

Willis: The wage structure will come up at that time and it will be changed at that time, that is why.

Carey: Wait a minute, wait a minute, wages will go up October 1, 1961. Let us make the agreement that the date the wages go in—that is the date the wages go in, the pensions go in effect at that date.

Hilbert: Let's wait and see what happens on wages—it won't be October, 1961.

Carey: All right—let's leave it on that basis. If it is based on the wage structure we can conform to those dates.

Hilbert: We can consider it.

* * *

Carey: We would like to proceed to arrive at an agreement on insurance, vacations and holidays like we did on pensions. I think we have an agreement on that if Management would change the date of the pensions to the date of the wage levels, now that they said that Mr. Hilbert would consider.

Moore: Mr. Carey, we aren't taking anything under advisement for later consideration.

Carey: A Management representative said that they would take it under advisement for later consideration. Sid and Hilbert did. I think you ought to leave them alone and go on to your assignment, Mr. Moore. Maybe we can get an agreement.

Moore: Do we have that cleared up? We have nothing under advisement, Mr. Carey.

Carey: What are these fellows doing here. They said they would take it under advisement.

Moore: We aren't taking anything under advisement, Mr. Carey. It is all on the table.

Carey: Can we get an agreement on a tentative basis like we did on pensions?

Moore: We have got everything there is on the table. We have all five items in the proposal. They are on the table.

* * *

On September 27, 1960, the Union raised the question of pension dates again:

Stanley (Union): I was here. Last week you said you were basing your pension date on the date that wages were made effective which was April, 1962 and if it changed you would consider.

Hilbert: Let's take first things first, Mr. Stanley.

Sigal (Union): How about the first part of the pensions and their effective date? Why aren't the pension changes effective on that date? The 1st of October, 1960.

Willis: We did make them effective the first part. We made the increase of $2.25 to $2.40 effective on January 1st.

Sigal: Where does the April, 1962 date come from?

Willis: It's the midpoint of the contract.

Sigal: If it is status that counts, what does January 1, 1961 have to do with it? That isn't the mid-point of the first part.

Hilbert: You know it's the beginning of the year and it's the time that you make all the resolutions for New Years and all that.

Sigal: You mean all the things that you break, is that it? If you are talking about contract dates it should be October 1, 1960.

Willis: We think it is an appropriate date, Mr. Sigal.

a Union negotiator, seeking to salvage something of the earlier IUE Supplemental Unemployment Benefits proposal, suggested a local option plan under which some of the funds the Company had allocated to wage increases and its income extension offer could be diverted to supplement unemployment compensation. He was clear that nothing was to be added to the Company's costs. Moore responded, "After all our month of bargaining and after telling the employees before they went to vote that this is it, we would look ridiculous to change it at this late date; and secondly the answer is no." A few moments later Moore reiterated his belief that "we would look ridiculous if we changed it." Hilbert, for GE, later gave three reasons why the Company would not consider the proposal—and two of them were that it would make GE "look foolish in the eyes of employees and others. . . ."

[OFFER REJECTED]

GE on September 29 rejected a Union offer to maintain the status quo under the old contract until a new one was signed, specifically refusing the cost-of-living escalator clause, and stating that it would "consider" later Union-related terms such as dues checkoff. A strike (which took place on October 2, except for

the Schenectady Local, which joined October 6) was clearly imminent. Although claiming to be uncertain about truce terms with national IUE negotiators, GE headquarters on September 29 authorized its Schenectady Employee Relations Manager, Stevens, to offer all the pre-existing terms of the contract (except for the cost-of-living term) to the local. Stevens did so in statements to Union members and to the local Business Agent, Jandreau. A similar offer was made to the Pittsfield local, and broadly publicized there.

By October 10, the Company (after the Union had filed an unfair labor practice charge) made the same offer to the Union's national negotiators, for any locals that returned to work. Despite rejection by the Union at the national level, the Company proceeded to deal directly with local officials, and to urge acceptance of the offer. When local officials demurred, as, for example, at Lynn, Massachusetts, publicity was aimed at the employees themselves, criticizing the local officials' stand on the "truce." Similar events occurred at Waterford, Louisville, Bridgeville, and Syracuse.

Throughout the course of the strike, GE communications to the employees emphasized the personal character of the Union leaders' conduct, and threatened loss of jobs to plants that returned to work late. Negotiations were held during the strike until October 19, when the Company declared that an impasse had been reached, During that period, GE refused to give the IUE definitive contract language until the Union had chosen which of the options it preferred, and until it gave its unqualified approval of the Company proposal.

[CAPITULATION]

On October 21, it became clear that Union capitulation was near. The Company, which had previously refused to delete the retraining provision from its offer felt free to relax its position, and granted the Union's request to permit a local option on retraining. While refusing a joint strike settlement agreement, which both parties would sign, GE did propose a unilateral "letter of intent," indicating that it was in agreement with most of the Union settlement proposals. On October 22, the Union capitulated completely, signing a short form memorandum agreement (they had not yet seen the complete contract language to which they were agreeing), and the Company alone issued its letter of intent. The strike ended on October 24.

Two matters were left open for settlement: seniority for transferred employees, and dues checkoffs. Neither, when finally settled, represented more than an adjustment to take account of NLRB decisions that rendered the original form of the agreement of dubious legality. Some minor changes also followed, none of any considerable significance.

The only other events of importance occurred at the Augusta, Georgia plant. On October 5, the plant manager sent a letter to the four employees on strike (at that time the only ones), warning them that their employment would be terminated and replacements hired if they did not return to work. On October 13, however, he sent them telegrams, retracting the earlier letter as to job termination, but indicating the replacements would be hired. More employees (twenty in all) joined the strike after October 5, and on October 24 the Company refused their unconditional offer to return to work. It did, however, give physical examinations to three of the employees, and rehired the two who passed.

IV. The Specific Unfair Labor Practices

A. Unilateral Insurance Proposal

On June 1, 1960, before the reopening of negotiations, but after GE had agreed to meet with the Union on June 13 to hear its proposals, the Company notified the Union by letter that it would unilaterally institute a personal accident insurance proposal. Under the Company plan. the insurance would go into effect on July 1, would be paid wholly by the employees, and would be in addition to existing insurance coverage provided by GE. If the IUE objected, GE would not offer the insurance to its members: it would, however, make it available to other employees regardless of the stand taken by the IUE.

Prior to the June 13 meeting, GE publicized the new insurance proposal, along with the information that enrollment would take place later in the month. At the meeting, the Union objected strenuously to GE's failure to bargain over the insurance, claiming that it was clearly a bargainable issue, which GE had a duty to discuss with Union representatives.

Ordinarily, the matter would be

relatively simple: it appears well settled that insurance is a mandatory subject for collective bargaining, and the employer violates section 8(a)(5) of the National Labor Relations Act by refusing to bargain over it. See NLRB v. General Motors Corp., 179 F.2d 221, 25 LRRM 2281 (2d Cir. 1950); Inland Steel Co. v. NLRB, 170 F.2d 247, 22 LRRM 2506 (7th Cir. 1948), cert. denied, 336 U.S. 960, 24 LRRM 2019 (1949) (dictum). He would, of course, also violate the Act if he unilaterally changed the conditions or terms of employment. See NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962). Here, however, both the policy of section 8(d) of the Act, and the 1955 IUE-GE Pension and Insurance Agreement (which was to remain in force until October 1, 1960) affect the issue, although it is correct that section 8(d) is not by its terms applicable. Section 8(d) provides that during the term of a collective bargaining agreement neither party need:

". . . discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." 29 U.S.C. § 158 (d) (1964).

Under the 1955-1960 Pension and Insurance Agreement, each party waived the right to require the other to bargain as to pensions or insurance matters except during the stated renegotiation period—which, barring waiver, was months off.

Read expansively, and without any attention to the purpose of the section, the combination of 8(d) and the Pension Agreement might appear to protect any action that GE might take with respect to insurance during the term of the agreement. In Equitable Life Insurance Co., 133 NLRB 1675, 49 LRRM 1070 (1961), however, the Board took the view that that 8(d) was designed to protect the status quo: it was to be used as a shield, not as a sword.

[BOARD'S ARGUMENT]

To support this view, the Board now urges that the legislative history demonstrates that the primary purpose to be served by the relevant portion of 8(d) was to achieve "peaceful industrial relations" through stable collective bargaining agreements which guard "the right of either party to a contract to hold firm to the terms or conditions of employment specifically provided for in writing." 133 NLRB at 1689. See II Legislative History, LMRA 1947, at 1625.[3] See also NLRB v. Jacobs Mfg. Co., 196 F.2d 680, 684, 30 LRRM 2098 (2d Cir. 1952). Indeed, a convincing *reductio ad absurdum* argument can be made that any other reading would construe 8(d) and the contract provision as permitting GE to make any modifications in the insurance terms that it sees fit—for example to increase or decrease its contribution to the existing policy—all without any consultation with or recourse for the Union. Section 8(d), the argument would run, covers "any modification," which would include a decrease in benefits. Such a construction is patently unsupportable; it would simply destroy the stability of the agreement that 8(d) is designed to protect. Moreover, viewing this as a matter of contractual interpretation, it seems highly unlikely that the Union would have ever considered such a clause.

An argument more reasonable superficially is that the Company might add to the agreement through unilateral action, but could not subtract from it. In a sense, of course, the difference is illusory. A collective bargaining agreement is a compromise not only between the parties, but of their past, present, and future goals. An insurance agreement that covers particular risks, in a specified way, impliedly rejects other risks, and other methods. Specifically, a Union may always oppose insurance plans to which its employees contribute, believing that the tax benefits of noncontributory plans to its members—and often to the company—in the long run will outweigh any present gains. Or, it may believe that it is important to keep insurance benefits within narrow bounds, so that at the next negotiating session it will be able to press more vigorously for other benefits. In this sense, then, even "additions" to the insurance agreement subtract from the basic compromise that the agreement represents.

[SERIOUS OBJECTIONS]

Yet even if we were to ignore this threshold difficulty, there are serious

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3 "It [section 8(d)] merely provides that either party to a contract may refuse to change its terms or discuss such a change to take effect during the life thereof without being guilty of an unfair labor practice." II Legislative History of the Labor Management Relations Act (Taft-Hartley Act) 1947, at 1625 (remarks of Senator Taft).

objections to permitting one party to an agreement unilaterally to hold out this type of inducement to the other. It creates divisive tensions within the Union; employees with hazardous occupations will favor the proposal, while those with routine tasks will object. Whichever way the Union moves, it loses ground with some part of its constituency. Union democracy is not furthered by permitting the Company to pick the Union apart piece by piece. The same point may be made where there are both union and non-union employees. If the Union refuses the benefit, then it may appear, at least in the short run, to have disadvantaged its members vis-a-vis non-members. Thus it may be forced to sacrifice long-term goals to avoid short-term dissatisfaction.

In the context of this case, where the Company's tactics seemed so clearly designed to show the employees that the Union could win them nothing more than the Company was prepared to offer, it is even more apparent that a unilateral offer—over which the Union may not bargain—diminishes the rewards and the importance of the bargaining at the end of the contract period. Thus the Union's ability to function as a bargaining representative is seriously impaired. Indeed, such conduct amounts to a declaration on the part of the Company that not only the Union, but the process of collective bargaining itself may be dispensed with. Cf. Equitable Life Ins. Co., 133, NLRB 1675, 1693, 49 LRRM 1070 (1961).

A far more subtle argument on behalf of the Company concentrates on the effect the Equitable rule has on non-Union employees. This line of thought suggests that the employer can always grant unilateral benefits to non-Union employees. If he were forbidden to do so whenever some of the employees chose a Union as their bargaining representative, then the Union would in effect have the ability to prevent non-Union employees from making an independent choice on benefits. In fact, the argument goes, he would be denying the unrepresented employees their right to refuse to be represented by the Union, and would thus be committing an unfair labor practice. See § 7, 29 U.S.C. § 157 (1964) ("Employees . . . shall also have the right to refrain from any or all of such activities. . . ."); § 8(a)(1), 29 U.S.C. § 158(a)(1) (1964) (making violations of § 7 an unfair labor practice).

[TWO ANSWERS]

There are two answers to this argument. Section 8(a)(3), 29 U.S.C. § 158(a)(3) (1964), forbids discrimination in terms of employment that discourage or encourage union membership. Were GE unilaterally to give only non-Union employees a cash bonus, it would be violating the policy of section 8(a)(3), if its aim were to disparage the Union. Under some circumstances, in fact, its subjective state of mind would be wholly irrelevant. See Note, Labor Law—The Decreasing Importance of Employer Motivation as an Element of Unfair Labor Practice, 46 North Carolina L. Rev. 975 (1968). Hence it is not by any means clear that an employer may give benefits to non-union employees whenever he wishes; his freedom, and that of the non-union employees, is limited by section 8(a)(3). Moreover, Equitable hardly says that an employer like GE may not offer to increase benefits during the term of the contract; rather, its thrust is that if an employer wishes to do so, he must be prepared to bargain with the union. The Act can hardly be read to require less.

GE attempts to distinguish Equitable by urging that only section 8(d) and not a contract provision was at stake in that case, and the employer attempted to capitalize on the dilemma it created for the union. The first ground is unconvincing. GE does not direct us to circumstances indicating a desire by the parties to the collective bargaining agreement to do more than invoke the protections of section 8(d). Indeed, the Company described the contract language as "the standard 8(d) clause." [4]

[4] Title 1, Section 4 of the IUE-GE 1955 Pension and Insurance Agreement provided in part:

". . . each of the parties voluntarily and unqualifiedly hereby waives any and all rights to require that the other party or parties hereto bargain collectively during the term of this Agreement, with respect to any such subjects or matters whether or not such matters are covered by this Agreement. . . .

"The Union and Locals agree that, during the term of this Agreement, there shall be no strike, slowdown, sitdown, or other form of stoppage of work arising out of or conducted in connection with any effort to induce modifications of or amendments or additions to the insurance and pension benefits provided for by this agreement. . . ."

Despite the extremely broad language of the first paragraph, the language of the second—"to induce modifications of or amendments or additions to the insurance agreement"—seems rather clearly to indicate that the clause, like section 8(d), was for the benefit of the party attempting to maintain the status quo, and not the party seeking to unsettle it.

The NLRB may interpret such a contract during the course of an unfair labor practice

[EQUITABLE CASE]

Although the Trial Examiner found that GE did not attempt to capitalize on the IUE's refusal to accept the personal accident insurance proposal, this case is not distinguishable from Equitable. The employer's attempt to use the Union's plight to its own advantage was not a determinative factor there. The dilemma created by an employer exists whether he uses it crudely or subtly; it is inherent in a take-it-or-leave-it bargaining approach. True, GE did not capitalize on the Union's refusal; but through its enrollment program late in June, and by the unavoidable controversy that the issue itself raised in Union ranks, the Company was able to profit from the situation without exploiting it outright. The rationale of the Board's Equitable rule reaches at least that far. Once it is clear that the party who disrupts the status quo cannot rely on section 8(d) to protect his conduct, then unilateral action over a mandatory matter, joined to a refusal to bargain, represents a straightforward rejection of the collective bargaining principle in fact. See NLRB v. Katz, 369 U.S. 736, 743, 50 LRRM 2177 (1962).

Lastly, GE urges that since the Equitable decision was not filed until 1961, it should be found blameless, since it did not know that its conduct was proscribed.[5] Of course, it is also true that the conduct, although not yet proscribed, had not been judged proper either, and indeed, Equitable Life Insurance Company itself stands on the same footing with GE in that respect. In any event, parties who make a practice of stretching the statutory fabric to the breaking point should not be surprised when the cloth gives way. Cf. NLRB v. Gissel Packing Co., Inc., 395 U.S. 575, 620, 71 LRRM 2481 (1969) (condemning "brinkmanship").

B. Refusal to Furnish Information

It is conceded that in the prenegotiation period GE was quite cooperative in aiding the Union to secure information. GE submits that it spent over $100,000 in fulfilling Union requests. Indeed, in several instances where the necessary data was too costly to obtain, or was unavailable, GE suggested a substitute, which substantially satisfied the Union's needs without straining the Company's resources.

Once formal negotiations were underway, however, GE's attitude changed markedly. A pattern gradually began to develop in which the Union would propose a particular benefit. Company negotiators would label it as "astronomical," or "costly," and when pressed by the Union for figures to back up their cost criticisms, would respond with "we talk level of benefits, not costs."

There were times when the format changed, but the result remained relatively the same. On occasion, the Company might suggest one set of employment security provisions, which the Union did not like. When the Union indicated that it preferred its proposals to the Company's, the Company responded that the Union alternates were too costly. GE refused to indicate the cost of Union proposals, or how much it was willing to expend, so that the Union might recast its demands. The following exchange is not atypical:

Swire (Union): We are asking for an improvement in maternity. We want the Company to pay everything up to $550, then co-insurance after that.

Willis (Company): Something like that is out of reach. Maternity is the most expensive item.

Swire: What does it cost, Sid?

Willis: We talk level of benefits, not costs.

[TRUITT CASE]

The cases that have dealt with the difficult problem of giving meaning to "bargaining in good faith" are instructive. In NLRB v. Truitt Manufacturing Co., 351 U.S. 149, 38 LRRM 2042 (1956), the company claimed that

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hearing, where the question is whether the union waived a statutory safeguard. NLRB v. C & C Plywood Corp., 385 U.S. 421, 64 LRRM 2065 (1967).

5 GE cites Columbine Beverage Company, 138 NLRB 1297, 51 LRRM 1221 (1962) for the proposition that it might avoid an unfair labor practice finding by relying on a pre-existing NLRB ruling. In Columbine an employer refused to bargain with a unit at a time when the NLRB considered the unit appropriate. After the union filed unfair labor practice charges, the Board in another case decided that the unit was not an appropriate one. The NLRB held that since his conduct was illegal at the time that it occurred, the employer could not rely on the later NLRB decision to purge itself, and thus sustained an unfair labor practice finding.

Here, however, there was no outstanding ruling that an employer might propose new terms to a collective bargaining agreement on a take-it-or-leave-it basis: Equitable, decided a year later, was a case of first impression. More to the point, Columbine merely held that later decisions would not be a defense to charges based on law in effect at the time that the conduct occurred. GE apparently is assuming that the converse principle is necessarily true—indefensible in logic, and with a nod to Justice Holmes, equally so in law.

a wage increase of over 2½ cents per hour would put it out of business, but refused to furnish the Union with any indication of its financial status. The Supreme Court, in finding that the Company had committed an unfair labor practice, commented,

"Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." 351 U.S. at 152-53.

See also NLRB v. George P. Pilling & Son Co., 119 F.2d 32, 8 LRRM 557 (3d Cir. 1941); NLRB v. Western Wirebound Box Co., 356 F.2d 88, 61 LRRM 2218 (9th Cir. 1966).

Moreover, it is not always necessary that the Company put the cost of its proposals in issue, or even refuse Union demands on the ground that they are too costly. In Sylvania Electric Products, Inc. v. NLRB, 358 F.2d 591, 61 LRRM 2657 (1st Cir.), cert. denied, 385 U.S. 852, 63 LRRM 2236 (1966), the court decided (without raising the issue of cost justifications by the company) that pension and insurance costs (which it labeled "collateral" issues) should be made available to the Union where it wished to weigh the value of such plans against an increase in take-home pay.[6] This is particularly true, of course, where the Company contributes to the plan, thus in effect substituting it for wages.

The rationale of these opinions seems obvious; if the purpose of collective bargaining is to promote the "rational exchange of facts and arguments" that will measurably increase the chance for amicable agreement, then sham discussions in which unsubstantiated reasons are substituted for genuine arguments should be anathema. See Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401 (1958).

[6] GE argues that a prior decision of the First Circuit, Sylvania Electric Products, Inc. v. NLRB, 291 F.2d 128, 48 LRRM 2313 (1st Cir.), cert. denied, 368 U.S. 296, 49 LRRM 2173 (1961), denied discovery of such information for a noncontributory plan and thus demonstrated that the state of the law was, at the very least, highly unsettled. In the first Sylvania case, however, the court was careful to indicate that if the Company interposed a cost objection to a Union proposal—as here—the Union might be entitled to the cost figures, citing Truitt. In any event the second Sylvania case expressly distinguished the first almost to the point of extinction by permitting the Union to demand cost information wherever the Union sought to weigh the value of different possible wage-benefit packages.

[TWO INSTANCES]

The Board and the Trial Examiner relied on two specific instances of refusal to furnish information to substantiate their unfair labor practice charge. The first was an oral request by the Union on August 24 for the number of employees with one year, and with twenty years, of service, so that the Union might determine the cost of its demand for a fourth week of vacation for employees with 20 or more years of service. Carey later pointed out that this request was in response to the Company's labelling the Union's vacation plan as "astronomical." Hilbert, for GE, stated that the Company did not have the information; on August 31 Moore responded that GE was discussing "the level of benefits."

The second refusal to furnish information relied upon occurred in September. When the Union, on September 8, sought to evaluate the number of employees who would have benefited from the Company's Income Extension Aid proposal, had it been in effect for the past two years. Moore responded, "Somewhere between zero and 100 per cent." Later in the month, on September 22, the IUE put this and other requests for information in writing, and submitted them to GE. Like the original August oral request, the cost information the Union wanted was put in issue by the Company's repeated references to cost as a justification for rejecting Union proposals, or as a reason for preferring Company plans.[7] GE also frequently couched its objections to Union demands on the ground of "competition," thereby implying that the cost of the IUE proposals was a material element in its considerations. See Local 5571, United Steelworkers of America v. NLRB, 401 F.2d 434, 69 LRRM 2196 (D.C. Cir. 1968); NLRB v. George P. Pilling & Son Co., 119 F.2d 32, 8 LRRM 557 (3d Cir. 1941).

[UNION'S LETTER]

The September 22 letter requested basically five categories of information: (A) cost per employee of pro-

[7] For example, on August 31, GE negotiators rejected the Union's SUB proposal as "an expensive item," but then refused to value its own income extension and (IEA) proposal because "we haven't figured it out yet," but SUB "would cost a lot more." Similar discussions occurred over pensions, insurance, wages, and the cost-of-living escalator clause that the Company wanted dropped from the new contract.

posed insurance benefits; (B) cost per employee proposed pension benefits; (C). (D) number of employees likely to benefit from the Company's income extension and (IEA) program; (E) number of employees with 20 or 25 years of continuous service.[8] The last request, like that made orally on August 24, was designed to test the Company's assertion that an extra week of vacation after 20 years would be too expensive, and that one after twenty-five years would be preferable.

Addressing ourselves first to the oral request of August 24, GE never did reply until it answered the same question, posed under "E," above, after the strike was over. While there is some dispute over whether the Union orally requested the information for the whole Company or for IUE units alone, there is no disagreement that GE had the figures available on a company-wide basis.

8 The text of the letter was as follows:

September 22, 1960

Mr. Philip D. Moore, Manager
Employee Relations Service
General Electric Company
570 Lexington Avenue
New York 22, New York

Dear Sir:

We have made oral requests several times, since General Electric announced its contract proposals on August 30, 1960, for information necessary for intelligent bargaining on this matter. The requests were rejected.

In order that we may be in a position to appraise the cost of your proposals, and to determine the number of people who might benefit by them, we renew our request for the following information with respect to the employees in each of the General Electric bargaining units represented by the Union and its locals:

A. Cost per employee, and also for employee dependents, of each proposed new insurance benefit, and of each proposed increment in existing benefits, broken down into

(1) cents per month premium and

(2) cents per month net cost estimated on basis of the Company's 1965 experience.

B. Cost in cents per hour per employee of the proposed increment in each of the pension benefits.

C. Number of employees on the Company's recall list as of June 30, 1960, for

(1) less than 6 months;

(2) more than 7 months and less than one year;

(3) more than one year.

D. Number of employees who have been recalled since January 1, 1960, and who, prior to their recall, had been laid off

(1) less than 6 months;

(2) more than 6 months and less than one year;

(3) more than one year.

E. Number of employees with [following handwritten to semicolon]

(a) 20 years;

(b) 25 years or more continuous service.

We would appreciate having this information without delay.

Very truly yours,

/s/ JAMES B. CAREY
James B. Carey
President

[EMPLOYER'S FAILURE]

Even if we were to assume that the Union had asked for figures for IUE units alone, GE's failure to provide the information is inexcusable. The Trial Examiner appropriately found that GE could readily have obtained the data from local plants, and even had it been unwilling to do so, it could, at a minimum, have informed the Union that it had the information available on a company-wide basis, which the Union probably would have found just as useful (since GE indicated that it would put the same benefits into effect for all employees, pursuant to its uniformity policy). Thus, under the most favorable interpretation of the facts, GE's offhanded refusal to submit information on an issue which it had itself raised, would amount to an unfair labor practice. This conclusion is fortified by GE's behavior in the prenegotiation meetings, when it demonstrated that it was capable of providing information—indeed even suggesting that it be provided—in a form different from that originally desired. If we were to hold that because the information requested did not conform precisely to the data in the possession of the Company, an employer might refuse to provide any data at all, we would, in our view, be taking a step backwards, towards incorporating all the worst features of the ancient common law pleading system into our present-day labor negotiations. GE seems to suggest that even an insignificant variance between the request and the available information would be a complete bar to the Union—even though it was utterly unaware of the precise form in which the Company kept its records, and the Company refused to enlighten it. In a day when liberal pleadings, liberal discovery, and modern rules of evidence have largely superseded ancient formalism, grafting such a pointless and dysfunctional rule onto negotiating procedures is clearly out of place.

[RESPONSE TO LETTER]

GE did finally respond to item "E," as well as items "C" and "D" in the September 22 letter, on November 7, after the strike had been settled and the contract agreed upon.[9] All three

9 The Company also answered with a letter on September 28, which refused items A and B as "speculative," indicated that C and D "would take some time" and answered that portion of E relating to 25 years of service, but not that for 20 (despite the fact that the later request had been made orally for more than a month earlier).

of the requests required that the Company collect information from its local plant managers; GE, however, waited until October 24 to initiate the collection process. The Company also claims that mass picketing, violence, and problems of shutting down struck plants forced it to delay. But, as the Trial Examiner pointed out, this retrospective explanation fails to explain the initial delay of a week, before the strike began. The Trial Examiner, who had the opportunity to observe and evaluate the testimony, refused to credit this explanation. Finding that his conclusion (adopted by the Board) is supported by substantial evidence (and is not vigorously contested by the Company), we conclude that the Company committed an unfair labor practice by failing to provide the information highly relevant to the negotiations, within a reasonable time. See NLRB v. Fitzgerald Mills Corp., 313 F.2d 260, 52 LRRM 2174 (2d Cir.), cert. denied 375 U.S. 834, 54 LRRM 2312 (1963); Utica Observer Dispatch, Inc., 111 NLRB 58, 35 LRRM 1402, enforced 229 F.2d 575, 37 LRRM 2441 (2d Cir. 1956); Reed & Prince Mfg. Co., 96 NLRB 850, 28 LRRM 1608, enforced 205 F.2d 131, 32 LRRM 2225 (1st Cir.), cert. denied 346 U.S. 887, 33 LRRM 2133 (1953). See also section 10(e), 29 U.S.C. § 160(e) (1964); Universal Camera Corp. v. NLRB, 340 U.S. 474, 27 LRRM 2373 (1951) (Frankfurter, J.).

Items A and B, mentioned in the September 22 letter—the estimated per employee pension and insurance data—were never provided by the Company. It insisted that it was not legally required to disclose the cost of fringe benefits to it, and that in any case the information was so "purely speculative" that compiling it would be both burdensome and valueless. The first contention seems clearly wrong. In order for the Union to assess properly the Company's objections to some of its proposals, and to understand which of GE's objections to cost were soundly based, the IUE had to have the basic data on which to make informed choices.

A union weighing wages against benefits, or one form of benefit against another, should receive answers to its genuine non-burdensome requests for cost information. If the Union were denied such data, it would be unable to bargain intelligently, and arrive at sensible and reasoned decisions, particularly those involving reallocation of benefits within GE's cost framework. Even the first Sylvania decision indicated that when the employer (as here) puts cost in issue, or the discussion involves a contributory plan (as here), the Union may be entitled to cost information. See also note 6, supra.

[FURTHER CONTENTION]

The Company further urges that since the Trial Examiner found that some of the information would have been difficult or expensive to obtain in the form requested, it need not have provided it. But GE had most of the information in some form that would have been useful to the Union, and easily could have either presented it in that form, or at least advised the Union that it had other relevant information (like the C, D, and E data) available. The objection is unavailing.

The last major claim is that future pension and insurance costs were "purely speculative" and only "educated guesses." The difficulty with this stand is that it would excuse the Company from furnishing virtually all information of which it was not absolutely certain. In bargaining, as in most other circumstances, it is the use to which the information is put that should determine the degree of accuracy that is required. The root question, as posed in the second Sylvania case, is whether the data "would significantly aid in the bargaining process." 358 F.2d at 592. There can be no question that the information available would have assisted the Union here; GE committed an unfair labor practice in withholding it.[10]

C. Bargaining Directly with Locals

As we have pointed out above, GE and the IUE had a consistent pattern of national negotiations for over ten years before the 1960 strike. There can be little doubt that the Board's finding that GE recognized and dealt with the IUE-GE Conference Board as representative of all IUE locals was both supported by substantial evidence and correct.[11]

10 A last claim, like that made in the take-it-or-leave-it personal accident insurance unfair labor practice, is that bad faith could not be found since GE under then-existing precedents could not have known that its conduct would be found wanting. It deserves the same reply. What has been said should indicate that GE's reliance on the first Sylvania case is misplaced, particularly where the Union's need was clear, and the Company's refusal not attributable to a legitimate concern other than doing the minimum that the law required.

11 At Louisville, Waterford, and Bridgeville, the IUE itself was certified as the bargaining agent; at Schenectady, Syracuse, Lynn, and

Once the strike was imminent, however, GE abandoned this pattern, and dealt separately with several of the IUE locals. On September 29, GE notified the IUE at their bargaining meeting that after October 1, it would consider its contractual obligations at an end; it would continue current wages, benefits, and seniority, but such union-related matters as dues checkoff, grievance time pay and superseniority for union officials, would have to be "considered."

That same day, however, GE headquarters authorized their local Employment Relations Manager, A. C. Stevens, in Schenectady to offer more to the local there than had been offered to the national negotiators, if Schenectady Local 301 stayed at work. Specifically, all the union-related provisions of the old contract—dues checkoff and the like—were to remain in effect, while at the national level, GE had committed itself only to "consider" them. On October 4, Stevens wrote to Leo Jandrean, Local 301's business agent, stating:

"We agree to extend to you protection of the recent contract, including grievance machinery, protection covering working conditions, seniority, prices, wage rates, and any other condition of employment recited in the contract. Current cost-of-living adders will remain in effect. We will continue union representation recognition as presently constituted and all the above will remain in effect so long as we are not on strike."

On the same day, the local Employee Relations Manager at Pittsfield made a similar offer, containing the same truce conditions, which was broadly publicized.[12] The IUE then filed an unfair labor practice charge, based on the offers to the locals. Several days later (about October 10), GE offered the same terms to the national negotiators.

[PROPOSAL TO LOCAL]

On the day the Company made its Schenectady-Pittsfield terms available to the IUE generally, the Lynn, Massachusetts Employment Relations Manager, Robert Burns, wrote to Lynn Local 201's Business Agent, and proposed:

". . . we meet to work out a memorandum of intent which would re-establish for all employees represented by Local 201 all of the provisions which were in the contract . . . which . . . would go into effect when Local 201 terminates the strike in Lynn while contract negotiations continue."

At Waterford, a similar proposal was made to the local Business Agent and union members were telephoned by their foremen and urged to convince their local officers to accept the return to work proposal.

At Louisville, Kentucky, the Employee Relations Manager forwarded a copy of the Company's October 10 proposal along with a noncommittal letter to the Local Business Agent indicating that the copy might be "helpful" in removing the "confusion" over how employees might return to work. The Bridgeville, Pennsylvania Employee Relations Manager also forwarded a copy of the proposal, but he in addition added that he was

". . . suggesting it to you and other Local 640 officials as a means of permitting local members to return to their jobs and to continue to earn their wages, until a settlement agreement is reached."

At Syracuse, in a phone conversation between the Local President and the Union Relations Manager, the Manager not only suggested accepting the terms now offered to the IUE nationally, but indicated that the President and several other Syracuse employees could have their alleged strike misconduct suspensions lifted if they returned to work.

[UNFAIR PRACTICE]

The Trial Examiner and the Board agreed that in each instance GE committed an unfair labor practice when it went behind the backs of the national negotiators and offered separate peace settlements to locals. Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 14 LRRM 581 (1944) sustains this conclusion. In Medo, several employees who appeared to represent a majority met with their employer to express their dissatisfaction with the union representing them. They offered to abandon it if their wages were increased. When the Employer treated with the dissenting employees, the Court held, he violated section 9(a) of the Act, 29 U.S.C. § 159(a) (Bargaining representatives of the union are "exclusive"). Therefore, he committed unfair labor practices under sections 8(a)(1) and 8(a)(5), 29 U.S.C.

Pittsfield, individual locals were certified. However, by reason of consistent past practice, GE was obliged to treat the IUE-GE Conference Board as the representative of all.

12 GE claimed that the Pittsfield Local initiated the discussion of truce terms. The Trial Examiner, who had the opportunity to observe the witnesses, disbelieved this testimony, and the Board sustained him. We are unable to say that his finding is unsupported by substantial evidence; in any case, it should not matter who initiates the dealing. See Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683, 14 LRRM 581 (1944).

§§ 158(a)(1), 158(a)(5) (1964). Medo instructs that it does not matter who initiates the by-passing of the bargaining representatives. 321 U.S. at 683. Subsequent cases appear to have applied the doctrine even where the offer to the local or to the employees was no better than that made to the bargaining representative. See, e.g., Independent Stave Co. v. NLRB, 352 F.2d 553, 60 LRRM 2406 (8th Cir. 1965), cert. denied, 384 U.S. 962, 62 LRRM 2231 (1966) (by implication). We have, under similar circumstances, condemned efforts by an employer to take a matter up with his employees, where their bargaining representative had already taken a stand on the matter. Utica Observer-Dispatch v. NLRB, 229 F.2d 575, 37 LRRM 2441 (1956). But cf. NLRB v. Penokee Veneer Co., 168 F.2d 868, 22 LRRM 2254 (7th Cir. 1948).

The terms offered at Schenectady and Pittsfield were in fact better than those made available to the national negotiators. There can be no question but that such offers clash with the Medo rationale, for they cut deeply into the Act's command that bargaining representatives be "exclusive." See § 9(a), 29 U.S.C. § 159 (a) (1964). The Company's claim that it had to "clarify" its position to the Schenectady management so that they would know what terms to effectuate if the local there came to work ignores the fact that it was the Company's vagueness on return to work provisions that caused the need for clarification. In any case, the additional union-related terms should have been offered to the national negotiators for their consideration before — or at least at the same time that—they were given to the locals; yet GE waited until the Union had filed an unfair labor practice charge to do so. We agree with the Board that GE committed an unfair labor practice by failing to respect the IUE-GE Conference Board's status as exclusive bargaining representative.

[OTHER PROPOSALS]

The other proposals complained of occurred after October 10, and so there is no question (with the possible exception of Syracuse) of offering more to the local than to the national negotiators. Yet, as we have suggested, this factor cannot be dispositive. The vice that Medo sought to avoid was the practice of undermining the authority of the union's bargaining representatives through direct dealings with the locals or employees they represented. Such tactics are inherently divisive; they make negotiations difficult and uncertain; they subvert the cooperation necessary to sustain a responsible and meaningful union leadership. The evil, then, is not in offering more. It is in the offer itself.

At Lynn and Waterford it is clear that the employment managers were proposing that they and the local make a separate settlement. At Lynn, GE even offered a separate "letter of intent." Bridgeville is similar, and though the evidence is not so strong, the Board might reasonably have found that the manager there was suggesting an independent settlement. The offers of reinstatement at Syracuse place that proposal as well in the forbidden category, for they indicate that an individual settlement was being held out to the local.

At Louisville, however, the only indicia the Board relies on pointing to a separate agreement, or to treating separately with the local, is the fact that the letter was addressed to the local's president. A fair reading of the brief missive, however, fails to disclose that it had anything more than an informational purpose, giving the content of the proposal made at the national level previously. The basic distinction is between attempting to reach a separate settlement with the local—as at Schenectady—and keeping the local informed of Company positions. In circumstances such as these, the interest in free speech and informed choice must prevail over the slight possibility that the representatives' positions might be undermined, and thus we believe the Board's finding is unsupported by substantial evidence. See NLRB v. Penokee Veneer Co., 168 F.2d 868, 22 LRRM 2254 (7th Cir. 1948). Cf. Linn v. United Plant Guard Workers of America, 383 U.S. 53, 62, 61 LRRM 2345 (1966) (favoring "uninhibited, robust" debate).

V. Overall Failure to Bargain in Good Faith

We now approach the most troublesome and most vigorously contested of the charges. In addition to the three specific unfair labor practices, GE is also charged with an overall failure to bargain in good faith, compounded like a mosaic of many pieces, but depending not on any one alone. They are together to be understood to comprise the "totality of the circumstances." Despite my brother Friendly's distaste for the term, past decisions have indeed emphasized

that good faith—or lack of it—must in the absence of a per se violation depend upon a factual determination based on the overall conduct of the party charged. See NLRB v. Insurance Agents' Union, 361 U.S. 477, 498, 45 LRRM 2704 (1960); NLRB v. Truitt Mfg. Co., 351 U.S. 149, 38 LRRM 2042 (1956). The Board can hardly be faulted for resting its finding on a ground that the Supreme Court has mandated. Certain specific practices, such as making unilateral changes in working conditions during bargaining, can be found to constitute per se violations of the duty to bargain, since they constitute a "refusal to negotiate in fact." See NLRB v. Katz, 369 U.S. 736, 743, 50 LRRM 2177 (1962). When such conduct is present, the Board need make no finding that the totality of the party's conduct manifests bad faith; the practice itself is conclusive on that issue.

The Board, however, chose to find an overall failure of good faith bargaining in GE's conduct. Specifically, the Board found that GE's bargaining stance and conduct, considered as a whole, were designed to derogate the Union in the eyes of its members and the public at large. This plan had two major facets: first, a take-it-or-leave-it approach ("firm, fair offer") to negotiations in general which emphasized both the powerlessness and uselessness of the Union to its members, and second, a communications program that pictured the Company as the true defender of the employees' interests, further denigrating the Union, and sharply curbing the Company's ability to change its own position.

[BOARD'S POSITION]

The Board relies both on the unfair labor practices already discussed and on several other specific instances to show that GE had developed a pattern of conduct inconsistent with good faith bargaining. It points to GE's proposed personal accident insurance proposal on a take-it-or-leave-it basis as an example of an attempt to bypass the Union, and an attempt to disparage its importance and usefulness in the eyes of its members. GE's response to this is that the Equitable case had not been decided in 1960. Therefore, it argues, its actions were based on a "justifiable belief" in the state of the law at that time and cannot support the view that the Company was motivated by bad faith.

This reasoning overlooks the principle that acts not in themselves unfair labor practices may support an inference that a party is acting in bad faith. See NLRB v. Insurance Agents' Union, 361 U.S. 477, 500, 45 LRRM 2704 (1960) (Frankfurter, J., concurring). While GE may have believed that it was acting within its "rights" in offering a take-it-or-leave-it proposal, doing so may still be some evidence of lack of good faith. Here there was no substantial justification offered for refusing to discuss the matter, other than a niggling—and incorrect—view of the contract and the statute. Cf. NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 32 LRRM 2225 (1st Cir.) (Magruder, J.) ("must make some reasonable effort in *some* direction"), cert. denied 346 U.S. 887, 33 LRRM 2133 (1953). Given the effects of take-it-or-leave-it proposals on the Union, already set forth in our review of the specific unfair labor practice charges, the Board could appropriately infer the presence of anti-Union animus, and in conjunction with other similar conduct could reasonably discern a pattern of illegal activity designed primarily to subvert the Union.

We have already discussed at length the Company's failure to furnish information. As in the instance of the personal accident insurance proposal, GE's attitude on information was characterized by a pettifogging insistence on doing not one whit more than the law absolutely required, an insistence that eventually strayed over into doing considerably less. GE's conduct, as the Board's opinion points out, was all of a piece. It negotiated, to the greatest possible extent, by ignoring the legitimacy and relevance of the Union's position as statutory representative of its members. Thus it is hardly surprising that IUE requests for information were met (at least once negotiations had begun) with less than enthusiasm, for they reflected the Union's contrary belief that it had to know the worth of the Company proposals in order to evaluate them for its members.

[EMPLOYER'S RELUCTANCE]

GE's reluctance to part with information was not limited to the specific instances complained of as an unfair labor practice. The record discloses that even before the general reopening of negotiations, GE displayed a patronizing attitude towards Union negotiators inconsistent with a genuine desire to reach a mutually satisfactory accord. During the early

meetings devoted to employment security, GE's responses to the Union's detailed proposals were vague and uninformative, hardly calculated to apprise the IUE of GE's stand on any of the matters about which it wanted to negotiate. When the Union finished presenting its plan, GE, instead of offering counter-proposals, or commenting specifically on the IUE's suggestions, offered a prepared lecture series on the general causes of economic instability, a response not at all designed to enlighten the Union on specific bargainable matters. This impression is reinforced by Moore's consistent refusal to permit the lecturing Employee Relations Managers to answer specific Union inquiries.

More crucial, perhaps, was the Company's persistent refusal, after publicizing its proposal, to estimate not only the cost of components of its offer, but the total size of the wage-benefit package it would consider reasonable. Responses such as "it hasn't occurred yet" were interposed when IUE negotiators asked for estimates of the GE offer; yet the trial examiner found (as GE's bargaining philosophy required) that considerable cost studies had in fact been made, which have been of substantial assistance to the Union. Without an estimate of the overall size of GE's offer, the Union was hamstrung in its efforts to decide which substitutions were reasonable, whether to press for more total benefits, or how much redistribution could be accomplished within GE's cost framework.

In addition to its reluctance to make meaningful cost disclosures, GE occasionally took untenable and unreasonable positions and then defended them, with no apparent purpose other than to avoid yielding to the Union. The most flagrant example occurred in setting the date for the beginning of pension and insurance benefits. As indicated in our opening discussion of the negotiating background, GE vacillated back and forth, chose inconsistent and confusing explanations at random, interposed some inconsequential attempts to pass the problem off with banter, and finally settled by characterizing the date it had chosen as "appropriate." See note 2 supra, and accompanying text. Certainly, GE could insist on any dates that it desired—but its manner of responding to Union inquiries reflected its philosophy of "bargaining."

When the last act was virtually played out and it had become apparent that the Union would have to end its abortive strike and concede to GE's terms, the Company continued to display a stiff and unbending patriarchal posture hardly consistent with "common willingness among the parties to discuss freely and fully their respective claims and demands and, when these are opposed, to justify them on reason." NLRB v. George P. Pilling & Son Co., 119 F.2d 32, 37, 8 LRRM 557 (3d Cir. 1941). With the Union, as it were, "on the ropes," the Company insisted that IUE choose the options that it preferred, and assent to the contract unconditionally, without ever seeing the final contract language. When the Union protested that the memorandum proposed for its signature was too vague, the Company refused to submit more definite language. Four days later, the Union capitulated completely and signed the short form memorandum, still without having seen the final contract to which it was agreeing.

[NOTION REJECTED]

In a similar vein the Company rejected the notion of a bilateral strike settlement agreement. Instead, it proffered a unilateral "letter of intent." While again, it is true GE did not have to sign a joint settlement agreement, it gave no reason for refusing to do so (other than that this had been its past practice). The Board might reasonably infer that its prime purpose was to avoid recognizing the Union's status as bargaining representative of the striking employees, and not to further any legitimate business aim.

GE argues forcefully that it made so many concessions in the course of negotiations — concessions which, under section 8(d), it was not obliged to make—that its good faith and the absence of a take-it-or-leave-it attitude were conclusively proven, despite any contrary indicia on which the Trial Examiner and the Board rely. The dissent proceeds under the misapprehension that we consider lack of major concessions as evidence of bad faith. Rather, we discuss them only because while the absence of concessions would not prove bad faith, their presence would, as GE claims, raise a strong inference of good faith. On close examination, however, few of the alleged concessions turn out to have a great deal of substance. Its offer of a wage reopener accompanied its original proposal; the option to choose a vacation instead of a wage increase was included over

the Union's objections (at least during the negotiating meetings), and changes in the Pension Plan were more in the nature of clarifications than actual shifts in position, or in any case involved issues of quite minor significance.[13]

The Company's stand, however, would be utterly inexplicable without the background of its publicity program. Only when viewed in that context does it become meaningful. We have already indicated that one of the central tenets of "the Boulware approach" is that the "product" or "firm, fair offer" must be marketed vigorously to the "consumers" or employees, to convince them that the Company, and not the Union, is their true representative. GE, the Trial Examiner found, chose to rely "entirely" on its communications program to the virtual exclusion of genuine negotiations, which it sought to evade by any means possible. Bypassing the national negotiators in favor of direct settlement dealings with employees and local officials forms another consistent thread in this pattern. The aim, in a word, was to deal with the Union through the employees, rather than with the employees through the Union.

[EMPLOYER'S ATTITUDE]

The Company's refusal to withhold publicizing its offer until the Union had had an opportunity to propose suggested modifications is indicative of this attitude. Here two interests diverged. The command of the Boulware approach was clear; employees and the general public must be barraged with communications that emphasized the generosity of the offer, and restated the firmness of GE's position. A genuine desire to reach a mutual accommodation might, on the other hand, have called for GE to await Union comments before taking a stand from which it would be difficult to retreat. GE hardly hesitated. It released the offer the next day, without waiting for Union comments on specific portions.[14]

The most telling effect of GE's marketing campaign was not on the Union, but on GE itself. Having told its employees that it had made a "firm, fair offer," that there was "nothing more to come," and that it would not change its position in the face of "threats" or a strike, GE had in effect rested all on the expectation that it could institute its offer without significant modification. Properly viewed, then, its communications approach determined its take-it-or-leave-it bargaining strategy. Each was the natural complement of the other; if either were substantially changed, the other would in all probability have to be modified as well. It is only in this context that GE's incomprehensible insistence on a January 1 starting date for the pension benefits, and the "explanations" that followed it, can be understood.

[PRE-STRIKE MEETING]

All this was brought into the open during the September 28 meeting. Virtually on the eve of the strike, Union negotiators were searching for a way to save face by reconstituting their SUB proposal within the outlines of the Company's costs. Far from being frivolous as the dissent seems to suggest, such last minute attempts at compromise are the stuff of which lasting accomodations and productive labor-management relations are made. The substance of the Company's response to this effort was well put by their chief negotiator, Philip Moore:

"After all our month of bargaining and

13 For example, to describe the reduction in Union representatives' pension contributions as a "concession" as the dissent urges, seems inappropriate. GE simply indicated that it would conform its deductions to the actual 1960 actuarial estimates, rather than the higher (and by 1960 incorrect) 1955 assumption.

As to "yielding" on Exclusion K, the Company, in response to a Union request, revealed that it had already revised its health insurance proposal to provide payments to employees insured under other contributory group medical coverage. More simply put, the Company, on its own motion (or possibly, although not certainly, in response to a prior union inquiry of September 20) decided that GE employees who paid full premiums on both GE and other contributory group plans should not be required to forego their GE benefits. Those whose spouse, for example, received family coverage under a plan paid in part by another employer, would still receive nothing under the GE plan. With all due respect, the characterization "minor" still seems appropriate.

14 GE claims that the IUE first released the Company offer to its members. Examining the basis for this claim, we find it insubstantial. First, the IUE releases occurred only after GE announced that it would not delay publication of its offer, but would give it to the media the next morning, August 31. Second, both the instances relied upon involved incidental mimeographed flyers, one of which stated that it was not to be released until after 4 P.M. August 30. When viewed against the Company's coordinated, massive campaign, both instances appear unplanned and inconsequential. For example, a typical employee at some of the larger plants received over 100 written Company communications during September and October. On many days he was subjected to two, and sometimes three or four GE messages, not including oral discussions and meetings with Company supervisors.

after telling the employees before they went to vote that this is it, we would look ridiculous to change it at this late date; and secondly the answer is no."

The Company, having created a view of the bargaining process that admitted of no compromise, was trapped by its own creation.[15] It could no longer seek peace without total victory, for it had by its own words and actions branded any compromise a defeat.

[CONTENTION]

GE urges that section 8(c), 29 U.S.C. § 158(c) (1964) prohibits the Board from considering its publicity efforts in passing on the legality of its bargaining conduct. The section reads:

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

GE would have us read that section as a bar to the Board's use of any communications, in any manner, unless the communication itself contained a threat or a promise of benefit. The legislative history, past decisions, and the logic of the statutory framework, however, indicate a contrary conclusion.

The bald prohibition of section 8(c) invited comment when it was enacted, as well as later. Senator Taft replied to some of the criticism of the bill that bears his name:

"It should be noted that this subsection is limited to 'views, arguments, or opinions' and does not cover instructions, directions, or other statements that would ordinarily be deemed relevant and admissible in courts of law." I Legislative History of the LMRA 1947, at 1541.

The key word is "relevant." The evil at which the section was aimed was the alleged practice of the Board in inferring the existence of an unfair labor practice from a totally unrelated speech or opinion delivered by an employer. Senator Taft later indicated, for example, in the context of a section 8(a)(3) discriminatory firing, that prior statements of the employer would have to be shown to "tie in" with the specific unfair labor practice. I Legislative History of the LMRA 1947, at 1545. Later references to the section described the barred statements as those which were "severable or unrelated," and "irrelevant or immaterial." II Legislative History of the LMRA 1947, at 429 (Senate Report), 549 (House Conference Report). The objective of 8(c) then, was to impose a rule of relevancy on the Board in evaluating the legality of statements by parties to a labor dispute.[16] Its purpose was hardly to eliminate all communications from the Board's purview, for to do so would be to emasculate a statute whose structure depends heavily on evaluation of motive and intent. See e.g., § § 8(a)(1), 8(a)(3), 8(a)(5).

[OTHER CASES]

The cases have largely supported this view. The Board may rely on communications to establish discriminatory treatment in violation of sections 8(a)(3) and 8(a)(1). See NLRB v. Lipman Bros., Inc., 355 F.2d 15, 61 LRRM 2193 (1st Cir. 1966); Hendrix Mfg. Co. v. NLRB, 321 F.2d 100, 53 LRRM 2831 (5th Cir. 1963). Employer communications were used to evaluate the presence of a state of mind inconsistent with the obligation to bargain in good faith in NLRB v. Fitzgerald Mills Corp., 313 F.2d 260, 268, 52 LRRM 2174 (2d Cir.), cert. denied, 375 U.S. 834, 54 LRRM 2312 (1963); and NLRB v. Herman Sausage Co., 275 F.2d 229, 45 LRRM 2829 (5th Cir. 1960).

While it is clear that the Board is not to control the substantive terms of a collective bargaining contract, nonetheless the parties must do more than meet.[17] Our brother Friendly

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15 Similarly, GE's insistence on putting its pension and wage benefit porposals into effect before the IUE agreed to them, or the old contract was at an end (contrary to prior practice) dovetailed with its communications program, since its policy of uniformity meant that it intended firmly to see that union members would receive the same and no more. This is but one more example of how a policy such as uniformity, innocent in and of itself, can in context become a vital part of an illegal overall pattern of conduct.

16 See Linn v. Plant Guard Workers, 383 U.S. 53, 62 n. 5, 61 LRRM 2345 (1966):

"The wording of the statute indicates, however, that § 8(c) was not designed to serve this interest by immunizing all statements made in the course of a labor controversy.

* * *

It is more likely that Congress adopted this section for a narrower purpose, i.e., to prevent the Board from attributing anti-union motive [sic] to an employer on the basis of his past statements." [Citations omitted.] Congress may also have been concerned with the Board's "captive audience" doctrine, by which employer speeches during working time were found to be unfair labor practices. See Casenote, 57 Mich. L. Rev. 615 (1959). That problem, of course, is not present here, and supports our view of the restrictive scope of section 8(c).

17 Thus we find no ground for disagreement with the portion of Judge Burger's dissent in United Steelworkers of America v.

makes much of the point that General Electric did bargain and reach an "agreement" with the Union. He says that prior 8(a)(5) cases demanded nothing less than a showing of no such desire to reach an agreement, and opines that without such a "definite standard" an 8(a)(5) violation may not be made out. Some cases have indeed spoken of the evil of a "desire not to reach an agreement with the Union" as crucial. While the dissenting opinion cites NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134, 32 LRRM 2225 (1st Cir.), cert. denied, 346 U.S. 887, 33 LRRM 2133 (1953), for that authority, we hasten to note that Judge Magruder was careful in his opinion not to be misled, as our dissenting brother appears to be, by words that seem on the surface quite simple but in practice require a highly pragmatic and individualized interpretation. Judge Magruder did not suggest that "desire not to reach an agreement" could be found, as the dissent suggests, by a clearly delineated series of steps X_1, X_2, X_3, taken to "point Y, plus a number of additional items, Z_1, Z_2, Z_3." Far from being a devotee of the new math, he would have agreed with Learned Hand that numbers, even more than words, "are utterly inadequate to deal with the fantastically multiform occasions which come up in human life." In the case before Judge Magruder, Reed & Prince submitted a woefully inadequate and demeaning "offer" of a contract. Presumably, the Union could have seen no alternative but to accept it, and had it done so, our brother Friendly would have held that the Company bargained with a "desire to reach an agreement." and thus had not violated the proscriptions of § 8(a)(5). Judge Magruder, on the other hand, said that the "employer is obliged to make *some* reasonable effort in *some* direction to compose his differences with the union, if § 8 (a)(5) is to be read as imposing any substantial obligation at all." 205 F.2d at 135, 32 LRRM 2225. His point, of course, was that "desire to reach agreement" may mean different things to different people, but in the context of a meaningful and purposeful reading of section 8(a)(5) it must mean more than a willingness to sign a piece of paper. The statute does not say that any "agreement" reached will validate whatever tactics have been employed to exact it. To imply such a Congressional purpose would be to encourage parties to make their violation so blatant that it would be impossible for the other side to continue to exist without signing. Instead the statute clearly contemplates that to the end of encouraging productive bargaining, the parties must make "a serious effort to resolve differences and reach a common ground." NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 486, 487, 488, 45 LRRM 2705 (1960), an effort inconsistent with a "predetermined resolve not to budge from an initial position." NLRB v. Truitt Mfg. Co., 351 U.S. 149, 154-55, 38 LRRM 2042 (1956) (Frankfurter, J., concurring). These are not simple tests; they will not be resolved by formular incantations. Sadly, neither will they be so precise that one will always know the exact limits of what is allowed, and what forbidden—but this is a problem hardly unknown in the law or to judges. The difficulty here, however, arises out of the herculean task of legislating a state of mind. Congress has ordered the Board —and this court—to effectuate its policy of encouraging good faith bargaining, and not to avoid it because the mandate is difficult to apply. The Board has done just that. And, on the basis of substantial evidence we agree. A pattern of conduct by which one party makes it virtually impossible for him to respond to the other —knowing that he is doing so deliberately—should be condemned by the same rationale that prohibits "going through the motions" with a "predetermined resolve not to budge from an initial position." See NLRB v. Truitt Mfg. Co., supra (concurring opinion).

The employer who leaves for a long vacation, giving his negotiator instructions not to budge is no different from the employer who remains on the scene and commands the same behavior daily. Cf. Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1418 & n. 61 (1958). We are assumed to intend the natural and probable consequences of our acts.

[NOVEL POSITION]

The Company and the dissenting opinion seem to take the novel position that the holding in Insurance Agents'—that the Board might not forbid a partial strike during bargaining—ousts the Board's control

NLRB, 390 F.2d 846, 67 LRRM 2450 (D.C. Cir. 1967), cert. denied, 391 U.S. 904, 68 LRRM 2097 (1968), cited by our brother Friendly. Indeed, we are somewhat perplexed at the unusually heavy reliance our dissenting brother places on a dissenting opinion. The author of that opinion is now the Chief Justice of the United States.

over bargaining tactics. But in NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962), the Court held that at least one tactic—instituting unilateral changes during bargaining—was forbidden, for it put a bargainable topic outside the reach of the bargaining process. GE has done no less; it has, if anything, done more. By its communications and bargaining strategy it in effect painted itself into a corner on all bargainable matters.

In order to avoid any misunderstanding of our holding, some additional discussion is in order. We do not today hold that an employer may not communicate with his employees during negotiations. Nor are we deciding that the "best offer first" bargaining technique is forbidden. Moreover, we do not require an employer to engage in "auction bargaining," or, as the dissent seems to suggest, compel him to make concessions, "minor" or otherwise. See p. 44, supra.

Our dissenting brother's peroration conjures up the dark spectre that we have taken a "portentous step" which "'contains seeds of danger for unions'" as well as employers. This picturesque characterization is unfortunate for it is a scare-phrase which tends to distract from the facts in this case. It paints over with a broad stroke the care we have taken to spell out the bounds of our opinion. We hold that an employer may not so combine "take-it-or-leave-it" bargaining methods with a widely publicized stance of unbending firmness that he is himself unable to alter a position once taken. It is this specific conduct that GE must avoid in order to comply with the Board's order, and not a carbon copy of every underlying event relied upon by the Board to support its findings. Such conduct, we find, constitutes a refusal to bargain "in fact." NLRB v. Katz, 369 U.S. 736, 743, 50 LRRM 2177 (1962). It also constitutes, as the facts of this action demonstrate, an absence of subjective good faith, for it implies that the Company can deliberately bargain and communicate as though the Union did not exist, in clear derogation of the Union's status as exclusive representative of its members under section 9(a). See NLRB v. Herman Sausage Co., 275 F.2d 229, 234, 32 LRRM 2225 (5th Cir. 1960).

We have considered the Company's other arguments, including those in favor of disqualifying Board Member Fanning, and against reinstating the replaced workers, but we find them unavailing.[18] The petition for review is denied, and the petition for enforcement of the Board's order is granted.[19]

Concurring Opinion

WATERMAN, Circuit Judge, concurring: — I fully concur with my brother Kaufman. Without differing from the majority opinion in any way and without reiterating its argu-

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18 We do not think that Board Member Fanning's use of the term "boulwareism" was idicative of bias; the term is more description than invective. See note 1 supra.

Since the Board might reasonably have found that the unfair labor practice was a cause of the strike, reinstatement of replaced strikers was proper. NLRB v. Fitzgerald Mills Corp., 313 F.2d 260, 269, 52 LRRM 2174 (2d Cir. 1963), cert denied 375 U.S. 834, 54 LRRM 2312 (1963).

19 The dissent joins GE and the intervenor Union in attacking the Board's order as wanting in specificity. While a more detailed order would be preferable, we are aware that:

> "Once good faith is found wanting, the scope of relief to be given by the Board is largely a question of administrative discretion." NLRB v. Truitt Mrfg. Co., 351 U.S. 149, 156, 38 LRRM 2042 (1956) (Frankfurter, J., concurring).

See also NLRB v. Celotex Corp., 364 F.2d 552, 554, 62 LRRM 2475 (5th Cir. 1966), cert. denied 385 U.S. 987, 63 LRRM 2559 (1966). Courts do not rubber stamp requests by the NLRB for a contempt citation pursuant to a general bargaining order. See, e.g., NLRB v. Corsicana Cotton Mills, 179 F.2d 234, 25 LRRM 2122, 2298 (5th Cir. 1950). It is unreasonable to assume that before a court would undertake to cite either a union or an employer for contempt, it would afford the party every opportunity to show that it was not contumacious, and had made a good faith effort to comply with the terms of the bargaining order. See NLRB v. Corsicana, supra; NLRB v. Athens Mfg. Co., 163 F.2d 255, 20 LRRM 2095 (5th Cir. 1947).

We are also mindful of the excessively lengthy and complicated history of this case, and are unwilling to add needless pages and innumerable days to it by remanding to the NLRB for a more specific order, or by starting the interminable process anew. To illustrate, the action has been before the Board and the courts for nine years; one procedural matter has been to the Supreme Court already. The negotiating minutes occupy 1500 pages; the transcript (taken on 79 separate dates) before the Trial Examine another 10,000. The Trial Examiner's Intermediate Report covers some 240 pages in the appendix to this action; GE took 527 exceptions to that report before the full Board. The NLRB's opinion was mercifully short, but briefs before this court ran to almost 500 pages. We need not dwell on the exhibits, which detailed (in detail) a substantial portion of Union and Company publicity efforts.

The dissent (p. 19) undoubtedly relying on newspaper reports suggests that it is "scarcely possible that the Company's actions are so nearly parallel to those of 1960. . . ." For what it is worth, we quote the last three paragraphs of a recent news report:

> A company spokesman objected to a description of the company's offer on Tuesday as its "first" because, he said, this implied that there would be a second or third.
>
> He said that the company had put its

ments, I would challenge my brother Friendly's dissenting assertion that the standard set forth by Judge Kaufman for determining overall bad faith is vague or difficult to apply. A company may make a firm, fair offer to the union and may stand by that offer, but the company should not be permitted to advertise to its employees that it believes in the firmness of its offers for the sake of firmness.

We recognize that a company is entitled to insist on the terms of its original offer if it believes that the union can be made to accept that offer. That GE refused to yield to union demands without giving reasons based upon cost, maintained a "stiff and unbending" posture, used a unilateral letter of intent when final agreement was reached, failed to make significant concessions, and publicized its offer without waiting for union suggestions do not indicate anything except that GE made and stood by what it conceived to be a fair, firm offer.

What makes these practices unfair is GE's "widely publicized stance of unbending firmness," that is, GE's communications to its employees that firmness was one of the company's independent policies. Two distinct evils derive from such publicity. First, publicity regarding firmness tends to make the company seal itself into its original position in such a way that, even if it wished to change that position at a later date, its pride and reputation for truthfulness are so at stake that it cannot do so. Second, publicity regarding firmness fixes in the minds of employees the idea that the company has set itself up as their representative and therefore that the union is superfluous. Doubtless these evils exist to some extent whenever a company makes, and stands by, a firm fair offer even when there is no company publicity of the kind here involved. However, it seems clear that publicity tends to amplify these undesirable tendencies to the point that, in a case such as this one, the amplification can well be construed to have been activated by a company motive not to bargain in good faith.

[PUBLICITY]

On the other side of the ledger there is very little positive good which can derive from company publicity which indicates that a company believes in firmness for firmness' sake. The free speech benefits of publicity in labor negotiations lie in the fact that informed employees will better know whether to vote for or against a strike and how to evaluate the union's performance on their behalf. These benefits can all be reaped by a company which advertises the terms of an offer and its belief that these terms are fair, without also stating that as a matter of policy it can never be persuaded to change the advertised terms. Such advertisement could only tend to convince employees that because firmness is a company policy it is also a company policy to ignore the union. A company, of course, can advertise its belief that its offer is fair, and that, at the particular time, it sees no reason to change its offer even to forestall a strike. This kind of statement is different from advertising that it is company policy never to change any offer in response to union pressure.

This view does not differ from that of the NLRB, nor does it indicate that the Board reached the right result for the wrong reasons. The trial examiner, whose opinion the Board adopted, specifically condemned GE's declarations that "a union could obtain no added benefits that it would not otherwise grant." 150 NLRB at 279, 57 LRRM 1491. Because of this dominant wrong, we agree with the trial examiner that other aspects of the communications program also evidenced bad faith on the facts of this case although not as a matter of law. 150 NLRB at 274, 57 LRRM 1491. It does no violence to the doctrine of SEC v. Chenery Corp., 318 U.S. 80, 95 (1943) to point out which of those factors correctly relied upon by an agency in the case at hand will also be instrumental in determining decisions in the future.

Concurring and Dissenting Opinion

FRIENDLY, Circuit Judge (concurring and dissenting):—I agree with my brothers that by refusing to furnish cost information and by bargaining with locals during the strike, GE violated § 8(a)(5) of the National Labor Relations Act. I do not believe it also violated the Act by submitting a contributory personal accident insurance plan to the Union and declining to bargain about it until the time for reopening of negotiations. I think also, along lines similar to Member Jenkins' concur-

"whole offer" on the table and that nothing had been held back for later concessions.

Asked if he meant that the offer was the company's final one, he replied, "Not necessarily, but it is all that should be there at this time. New York Times, Oct. 9, 1969.

ring opinion, that other specific conduct of the Company, such as that in regard to the effective date of the pension plan, pp. 12-13, and the form of the strike settlement agreement, p. 17, could properly have been condenmned and an appropriate order framed. However, the majority of the Board was at pains to emphasize that its finding of overall bad faith was not based upon identifiable acts or failures to act that GE could avoid in the future but rather

> upon our review of (1) the Respondent's entire course of conduct, (2) its failure to furnish relevant information, (3) its attempts to deal separately with locals and to bypass the national bargaining representative, (4) the manner of its presentation of the accident insurance proposal, (5) the disparagement of the Union as bargaining representative by the communication program, (6) its conduct of the negotiations themselves, and (7) its attitude or approach as revealed by all these factors.[1]

Such attempts to restrict communications (item 5) and lay down standards with respect to bargaining techniques, attitudes and approaches (items (6) and (7)), bring the Board into collision with §§ 8(c) and (d) and the important policies they embody. It is easy to understand that anyone reviewing this enormous record would emerge with a good deal of sympathy for the situation of the Union and distaste for the tactics of the employer; no one likes to see a person who regards himself as in a strong position pushing it unduly, even though the fairness of GE's offer is not challenged. But the Act does not empower the Board to translate such feelings into a finding of an unfair labor practice, and judicial sanction of such efforts to intrude into areas which Congress left to the parties may in the long run be quite as detrimental to unions as to employers. See NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 45 LRRM 2705 (1960).

[DISAGREEMENT OUTLINED]

I. Before I elaborate my doubts with respect to the determination of overall bad faith, it will be desirable to outline the basis for my disagreement with the conclusion that GE' proffer of a personal accident insurance plan on a contributory basis, before the beginning of the contractual period for bargaining, constituted an independent violation of § 8(a)(5). While the Board's order contains no specific reference to this, at least three members relied heavily upon it for their conclusion of overall lack of good faith (see item (4)), as does the lead opinion here. If this conclusion is wrong, as I think it to be, such an important element is removed from the "totality of the circumstances" on which the Board relied that, on this ground alone, we could not properly enforce the order as to overall bad faith.

Discussion of the issue must begin by clearly delineating what it is not. No one is suggesting, as the majority intimates, p. 20, the GE could unilaterally change the terms of an agreed insurance plan to the detriment of its workers. Still less is anyone suggesting, see p. 22, that GE could confer a benefit only on nonunion members. It is not even claimed that the Company could make a benefit effective for employees represented by a union without advising the union and obtaining the latter's consent. The narrow issue is whether an employer is prohibited from even putting such a proposal to a union at a time when bargaining is not required under the contract unless he is willing to bargain about it then and there.

Section 8(a)(5), as elaborated in § 8(d), requires the employer and the representatives of the employees "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder . . ." When an agreement has been reached, its provisions define what constitute "reasonable times" for bargaining. Here GE and the Union provided in the 1955 Pension and Insurance Agreement in the most explicit terms that "each of the parties voluntarily and unqualifiedly hereby waives any and all rights to require that the other party or parties hereto bargain collectively during the terms of this Agreement, with respect to any such subjects or matters whether or not such matters are covered by this Agreement." See n. 4 to the majority opinon. Unless language in a labor agreement is to be denied its plain meaning, this protects GE's conduct here. I wholly fail to perceive how the Company's further insistence on a specific renunciation by the Union of strikes, etc., to enforce modifications of insurance and pension benefits outside of a bargaining period in any way qualifies the language I have quoted.

[1] Numbers have been inserted for convenient reference.

NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962), the decision relied upon to support the conclusion that GE's proffer of a contributory personal accident insurance plan violated § 8(a)(5), is more striking in its differences than in its resemblances. There, *during a period of bargaining* the employer *made* three unilateral changes with respect to terms and conditions of employment; the Court's decision, scarcely a surprising one, was that this constituted "a refusal to negotiate *in fact.*" 369 U.S. at 743, 50 LRRM 2177. Here GE merely *submitted a proposal* and did this *at a time when it had no duty to bargain at all.*

While I can understand that an employer's refusal to bargain about a benefit he has voluntarily proffered during the term of an agreement may not be pleasing to a union, that does not violate the Act, at least when the contract expressly permits it. The majority attempts to escalate the problems by suggesting that the course here followed would create "divisive tendencies within the Union," and even enable the Company "to pick the Union apart piece by piece." P. 21. These comments, unsupported by the record, are singularly inappropriate as applied to the offer of a contributory personal accident insurance plan which employees with hazardous occupations were free to accept and those with routine duties to decline, which could hardly affect the Union's position on the next negotiating round since it cost GE nothing other than the costs of administration, where the Company refused to make capital of the Union's rejection, and when the Union considered the issue so unimportant that it did not even bring the matter up for negotiations during the formal bargaining sessions. One could also argue, in opposition to the majority's position, that the Board's determination offends the policy, although not indeed the letter, of the lengthy proviso to § 8(d), since requiring an employer to bargain in a situation such as that presented here, with the corollary that the union may support its bargaining demands with strike threats or strikes, see NLRB v. Lion Oil Co., 352 U.S. 282, 39 LRRM 2296 (1957), undermines the broad purpose of enabling such modifications as are made during the term of an agreement to be made peaceably. However, it is enough for me that nothing in the Act or the court decisions under it can fairly be read to prohibit an employer, during the period of a contract when bargaining would not otherwise be required, from asking a union whether it will consent to his giving a benefit to the employees whom it represents. Cf. NLRB v. Honolulu Star-Bulletin, Inc., 372 F.2d 691, 64 LRRM 2342 (9 Cir. 1967).

[OBJECTIVE OF 8(a)(5)]

II. The objective of § 8(a)(5), as stated by the Senate Committee on Education and Labor, S. Rep. No. 573, 74th Cong. 1st Sess. 12 (1935), was to impose a duty on employers "to recognize such representatives as they have been designated . . . and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement . . ." In 1947 the fear was expressed in Congress that the NLRB "has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make." H.R. Rep. No. 245, 80th Cong. 1st Sess. 19 (1947). As a result Congress enacted § 8(d), expressly providing that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession." See NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 402-04, 30 LRRM 2147 (1952). At the same time, in the light of other actions of the Board, Congress added § 8(c), declaring in unequivocal terms that:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

The great bulk of the Board's salutary decisions under § 8(a)(5) have been in areas far removed from any possibility of conflict with §§ 8(c) or (d). Perhaps the most important single group consists of cases where the employer has refused to deal with a union at all or, as in GE's dealing with locals, has negotiated over its head; in such instances, although the Board normally issues a broad order to bargain in good faith, no one supposes that the order dictates just how the bargaining shall be conducted. Beyond that the Board, with the approval of the Supreme Court, has usefully identified a considerable number of practices constituting per se violations. These include refusal to sign a written contract embodying an agreement, H. T. Heinz Co. v. NLRB,

311 U.S. 514, 7 LRRM 291 (1941), a practice now specifically prohibited by § 8(d); offering employees, during the course of negotiation, more than was offered through the union, NLRB v. Crompton-Highland Mills, Inc., 337 US. 217, 24 LRRM 2088 (1949); making unilateral changes while bargaining is in process, NLRB v. Katz, supra, 369 U.S. 736, 50 LRRM 2177; refusing to furnish available information needed by the union to evaluate a bargaining position, NLRB v. Truitt Mfg. Co., 351 U.S. 149, 38 LRRM 2042 (1956); and insisting as a condition of agreement upon a subject outside the area of mandatory collective bargaining, NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342, 42 LRRM 2034 (1958).

The danger of collision with §§ 8 (c) or (d) arises only when the Board makes a finding of violation although the parties have sat down with each other and have not engaged in any proscribed tactic. Still I have no difficulty with the Board's making a finding of bad faith based on an entire course of conduct so long as the standard of bad faith is, in Judge Magruder's well-known phrase, a "desire not to reach an agreement with the Union." NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134, 32 LRRM 2225 (1 Cir.), cert. denied, 346 U.S. 887, 33 LRRM 2133 (1953). In such instances, the difficulties inevitable in an examination of the "totality of the circumstances" and an order based upon them are outweighed by the definiteness of the standard, the consequent feasibility of compliance, and the necessity for such an order if the employer's duty to recognize the union is to be carried out in substance as well as in form. See, e.g., NLRB v. Montgomery Ward & Co., 133 F.2d 676, 12 LRRM 508 (9th Cir. 1943).[1a] However, as Professor Cox remarked in a notable article which has been cited with approval by the Supreme Court, NLRB v. Insurance Agents' Union, supra, 361 U.S. at 489-90, 45 LRRM 2705, and has not suffered from the lapse of a decade, it is "doubtful whether much is gained by retrospective review of the negotiations when the parties have actually bargained together." The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1439 (1958). Here the General Counsel conceded that GE entertained no such prohibited desire and, despite the majority's innuendoes concerning anti-union animus, the Trial Examiner rightly observed that no claim was "made in this case that the respondent was seeking to rid itself of the Union" with which it had been dealing for many years and expected to deal for many more.

[PRIOR DECISION]

The only prior court decision that has approved a finding of overall bad faith when there was a desire to reach an agreement is United Steelworkers of America v. NLRB, 390 F.2d 846, 67 LRRM 2450 (D.C. Cir. 1967), cert. denied, 391 U.S. 904, 68 LRRM 2097 (1968), a decision rendered over the dissent of Chief Justice (then Judge) Burger. However one may regard that decision, the Board's case was far stronger than here. The employer had refused to budge from an adamant position against a voluntary check-off although it had granted this to a more favored union three years before, had propagandized the employees that a previous similar refusal on its part had destroyed a union, and had advanced no business reasons whatever, "all in a context of vigorous anti-union animus." 390 F.2d at 852, 67 LRRM 2450. There was thus considerable basis for inferring that the employer was seeking eventually to rid itself of the union despite its desire to reach an agreement at the moment. Yet even in that context Judge Burger referred to the Board's postulating "the novel and internally inconsistent proposition that a bargainer can be found to have refused to bargain in good faith even while at the same time it is found to have engaged in bargaining in a good faith effort to reach an agreement and has actually reached a final and binding contract," 390 F.2d at 853, 67 LRRM 2450.[2]

Although both the Board and the majority here have been quite explicit in describing what they are not deciding, they are far less informative with respect to what they are. The closest the lead opinion comes to this is its statement (p. 53) that its basis for upholding the order with respect to overall bad faith is "that an employer may not so combine

[1a] The lead opinion is in error in its speculation concerning what I "would have held" had I sat in Reed & Prince but an agreement had been reached on the employer's terms. There is simply no analogy between Reed & Prince's conduct, see 205 F.2d at 138-39, 32 LRRM 2225, and GE's response to the Union by an offer of a 3% increase for the first two years and a 4% increase for the third and numerous additional benefits, plus the further changes referred to below.

[2] I thus cannot understand how the majority can agree with Judge Burger's dissent, n. 17, and still reach the result it does.

'take-it-or-leave-it' bargaining methods with a widely publicized stance of unbending firmness that he is himself unable to alter a position once taken." My brother Waterman, though avowedly concurring fully, takes what seems to me a quite different view, namely, that GE's "bargaining methods" were entirely lawful and only its allegedly publicization of a "stance of unbending firmness" was unfair.

While the lead opinion makes much use of the "take-it-or-leave-it" phrase, it never defines this. I should suppose it meant a resolve to adhere to a position without even listening to and considering the views of the other side. To go further and say that a party, whether employer or union, who, after listening to and considering such proposals, violates § 8(a)(5) if he rejects them because of confidence in his own bargaining power, would ignore the explicit command of § 8(d)—as Judge Waterman recognizes. Although the taking of such a hard position may be unattractive, the attitude is one which the law allows an employer or a union to take, despite the dictum in Justice Frankfurter's concurring opinion in N.L.R.B. v. Truitt Mfg. Co., supra, 351 U.S. at 154, 38 LRRM 2042.

It surely cannot be, for example, that a union intent on imposing area standards violates § 8(b)(3) if it refuses to heed the well-documented presentation of an employer who insists that acceptance of them will drive him out of business. Neither can it be that a union violates § 8(b)(3) if it insists on its demands because it knows the employer simply cannot stand a strike.[3] It must be equally true that an employer is not to be condemned for "take-it-or-leave-it" bargaining when, after discussing the union's proposals and supporting arguments, he formulates what he considers a sufficiently attractive offer and refuses to alter it unless convinced an alteration is "right." Hence the Board correctly declined to affix the "take-it-or-leave-it" label which my brother Kaufman uses.

[ANOTHER ARGUMENT]

Once we rid ourselves of the prejudice inevitably engendered by this catch-phrase, we reach the argument that a party violates § 8(a)(5) if he gets himself into a situation where he is "unable to alter a position once taken," even though he would otherwise be willing to do so.

While this sounds fair enough, as does the Board's somewhat similar remark about the continuing duty to give "unfettered consideration," it would seemingly outlaw practices that no one has considered illegal up to this time. A union that has won a favorable contract from one employer and has broadcast that it will take no less from others seems to me to be quite as "unable to alter a position once taken" as GE was here, yet I should not have supposed this violated the Act. So also with an employer who has negotiated a contract with one union and has proclaimed that he will do no better for others. To say that taking such positions violates §§ 8(b)(3) or 8(a)(5) is steering a collision course with § 8(d).

Moreover, I find no substantial evidence that GE got itself into the predicament the majority depicts. The best evidence to the contrary consists of the changes the Company in fact made. In response to Union objections to the offer as initially presented informally, GE modified it to include a wage reopener on April 1, 1962, as an alternative to the automatic 4% increase it had proposed. On September 9, after it had publicized its offer and in response to feelers from some Union negotiators, it advanced the option of substituting an additional holiday and a fourth week of vacation for employees with 25 years of service in exchange for 1% of this 4%[4]. Twelve days later it agreed to reduce the costs of the Union's representatives' pension plan from 6% of the first $4800 and 15% thereafter to 4% and 10%—which the Union's chief negotiator called "an excellent proposition." Even though, as the majority states, the reduction was responsive to new actuarial calculations, this shows that GE was not using a mere form of words when it said it would make a change if convinced one was "right." Finally, GE yielded on a clause, Exclusion K, in

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3 Cutler v. N.L.R.B., 395 F.2d 287, 68 LRRM 2317 (2 Cir. 1968), is another illustration of the permissibility of union obduracy. Although the employer's failure to press his demands made it possible for this court to uphold the decision in favor of the union without reaching the issue of overall good faith, it would require some naivete to suppose that any efforts by the employer in that case to get the musicians' union to alter its wage scale would have borne the slightest fruit.

4 The Union was offered the choice of exercising this option on a plant-by-plant basis so that plants where employees with longer service predominated could accept the vacation option and others could retain the added pay.

its insurance plan [5] which the chairman of the Union negotiating committee had characterized as having "caused more dissatisfaction among the people than anything else." The Union's insurance specialist called this "a good improvement."

[UNION'S APPRAISALS]

The Union's appraisals of the value of these concessions at the time is more impressive than the depreciation of them nine years after the event. Moreover, in appraising such concessions it is important to remember Judge Burger's caution that, although it may sometimes be necessary to consider "the reasonableness of parties' positions on particular issues to determine whether, under all the circumstances of the negotiation, a particular bargaining position was adopted for the purpose of frustrating negotiating generally and thus preventing an agreement," "the courts have been vigilant lest the examination of parties' positions to test good faith become a process of judging, directly or indirectly, the substantive terms of their proposals." United States Steelworkers of America v. N.L.R.B., supra, 390 F.2d at 853, 67 LRRM 2450 (dissenting opinion). By characterizing some of the changes as "of quite minor significance," the lead opinion does precisely that.

I find nothing on the other side substantial enough to outweigh this evidence that GE remained able to adopt changes it thought to be "right". Much is made of the September 28 exchange between Jandreau, Moore, and Hilbert over a Union proposal that the Income Extension Aid funds and part of the money for a wage increase provided in the Company offer be used instead for Supplementary Unemployment Benefits (SUB). The lead opinion, following the Trial Examiner, misinterprets Hilbert's remarks. Hilbert's objection to the Union proposal was that it came at so late a date that the Union could not seriously expect the Company to act upon it. He said that there were only three reasons why the Company might change its offer at such a time; if they had deliberately held something back for horse-trading; if they had made an error in deciding what was "right"; or if they were so afraid of a strike that they would give in even though they continued to believe that their offer was "right." *If* the first or last reasons had applied, he said, GE would indeed look foolish in the eyes of its employees and the public at large, but they did not apply[6].

[ESSENTIAL ELEMENT]

III. An essential element to the Board's conclusion of GE's offending was the Company's publicity campaign. "The disparagement of the Union as bargaining representative" is item (5) in the Board's bill of particulars. The Board elaborated this by saying it is unlawful "for an employer to mount a campaign, as Respondent did, both before and during negotiations, for the purpose of disparaging and discrediting the statutory representative in the eyes of its employees, to exert pressure on the representative to submit to the will of the employer, and to create the impression that the employer rather than the union is the true protector of the employees' interests."

I find no warrant for such a holding in the language of the statute, its legislative history or decisions construing it. GE's communications fit snugly under the phrase "views, argument, or opinion" in § 8(c). The very archetypes of what Congress had in mind were communications by an employer to his workers designed to influence their decisions contrary to union views, and communications by unions to workers designed to influence their decisions contrary to employer views. The statute draws no distinctions between communications by an employer in an effort to head off organization [7] and communications after organization intended to show that he is doing right by his employees and will do no more under the threat of a strike. Congress had enough faith in the common sense of

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5 This prevented recovery of benefits for an employee or his dependents if they were covered by other group insurance.

6 More generally, Hilbert's and Moore's remarks must be set in context before they can be properly understood. SUB had first been proposed by the Union and rejected by the Company in the 1958 negotiations. It was again raised and again rejected in the early 1960 meetings on employment security. The Company's opposition was based largely on principle rather than cost, so that Jandreau's protests that he was trying to work within the cost framework of the Company were beside the point in its view. Considered in this context, and with the strike looming four days off, Hilbert's objection that the Union proposal came too late does not seem ill taken. But even here, after Moore had made the statement quoted in the majority opinion and Jandreau had said "There is no sense in being here," Moore replied "Unless there is anything you want us to hear. If you have something new or persuasive, persuade us."

7 See generally Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 Harv. L. Rev. 38, 66-92 (1964).

the American working man to believe he did not need—or want—to be shielded by a government agency from hearing whatever arguments employers or unions desired to make to him. Freedom of choice by employees after hearing all relevant arguments is the cornerstone of the National Labor Relations Act.

As for the legislative history of § 8 (c), the full text of Senator Taft's remarks in this context was:

> The purpose of this language is to make it clear that the Board is not to use any utterances containing [no] threats or promises of benefits as either an unfair practice standing alone or as making some act which would otherwise not be an unfair labor practice, an unfair labor practice. It should be noted that this subsection is limited to "views, argument, or opinions" and does not cover instructions, directions, or other statements which might be deemed admissions under ordinary rules of evidence. In other words, this section does not make incompetent, evidence which would ordinarily be deemed relevant and admissable in courts of law. 2 Legislative History of the LMRA, 1947, at 1541 (1948).

It is plain that GE's communications came under the protection of the statute, and not the exception which Senator Taft described. The word "relevant" in Senator Taft's speech cannot be blown up to such a degree as to render the amendment largely nugatory. The case is in sharp contrast with NLRB v. Fitzgerald Mills Corp., 313 F.2d 260, 268, 52 LRRM 2174 (2 Cir.), cert. denied, 375 U.S. 834, 54 LRRM 2312 (1963), cited by the Board and the majority, where the company's general manager said that he would "die and go to hell before he would sign a contract" and told his employees to "get those union agitating sons of bitches out of Fitzgerald." NLRB v. Herman Sausage Co., 275 F.2d 299, 45 LRRM 2829 (5th Cir. 1960), the only other case cited by the Board in support of this part of its opinion, is equally inapposite.

[CRITICISMS]

The Trial Examiner's criticisms of GE's communications as being one-sided and "massive," and as portraying the union negotiators in an unfavorable light, which were endorsed by the Board and are reflected in the lead opinion, see fn. 14, ignore the whole thrust of § 8(c). Although Mr. Justice Black was in dissent in Linn v. Plant Guard Workers, 383 U.S. 53, 67-68, 61 LRRM 2345 (1966), there was no disagreement with his statement:

> When Congress passed the National Labor Relations Act, it must have known, as almost all people do, that in labor disputes both sides are masters of the arts of vilification, invective and exaggeration.

It is for unions and employers, not for a government agency, to determine how "massive" their communications shall be.

The Examiner coined a phrase, echoed both by the Board and in the lead opinion, see p. 45, namely, that GE's communications program was an attempt "to deal with the Union through the employees rather than with the employees through the Union." Somewhat parallel to this is the opinion's statement that the Company "deliberately bargain[ed] and communicate[d] as though the Union did not exist, in clear derogation of the Union's status as exclusively representative of its members under section 9(a)," p. 53. Picturesque characterizations of this sort, at such sharp variance with the record, scarcely aid the quest for a right result. Members of Congress would probably be surprised to learn that being "exclusive representatives" means that interested parties may not go to constituents in an endeavor to influence the representatives to depart from positions they have taken. There can be nothing wrong in an employer's urging employees to communicate with their representatives simply because the communication is one the representatives do not want to hear. I thus find it impossible to accept the proposition that, by exercising its § 8(c) right to persuade the employees and by encouraging them to exercise their right to persuade their representatives, GE was somehow "ignoring the legitimacy and relevance of the Union's position as statutory representative of its members" (p. 41).

Apparently accepting this, Judge Waterman would narrow GE's offending, not only with respect to the publicity program but on the whole issue of overall bad faith, to its communicating "that firmness was one of the company's independent policies." The first thing to be said about this is that even if my brother were right, we would not be justified in enforcing the Board's order on that basis. "An administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." S.E.C. v. Chenery Corp., 318 U.S. 80, 95 (1943), and the Board's opinion leaned so heavily

on the Company's disparagement of the Union that we cannot disregard this on the basis that it would have ruled the same way even had it known it was wrong in its reliance. Moreover, GE certainly could not be sure it would be in compliance if it desisted merely from the one tactic that Judge Waterman condemns. My second difficulty is that his position would seemingly outlaw conduct such as in the cases I have put—where a union "finally" tells workers that it will not take less from one employer than it has won from another or an employer "finally" proclaims he will give no more to one union than he has to another. The third is that if his or the lead opinion implies that GE's publicity got it into a position where it could not yield even if it was convinced that it should, the necessary factual support does not exist. There is no need to repeat what has been said in the previous section of this opinion on that score. I add only, in response to Judge Waterman's proposed rationale, that, as I read the Trial Examiner's report, he made no finding that the publicity had produced any such result. His condemnation of the Company's "finality" campaign referred solely to communications following the resumption of negotiations after the strike vote, and the sense in which he understood the term "finality" is clarified by his statement that "The repeated mentions of the finality of the offer . . . were coupled throughout . . . this period] with declarations pointing up the inevitable futility of a strike, regardless of its duration, in the light of the Company's policy not to give more simply to avert a strike." (Emphasis added.)

[COMMUNICATION OF POLICY]

Since a policy not to give in just because of a strike is not a violation of § 8(a)(5). I cannot understand why communication of that policy to employees should be. The fact that strikes to coerce acceptance of union demands are "part and parcel of the process of collective bargaining," NLRB v. Insurance Agents' Union, supra, 361 U.S. at 496, 45 LRRM 2705. does not forbid the employer's doing his best to avoid being coerced by them. This, of course, does not change his duty to continue negotiations and to negotiate in good faith. But so far as economic warfare and vulnerability to it are concerned, the Act allows the parties a maximum of selfprotection. No one denies that § 8(c) protects employer communications attempting to persuade employees that they should not strike because the offer fully meets their needs, becaues union leaders are seeking a strike for personal reasons, or because a strike will cost too much in lost pay. To prohibit an employer from adding that the mere fact of a strike would gain nothing in the way of further concessions would remove his most important and most relevant argument. Yet this is all that GE's much discussed finality campaign amounted to and, with one insignificant exception, the campaign made the point in the narrowest way it could. GE did not say "If you strike we will automatically lock ourselves into our offer," but only that GE was not deliberately holding anything back and had to be convinced that its original offer was no longer "right" before it would make a change.[8]

It is doubtless true in labor as in other negotiations that the louder people shout, the harder it becomes for them to change their positions without unacceptable loss of face. In that sense any positive public declaration, whether by an employer or by a union, may run counter to the objective of securing industrial peace by promoting agreement. But the Board has been expressly prohibited from promoting peace by restricting speech. Conformably with the dictates of the First Amendment, Congress, when it enacted § 8(c), determined the dangers that free expression might entail for successful bargaining were a lesser risk than to have the Board police employer or union speech.

[NEW PROBLEMS]

IV. Even if one were to take the benevolent view toward the portion of the Board's opinion and order relating to overall bad faith that is done by the majority, it is beyond debate that if this decision should stand, it would open up wholly new problem areas in the application of §§ 8(a)(5) and 8(b)(3). I cannot perceive any sufficient reason for doing this when, as I see it, the order cannot be enforced in any practical sense and deals with events of half a generation ago.

The only standard of conduct set for GE by the Board's opinion is that a mix of the "fair, firm offer" technique pursued to an unknown point

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8 I thus cannot accept Judge Waterman's characterization that GE publicized "that, as a matter of policy, it can never be persuaded to change the advertised terms."

X, plus a communications program pursued to an equally unknown point Y, plus a number of additional items, Z_1, Z_2, and Z_3, is proscribed. This already sufficient confusion is now compounded by the difference in my brothers' efforts at elucidation.

In view of the general obscurity of what GE is and is not permitted to do, the Company could take little comfort from the majority's assurance that it will be given a full opportunity to show it has made a good faith effort at compliance before it is held in contempt. In fact, however, no contempt proceeding could be successfully maintained. For the Supreme Court has very recently declared, in the closely related context of an equitable decree with respect to work stoppages, that "The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension," Longshoremen's Local 1291 v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 76, 68 LRRM 2205 (1967).[9]

The venerable age this case has attained is a further reason for declining to churn up waters that already are troubled enough. We are dealing with an alleged unfair labor practice of *nine years ago*. Four years were taken by the Board to render a decision — itself some indication that Congress never intended to impose any such "herculean task." Passing over the two years spent in quarrels in the courts over venue and the Union's right to intervene, three more elapsed before the case was argued to us. Since then there have been two further negotiations, in 1963 and 1966. Another in which the IUE's bargaining position has been significantly bolstered by a decision of this court in which I joined, General Electric Co. v. NLRB, 412 F.2d 512, 71 LRRM 2418 (1969), is now in progress. Although the unions have called a strike and filed unfair labor practice charges, in part because of GE's adhering to a "fair, firm offer" of a first year increase less than the unions sought and with annual wage reopeners instead of automatic increases, many of the principals in the 1960 negotiations are no longer on the scene and it is scarcely possible that the Company's actions are so nearly parallel to those of 1960 that an order in this case, even had it been made earlier, would have supported a contempt proceeding.

I am well aware of the Supreme Court's statement that "Congress has introduced no time limitation into the Act except that in § 10(b)," NLRB v. Katz, 369 U.S. 736, 748 n. 16, 50 LRRM 2177 (1962). Still as it seems to me, a court must have some discretion to decline to enforce a Labor Board order relating to practices nearly a decade in the past when, as here, the parties have engaged in bargaining, any harmful effects of the alleged unfair labor practice has been dissipated, the case was one of first impression, and there has thus been no "stubborn refusal to abide by the law." Franks Bros. Co. v. NLRB, 321 U.S. 702, 705, 14 LRRM 591 (1944).

In conclusion, I respectfully suggest, as Judge Burger did in United Steelworkers of America v. N.L.R.B., supra, 390 F.2d at 858, 67 LRRM 2450, "that today's holding contains the seeds of danger for unions in their collective bargaining rights" as well as for employers in the exercise of theirs. It constitutes also a serious indentation of §§ 8(c) and (d), if not, indeed, of the First Amendment. For the reasons I have indicated, I believe the majority's decision to be deeply mistaken—the familiar instance of a hard case producing bad law. In any event, I think that, because of the confusion as to what the Board's order means and the lapse of time, the case is exceedingly inappropriate for taking such a portentous step.

I would grant enforcement with respect to the failure to furnish information and the bargaining with locals, and would otherwise deny.

[9] Acknowledging the impossibility of enforcing the order as written, and proposing that this court should supply a rationale which the Board's decision lacks, a sympathetic commentator has suggested that the only way to sustain the order would be to "hold single offer bargaining to be an unfair labor practice." Cooper, Boulwarism and the Duty to Bargain in Good Faith, 20 Rutgers L. Rev. 653, 689-92 (1966). But we could not uphold it on that basis even if the evidence supported a finding of "single offer bargaining," which it does not, see SEC v. Chenery Corp., supra, 318 U.S. 80. The lead opinion rightly does not do this, and the concurring opinion expressly disclaims any such view.

FIBREBOARD PAPER PRODUCTS CORP. v. NLRB

Supreme Court of the United States

FIBREBOARD PAPER PRODUCTS CORPORATION v. NATIONAL LABOR RELATIONS BOARD et al., No. 14, December 14, 1964

LABOR MANAGEMENT RELATIONS ACT

—Refusal to bargain — Contracting out work—Conditions of employment —Management rights ▶54.668

Employer was required by Sections 8(a)(5) and 8(d) of LMRA to bargain with union representing some of its employees about whether to contract out to independent contractor, for legitimate business reasons, the performance of plant maintenance work in which those employees had been engaged, where the contracting out merely involved the replacement of employees in existing bargaining unit with those of the independent contractor to do the same work under similar conditions of employment. Subject matter of the dispute involves "terms and conditions of employment" within meaning of Section 8(d) of Act, and, under the facts, to require the employer to bargain about the matter would not significantly abridge its freedom to manage the business.

—Affirmative action — Resumption of business operations—Reinstatement —Back pay ▶56.435 ▶56.511 ▶56.409

NLRB was empowered to order resumption of operations which had been discontinued by employer for legitimate business reasons and reinstatement with back pay of employees formerly employed therein, even though the case involved only a refusal to bargain collectively on the part of employer, and notwithstanding limitation provision of Section 10(c) of LMRA. That provision was designed to preclude Board from reinstating an individual who had been discharged because of misconduct; it was not designed to curtail Board's power in fashioning remedies when the loss of employment stems directly from an unfair labor practice.

On writ of certiorari to the U.S. Court of Appeals for the District of Columbia Circuit (53 LRRM 2666, 322 F.2d 411). Affirmed.

Marlon B. Plant, San Francisco, Calif. (Brobeck, Phleger & Harrison and Gerard D. Reilly, with him on the brief), for petitioner.

Archibald Cox, Solicitor General (Arnold Ordman, NLRB General Counsel, Dominick L. Manoli, Associate General Counsel, Norton J. Come, Assistant General Counsel, and Marion L. Griffin, with him on the brief), and David E. Feller, Washington, D.C. (Elliot Bredhoff, Jerry D. Anker, Michael H. Gottesman, and Jay Darwin, with him on the brief), for respondents.

Lambert H. Miller and Fred B. Haught filed brief for National Association of Manufacturers, as amicus curiae, seeking reversal.

Eugene Adams Keeney and James W. Hunt filed brief for Chamber of Commerce of the United States, as amicus curiae, seeking reversal.

John B. Olverson, Van H. Viot, and Matthew J. Flood filed brief for Electronic Industries Association, as amicus curiae, seeking reversal.

Full Text of Opinion

Mr. Chief Justice WARREN delivered the opinion of the Court.

This case involves the obligation of an employer and the representative of his employees under §§ 8(a)(5), 8(d) and 9(a) of the National Labor Relations Act to "confer in good faith with respect to wages, hours, and other terms and conditions of employment."[1] The primary issue is whether the "contracting out" of work being

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[1] The relevant provisions of the National Labor Relations Act are: "Section 8(a). It shall be an unfair labor practice for an employer—

* * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) . . .

* * *

"(d) For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . .

* * *

"Section 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such puposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . ."

performed by employees in the bargaining unit is a statutory subject of collective bargaining under those sections.

[FACTS OF CASE]

Petitioner, Fibreboard Paper Products Corporation (the Company), has a manufacturing plant in Emeryville, California. Since 1937 the East Bay Union Machinists. Local 1304, United Steelworkers of America, AFL-CIO (the Union) has been the exclusive bargaining representative for a unit of the Company's maintenance employees. In September 1958, the Union and the Company entered the latest of a series of collective bargaining agreements which was to expire on July 31, 1959. The agreement provided for automatic renewal for another year unless one of the contracting parties gave 60 days' notice of a desire to modify or terminate the contract. On May 26, 1959, the Union gave timely notice of its desire to modify the contract and sought to arrange a bargaining session with Company representatives. On June 2, the Company acknowledged receipt of the Union's notice and stated: "We will contact you at a later date regarding a meeting for this purpose." As required by the contract, the Union sent a list of proposed modifications on June 15. Efforts by the Union to schedule a bargaining session met with no success until July 27, four days before the expiration of the contract, when the Company notified the Union of its desire to meet.

The Company, concerned with the high cost of its maintenance operation, had undertaken a study of the possibility of effecting cost savings by engaging an independent contractor to do the maintenance work. At the July 27 meeting, the Company informed the Union that it had determined that substantial savings could be effected by contracting out the work upon expiration of its collective bargaining agreements with the various labor organizations representing its maintenance employees. The Company delivered to the Union representatives a letter which stated in pertinent part:

> For some time we have been seriously considering the question of letting out our Emeryville maintenance work to an independent contractor, and have now reached a definite decision to do so effective August 1, 1959.
>
> In these circumstances, we are sure you will realize that negotiation of a new contract would be pointless. However, if you have any questions, we will be glad to discuss them with you.

After some discussion of the Company's right to enter a contract with a third party to do the work then being performed by employees in the bargaining unit, the meeting concluded with the understanding that the parties would meet again on July 30.

By July 30, the Company had selected Fluor Maintenance, Inc., to do the maintenance work. Fluor had assured the Company that maintenance costs could be curtailed by reducing the work force, decreasing fringe benefits and overtime payments, and by preplanning and scheduling the services to be performed. The contract provided that Fluor would:

> furnish all labor, supervision and office help required for the performance of maintenance work . . . at the Emeryville plant of Owner as Owner shall from time to time assign to Contractor during the period of this contract; and shall also furnish such tools, supplies and equipment in connection therewith as Owner shall order from Contractor, it being understood however that Owner shall ordinarily do its own purchasing of tools, supplies and equipment.

The contract further provided that the Company would pay Fluor the costs of the operation plus a fixed fee of $2,250 per month.

At the July 30 meeting the Company's representative, in explaining the decision to contract out the maintenance work, remarked that during bargaining negotiations in previous years the Company had endeavored to point out through the use of charts and statistical information "just how expensive and costly our maintenance work was and how it was creating quite a terrific burden upon the Emeryville plant." He further stated that unions representing other Company employees "had joined hands with management in an effort to bring about an economical and efficient operation," but "we had not been able to attain that in our discussions with this particular Local." The Company also distributed a letter stating that "since we will have no employees in the bargaining unit covered by our present Agreement, negotiations of a new or renewed Agreement would appear to us to be pointless." On July 31, the employment of the maintenance employees represented by the Union was terminated and Fluor employees took over. That evening the

Union established a picket line at the Company's plant.

[THEORY OF BOARD]

The Union filed unfair labor practice charges against the Company alleging violations of §§ 8(a)(1), 8(a)(3) and 8(a)(5). After hearings were held upon a complaint issued by the National Labor Relations Board's Regional Director, the Trial Examiner filed an Intermediate Report recommending dismissal of the complaint. The Board accepted the recommendation and dismissed the complaint. 130 NLRB 1558, 47 LRRM 1547.

Petitions for reconsideration, filed by the General Counsel and the Union, were granted. Upon reconsideration, the Board adhered to the Trial Examiner's finding that the Company's motive in contracting out its maintenance work was economic rather than anti-union but found nonetheless that the Company's "failure to negotiate with . . . [the Union] concerning its decision to subcontract its maintenance work constituted a violation of Section 8(a)(5) of the Act."[2] This ruling was based upon the doctrine estabished in Town & Country Mfg. Co., 136 NLRB 1022, 1027, 49 LRRM 1918, *enforcement granted*, 316 F.2d 846, 53 LRRM 2054 (C. A. 5th Cir. 1963), that contracting out work, "albeit for economic reasons, is a matter within the statutory phrase 'other terms and conditions of employment' and is a mandatory subject of collective bargaining within the meaning of Section 8(a)(5) of the Act."

The Board ordered the Company to reinstitute the maintenance operation previously performed by the employees represented by the Union, to reinstate the employees to their former or substantially equivalent positions with back pay computed from the date of the Board's supplemental decision, and to fulfill its statutory obligation to bargain.

[ISSUES IN CASE]

On appeal, the Court of Appeals for the District of Columbia Circuit granted the Board's petition for enforcement. 322 F.2d 411, 53 LRRM 2666. Because of the importance of the issues and because of an alleged conflict among the courts of appeals,[3] we granted certiorari limited to a consideration of the following questions:

1. Was Petitioner required by the National Labor Relations Act to bargain with a union representing some of its employees about whether to let to an independent contractor for legitimate business reasons the performance of certain operations in which those employees had been engaged?

2. Was the Board, in a case involving only a refusal to bargain, empowered to order the resumption of operations which had been discontinued for legitimate business reasons and reinstatement with back pay of the individuals formerly employed therein?

We agree with the Court of Appeals that, on the facts of this case, the "contracting out" of the work previously performed by members of an existing bargaining unit is a subject about which the National Labor Relations Act requires employers and the representatives of their employees to bargain collectively. We also agree with the Court of Appeals that the Board did not exceed its remedial powers in directing the Company to resume its maintenance operations, reinstate the employees with back pay, and bargain with the Union.

[REFUSAL TO BARGAIN]

I. Section 8(a)(5) of the National Labor Relations Act provides that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Collective bargaining is defined in § 8(d) as

> the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.

"Read together, these provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment. . . .' The duty is limited to those subjects, and within that area neither party is legally obligated to yield. Labor Board v. American Ins. Co., 343 U.S. 395, 30 LRRM 2147. As to other matters, however, each party is free to bargain or not to bargain. . . ." Labor Board v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349, 42 LRRM 2034. Because of the limited grant of certiorari, we are concerned here only

[2] The Board did not disturb its original holding that the Company had not violated §§ 8(a)(1) or 8(a)(3), or its holding that the Company had satisfied its obligation to bargain about termination pay.

[3] Labor Board v. Adams Dairy, Inc., 322 F.2d 553, 54 LRRM 2171 (C. A. 8th Cir. 1963), cert. pending, No. 25, 1964 Term.

with whether the subject upon which the employer allegedly refused to bargain—contracting out of plant maintenance work previously performed by employees in the bargaining unit, which the employees were capable of continuing to perform—is covered by the phrase "terms and conditions of employment" within the meaning of § 8(d).

The subject matter of the present dispute is well within the literal meaning of the phrase "terms and conditions of employment." See Order of Railroad Telegraphers v. Chicago & N. W. R. Co., 362 U.S. 330, 45 LRRM 3104. A stipulation with respect to the contracting out of work performed by members of the bargaining unit might appropriately be called a "condition of employment." The words even more plainly cover termination of employment which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit.

[CONTRACTING OUT]

The inclusion of "contracting out" within the statutory scope of collective bargaining also seems well designed to effectuate the purposes of the National Labor Relations Act. One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation.[4] The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife. Labor Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42-43, 1 LRRM 703. To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace.

The conclusion that "contracting out" is a statutory subject of collective bargaining is further reinforced by industrial practices in this country. While not determinative, it is appropriate to look to industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining.[5] Labor Board v. American Nat'l Ins. Co., 343 U.S. 395, 408, 30 LRRM 2147. Industrial experience is not only reflective of the interests of labor and management in the subject matter but is also indicative of the amenability of such subjects to the collective bargaining process. Experience illustrates that contracting out in one form or another has been brought, widely and successfully, within the collective bargaining framework.[6] Provisions relating to contracting out exist in numerous collective bargaining agreements,[7] and "contracting out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators." United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 584, 46 LRRM 2416.

[OLIVER CASE]

The situation here is not unlike that presented in Local 24, Teamsters Union v. Oliver, 358 U.S. 283, 43 LRRM 2374, where we held that conditions imposed upon contracting out work to prevent possible curtailment of jobs and the undermining of conditions of employment for members of the bargaining unit constituted a statutory subject of collective bargaining. The issue in that case was whether state antitrust laws could be applied to a provision of a collective bargaining agreement which fixed the minimum rental to be paid by the employer motor carrier who leased vehicles to be driven by their owners rather than the carrier's employees. We held that the agreement was upon a subject matter as to which federal law directed the parties to bargain and hence that state antitrust laws could not be applied to prevent the effectuation of the agreement. We pointed out that the agreement was a

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4 See declaration of policy set forth in §§ 1 and 101 of the Labor-Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. §§ 141, 151 (1958).

5 See Cox and Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board, 63 Harv. L. Rev. 389, 405-406 (1950).

6 See Lunden, Subcontracting Clauses in Major Contracts, 84 Monthly Lab. Rev. 579, 715 (1961).

7 A Department of Labor study analyzed 1,637 collective bargaining agreements, which applied to approximately 7,500,000 workers (about one-half of the estimated work force covered by collective bargaining agreements). Among the agreements studied, approximately one-fourth (378) contained some form of a limitation on subcontracting. Lunden, supra, at 581.

direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract. The inadequacy of a rental which means that the owner makes up his excess costs from his driver's wages not only clearly bears a close relation to labor's efforts to improve working conditions but is a fact of vital concern to the carrier's employed drivers; an inadequate rental might mean the progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles from service. [*Id.*, at 294.]

Thus, we concluded that such a matter is a subject of mandatory bargaining under § 8(d). *Id.*, at 294-295. The only difference between that case and the one at hand is that the work of the employees in the bargaining unit was let out piecemeal in Oliver, whereas here the work of the entire unit has been contracted out. In reaching the conclusion that the subject matter in Oliver was a mandatory subject of collective bargaining, we cited with approval Timken Roller Bearing Co., 70 NLRB 500, 518, 18 NLRB 1370, *enforcement denied on other grounds*, 161 F.2d 949, 20 LRRM 2204 (C. A. 6th Cir. 1947), where the Board in a situation factually similar to the present case held that §§ 8(a)(5) and 9(a) required the employer to bargain about contracting out work then being performed by members of the bargaining unit.

[PROPRIETY OF NEGOTIATION]

The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.

The Company was concerned with the high cost of its maintenance operation. It was induced to contract out the work by assurances from independent contractors that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments. These have long been regarded as matters perculiarly suitable for resolution within the collective bargaining framework, and industrial experience demonstrates that collective negotiation has been highly successful in achieving peaceful accommodation of the conflicting interests. Yet, it is contended that when an employer can effect cost savings in these respects by contracting the work out, there is no need to attempt to achieve similar economies through negotiation with existing employees or to provide them with an opportunity to negotiate a mutually acceptable alternative. The short answer is that, although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation.

The appropriateness of the collective bargaining process for resolving such issues was apparently recognized by the Company. In explaining its decision to contract out the maintenance work, the Company pointed out that in the same plant other unions "had joined hands with management in an effort to bring about an economical and efficient operation," but "we had not been able to attain that in our discusions with this particular Local." Accordingly, based on past bargaining experience with this union, the Company unilaterally contracted out the work. While "the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position," Labor Board v. American Nat'l Ins. Co., 343 U.S. 395, 404, 30 LRRM 2147, it at least demands that the issue be submitted to the mediatory influence of collective negotiations. As the Court of Appeals pointed out, "it is not necessary that it be likely or probable that the union will yield or supply a feasible solution but rather that the union be afforded an opportunity to meet management's legitimate complaints that its maintenance was unduly costly."

We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of "contracting out" involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d). Our decision need not and does not

encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy.[8]

[ORDER OF BOARD]

II. The only question remaining is whether, upon a finding that the Company had refused to bargain about a matter which is a statutory subject of collective bargaining, the Board was empowered to order the resumption of maintenance operations and reinstatement with back pay. We believe that it was so empowered.

Section 10(c) provides that the Board, upon a finding than an unfair labor practice has been committed,

> shall issue . . . an order requiring such person to cease and desist from such unfair practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter. . . .[9]

That section "charges the Board with the task of devising remedies to effectuate the policies of the Act." Labor Board v. Seven-Up Bottling Co., 344 U.S. 344, 346, 31 LRRM 2237. The Board's power is a broad discretionary one, subject to limited judicial review. *Ibid.* "[T]he relation of remedy to policy is peculiarly a matter for administrative competence. . . ." Phelps Dodge Corp. v. Labor Board, 313 U.S. 177, 194, 8 LRRM 439. "In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience." Labor Board v. Seven-Up Bottling Co., 344 U.S. 344 346, 31 LRRM 2237. The Board's order will not be disturbed "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." Virginia Elec., & Power Co. v. Labor Board, 319 U.S. 533, 540, 12 LRRM 739. Such a showing has not been made in this case.

There has been no showing that the Board's order restoring the *status quo ante* to insure meaningful bargaining is not well designed to promote the policies of the Act. Nor is there evidence which would justify disturbing the Board's conclusion that the order would not impose an undue or unfair burden on the Company.[10]

It is argued, nonetheless, that the award exceeds the Board's powers under § 10(c) in that it infringes the provision that "no order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . ." The legislative history of that provision indicates that it was designed to preclude the Board from reinstating an individual who had been discharged because of misconduct.[11] There is no indication, however, that it was designed to curtail the Board's power in fashioning remedies when the loss of employment stems directly from an unfair labor practice as in the case at hand.

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8 As the Solicitor General points out, the terms "contracting out" and "subcontracting" have nc precise meaning. They are used to describe a variety of business arrangements altogether different from that involved in this case. For a discussion of the various types of "contracting out" or "subcontracting" arrangements, see Brief for Respondent, pp. 13-17; Brief for Electronic Industries Association as *amicus curiae*, pp. 5-10.

9 Section 10(c) provides in pertinent part: "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and 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 subchapter . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . ."

10 The Board stated: "We do not believe that requirement [restoring the *status quo ante*] imposes an undue or unfair burden on Respondent. The record shows that the maintenance operation is still being performed in much the same manner as it was prior to the subcontracting arrangement. Respondent has a continuing need for the service of maintenance employees; and Respondent's subcontract is terminable at any time upon 60 days' notice." 138 NLRB, at 555, n. 19, 51 LRRM 1101.

11 The House Report states that the provision was "intended to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plants, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct." H. R. Rep. No. 245, 80th Cong., 1st Sess., 42 (1947). The Conference Report notes that under § 10(c) "employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause [interfering with war production] . . . will not be entitled to reinstatement." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 55 (1947).

The judgment of the Court of Appeals is

Affirmed.

Mr. Justice GOLDBERG took no part in the consideration or decision of this case.

Concurring Opinion

Mr. Justice STEWART, with whom Mr. Justice DOUGLAS and Mr. Justice HARLAN join, concurring.

Viewed broadly, the question before us stirs large issues. The Court purports to limit its decision to "the facts of this case." But the Court's opinion radiates implications of such disturbing breadth that I am persuaded to file this separate statement of my own views.

Section 8(a)(5) of the National Labor Relations Act makes it an unfair labor practice for an employee to "refuse to bargain collectively with the representatives of his employees." Collective bargaining is defined in § 8 (d) as:

> the performance of the mutual obligation of the employer and the representatives of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.

The question posed is whether the particular decision sought to be made unilaterally by the employer in this case is a subject of mandatory collective bargaining within the statutory phrase "terms and condition of employment." That is all the Court decides.[1] The Court most assuredly does not decide that every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain. Nor does the Court decide that subcontracting decisions are as a general matter subject to that duty. The Court holds no more than that this employer's decision to subcontract this work, involving "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment" is subject to the duty to bargain collectively. Within the narrow limitations implicit in the specific facts of this case, I agree with the Court's decision.

Fibreboard had performed its maintenance work at its Emeryville manufacturing plant through its own employees, who were represented by a local of the United Steelworkers. Estimating that some $225,000 could be saved annually by dispensing with internal maintenance, the company contracted out this work, informing the union that there would be no point in negotiating a new contract since the employees in the bargaining unit had been replaced by employees of the independent contractor, Fluor. Maintenance work continued to be performed within the plant, with the work ultimately supervised by the company's officials and "functioning as an integral part" of the company. Fluor was paid the cost of operations plus $2,250 monthly. The savings in costs anticipated from the arrangement derived largely from the elimination of fringe benefits, adjustments in work scheduling, enforcement of stricter work quotas, and close supervision of the new personnel. Under the cost plus arrangement, Fibreboard remained responsible for whatever maintenance costs were actually incurred. On these facts, I would agree that the employer had a duty to bargain collectively concerning the replacement of his internal maintenance staff by employees of the independent contractor.

[BASIC QUESTION]

The basic question is whether the employer failed to "confer in good faith with respect to . . . terms and conditions of employment" in unilaterally deciding to subcontract this work. This question goes to the scope of the employer's duty in the absence of a collective bargaining agreement.[2] It is true, as the Court's opinion points out, that industrial experience may be useful in determining the proper scope of the duty to bargain. See Labor Board v. American Nat'l Ins. Co., 343 U.S. 395, 408, 30 LRRM 2147. But data showing that many labor contracts refer to subcontracting or that subcontracting grievances are frequently referred to arbitrators under collective

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1 Except for the quite separate remedy issue discussed in Part II of the Court's opinion.

2 There was a time when one might have taken the view that the National Labor Relations Act gave the Board and the courts no power to determine the subjects about which the parties must bargain—a view expressed by Senator Walsh when he said that public concern ends at the bargaining room door. 79 Cong. Rec. 7659 (1939). See Cox and Dunlop, Regulation of Collective Bargaining by the NLRB, 63 Harv. L. Rev. 389. But too much law has been built upon a contrary assumption for this view any longer to prevail, and I question neither the power of the Court to decide this issue nor the propriety of its doing so.

bargaining agreements, while not wholly irrelevant, do not have much real bearing, for such data may indicate no more than that the parties have often considered it mutually advantageous to bargain over these issues on a permissive basis. In any event, the ultimate question is the scope of the duty to bargain defined by the statutory language.

It is important to note that the words of the statute are words of limitation. The National Labor Relations Act does not say that the employer and employees are bound to confer upon any subject which interests either of them; the specification of wages, hours, and other terms and conditions of employment defines a limited category of issues subject to compulsory bargaining. The limiting purpose of the statute's language is made clear by the legislative history of the present Act. As originally passed, the Wagner Act contained no definition of the duty to bargain collectively.[3] In the 1947 revision of the Act, the House bill contained a detailed but limited list of subjects of the duty to bargain, excluding all others.[4] In conference the present language was substituted for the House's detailed specification. While the language thus incorporated in the 1947 legislation as enacted is not so stringent as that contained in the House bill, it nonetheless adopts the same basic approach in seeking to define a limited class of bargainable issues.[5]

The phrase "conditions of employployment" is no doubt susceptible of diverse interpretations. At the extreme, the phrase could be construed to apply to any subject which is insisted upon as a prerequisite for continued employment. Such an interpretation, which would in effect place the compulsion of the Board behind any and all bargaining-demands, would be contrary to the intent of Congress, as reflected in this legislative history. Yet there are passages in the Court's opinion today which suggest just such an expansive interpretation, for the Court's opinion seems to imply that any issue which may reasonably divide an employer and his employees must be the subject of compulsory collective bargaining.[6]

[STATUTORY PURPOSE]

Only a narrower concept of "conditions of employment" will serve the statutory purpose of delineating a limited category of issues which are subject to the duty to bargain collectively. Seeking to effect this purpose, at least seven circuits have interpreted the statutory language to exclude various kinds of management decisions from the scope of the duty to bargain.[7] In common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment. What one's hours are to be, what amount of work is expected during those hours, what periods of relief are available, what safety practices are observed, would all seem conditions of one's employment. There are other less tangible but no less important characteristics of a person's employment which might also be deemed "conditions"—most prominently the characteristic involved in this case, the security of one's employment. On one view of the matter, it can be argued that the question whether there is to be a job is not a condition of employment; the question is not one of imposing condi-

3 However, it did recognize that the party designated by a majority of employees in a bargaining unit shall be their exclusive representative "for the purpose of collective bargaining in respect of rates of pay, wages, hours of employment, or other conditions of employment." (§ 9(a).)

4 H. R. 3020, 80th Cong., 1st Sess., § 2 (11) (B)(vi) (1947), in 1 Legislative History of the Labor Management Relations Act of 1947, at 166-167 (1948). (Hereinafter LMRA.)

5 The conference report accompanying the bill said that although this section "did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, [it] had to a very substantial extent the same effect . . . ." 1 LMRA 538. Though this statement refers to the entire section, it is clear from the context that the focus of attention was upon the procedures of collective bargaining rather than its scope.

6 The opinion of the Court seems to assume that the only alternative to compulsory collective bargaining is unremitting economic warfare. But to exclude subjects from the ambit of compulsory collective bargaining does not preclude the parties from seeking negotiations about them on a permissive basis. And there are limitations upon the use of economic force to compel concession upon subjects which are only permissively bargainable. Labor Board v. Wooster Div. of Borg Warner Corp., 356 U.S. 343, 42 LRRM 2034.

7 Labor Board v. Adams Dairy, 322 F.2d 553, 54 LRRM 2171 (C.A. 8th Cir. 1963); Labor Board v. New England Web, 309 F.2d 696, 51 LRRM 2426 (C.A. 1st Cir. 1962); Labor Board v. Rapid Bindery, 293 F.2d 170, 48 LRRM 2658 (C.A. 2d Cir. 1961); Jay's Foods v. Labor Board, 292 F.2d 317, 48 LRRM 2715 (C.A. 7th Cir. 1961); Labor Board v. J. M. Lassing, 284 F.2d 781, 47 LRRM 2277 (C.A. 6th Cir. 1960); Mount Hope Finishing Co. v. Labor Board, 211 F.2d 365, 33 LRRM 2742 (C.A. 4th Cir. 1954); Labor Board v. Houston Chronicle, 211 F.2d 848, 33 LRRM 2847 (C.A. 5th Cir. 1954).

tions on employment, but the more fundamental question whether there is to be employment at all. However, it is clear that the Board and the courts have on numerious occasions recognized that unions demands for provisions limiting an employer's power to discharge employees are mandatorily bargainable. Thus,. freedom from discriminatory discharge,[8] seniority rights,[9] the imposition of a compulsory retirement age,[10] have been recognized as subjects upon which an employer must bargain, although all of these concern the very existence of the employment itself.

While employment security has thus properly been recognized in various circumstances as a condition of employment, it surely does not follow that every decision which may affect job security is a subject of compulsory collective bargaining. Many decisions made by management affect the job security of employees. Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and of sales, all may bear upon the security of the workers' jobs. Yet it is hardly conceivable that such decisions so involve "conditions of employment" that they must be negotiated with the employees' bargaining representative.

In many of these areas the impact of a particular management decision upon job security may be extremely indirect and uncertain, and this alone may be sufficient reason to conclude that such decisions are not "with respect to . . . conditions of employment." Yet there are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial c o n t r o l. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of § 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from the area.

[CONDITIONS OF EMPLOYMENT]

Applying these concepts to the case at hand, I do not believe that an employer's subcontracting practices are, as a general matter, in themselves conditions of employment. Upon any definition of the statutory terms short of the most expansive, such practices are not conditions—tangible or intangible—of any person's employment.[11] The question remains whether this particular kind of subcontracting decision comes within the employer's duty to bargain. On the facts of this case, I join the Court's judgment, because all that is involved is the substitution of one group of workers for another to perform the same task in the same plant under the ultimate control of the same employer. The question whether the employer may discharge one group of workers and substitute another for them is closely analoguous to many other situations within the traditional framework of collective bargaining. Compulsory retirement, layoffs according to seniority, assignment of work among potentially eligible groups within the plant—all involve similar questions of discharge and work assignment, and all have been recognized as subjects of compulsory collective bargaining.[12]

Analytically, this case is not far from that which would be presented if the employer had merely discharged all his employees and replaced them with other workers willing to work on the same job in the same plant without the various fringe benefits so costly to the company.

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8 Labor Board v. Bachelder, 120 F.2d 574, 8 LRRM 723 (C.A. 7th Cir.). See also National Licorice Co. v. Labor Board, 309 U.S. 350, 6 LRRM 674.

9 Labor Board v. Westinghouse Air Brake Co., 120 F.2d 1004, 8 LRRM 604 (C.A. 3d Cir.).

10 Inland Steel Co. v. Labor Board, 170 F.2d 247, 22 LRRM 2506 (C.A. 7th Cir.).

11 At least four circuits have held that subcontracting decisions are not subject to the duty to bargain. Labor Board v. Adams Dairy, 322 F.2d 553, 54 LRRM 2171 (C. A. 8th Cir. 1963); Jay's Foods v. Labor Board, 292 F.2d 317, 48 LRRM 2715 (C. A. 7th Cir. 1961); Labor Board v. J. M. Lassing, 284 F.2d 781 47 LRRM 2277 (C. A. 6th Cir. 1960); Labor Board v. Houston Chronicle, 211 F.2d 848, 33 LRRM 2847 (C. A. 5th Cir. 1954).

12 See notes 7, 8, and 9, supra.

these occasions to have been so obnoxious as to warrant the disciplinary measure invoked by Homan. Employees in an industrial plant do not always resort to polite, parlor room language during the course of a heated union campaign. Majestic Metal Specialities, Inc., 92 N.L.R.B. No. 265 [27 LRRM 1332]." (Note 14, Board's Decision, Record, p. 49.)

5 N.L.R.B. v. Edinburg Citrus Assn., 147 F.2d 353 [15 LRR Man. 867]; N.L.R.B. v. Hinde & Dauch Paper Co., 171 F.2d 240 [23 LRRM 2197]; N.L.R.B. v. Montgomery Ward & Co., 157 F.2d 436 [19 LRRM 2008]; N.L.R.B. v. Piedmont Cotton Mills, 179 F.2d 345 [25 LRRM 2299]; N.L.R.B. v. Tex-O-Kan, 122 F.2d 433 [8 LRR Man. 675]; N.L.R.B. v. Williamson Dickie, 130 F.2d 260 [10 LRR Man. 867].

6 Universal Camera v. N.L.R.B., 340 U.S. 474 [27 LRRM 2373]; N.L.R.B. v. Universal Camera, 190 F.2d 429 [28 LRRM 2274]; on reconsideration.

NLRB v. JACOBS MFG. CO.

U. S. Court of Appeals, Second Circuit (New York)

NATIONAL LABOR RELATIONS BOARD v. JACOBS MANUFACTURING COMPANY, No. 169, May 9, 1952.

LABOR-MANAGEMENT RELATIONS ACT

—Refusal to bargain—Pensions—Existing contract ▶54.625 ▶54.201

Employer has a statutory duty to bargain with union on subject of pensions for employees, which had not been discussed during negotiation of existing contract; employer may not lawfully refuse to bargain as to pensions on theory that existing contract did not contain a reopening clause broad enough to include that subject.

—Refusal to bargain—Refusal to disclose facts to union ▶54.523

Employer did not satisfy its statutory duty to bargain with union by merely inviting union to submit written offers for a settlement and by refusing to disclose pertinent facts to show that employer had, in good faith, reached its decision that it could not afford to meet union's wage demands.

—Refusal to bargain—Construction of Act ▶54.625 ▶54.517

Section 8(d) of Act does not relieve employer of duty to bargain with union as to subjects which were neither discussed nor embodied in any of terms and conditions of existing contract.

Obligation of collective bargaining, as defined in Section 8(d) of Act, means cooperation in the give and take of personal conferences with a willingness to let ultimate decision follow a fair opportunity for presentation of pertinent facts and arguments.

—Order of Board—Requirement of disclosure—Validity ▶56.501

Order of Board requiring employer to substantiate its position, by furnishing information to union, that it was financially unable to meet union's wage demands is valid, as construed to mean that requirement of disclosure will be met if employer produces whatever relevant information it has to indicate whether it can or cannot afford to comply with union's demands.

Petition to enforce an NLRB order (28 LRRM 1162, 94 NLRB 1214). Enforcement granted.

George J. Bott, General Counsel; David P. Findling, Associate General Counsel; A. Norman Somers, Assistant General Counsel; Frederick U. Reel, and Samuel M. Singer, all of NLRB, for petitioner.

Walfrid G. Lundborg, of Hartford, Conn., for respondent.

Before L. HAND, AUGUSTUS N. HAND, and CHASE, Circuit Judges.

Full Text of Opinion

CHASE, Circuit Judge:—On July 15, 1948, the respondent and the representative of its employees, Local 379, United Automobile Aircraft and Agricultural Implement Workers of America, CIO, hereinafter called the union, executed a collective bargaining agreement effective for two years. It contained a clause which provided that, "After the expiration of one year from the date hereof either party may request a meeting after fifteen days written notice, the purpose of which shall be to discuss wage rates of employees covered by this agreement." During the negotiation of this contract certain changes in an existing group insurance program were discussed but nothing on that subject was put into the agreement. The subject of pensions for employees was not even discussed.

[FACTS OF CASE]

On July 15, 1949, the union formally exercised its right under the above quoted clause and, in its written notice to the respondent, requested a wage increase together with changes in the group insurance program and the adoption of a pension plan.

When the parties first met to discuss these demands, the respondent took the first position that it could not raise wages because business conditions made it financially unable to do so. It refused to negotiate at all as to the subject of changes in the group insurance program and the setting up of a pension plan on the ground that neither of those subjects were within the scope of the reopening clause in the contract. The union requested permission to examine the respondent's books and sales records for the preceeding year to "prove to the people in the plant that the company was not" able to increase wages but the respondent refused to furnish any such information on the ground that the determination of this question was a matter solely within its own business judgment. At a subsequent meeting of the parties there was substantially a repetition of what had transpired at the first meeting. Following that, the union made numerous requests for further meetings because it had "a great many arguments to offer both on wages and the workers' security" but the respondent declined, stating that its position remained unchanged and that the union should communicate "such new and different thoughts * * * in writing to us so that we may answer them by letter or in a meeting as requested by you."

On these facts, the Board held that the respondent had refused to bargain in good faith in violation of § 8 (a)(1) and (5) of the Act, 29 U.S.C.A. § 158(a)(1) and (5), by refusing to meet and confer with the union after the second bargaining conference; by refusing to furnish the union with any information to support its position that it was financially unable to grant the requested wage increases; and by refusing to discuss the question of pensions.[1]

[ORDER OF BOARD]

Decision as to enforcement turns upon the validity of the following parts of the order:

"2. (a) Upon request bargain collectively with (the union) * * * with respect to rates of pay, wages, hours of employment, including the subject of a pension plan or program * * *"

"(b) Upon request furnish (the union) with such statistical and other information as will substantiate the Respondent's position in bargaining with the Union."

[THEORY OF EMPLOYER]

The respondent contends that it was under no statutory duty to confer with the union after the second meeting since all of the issues had been fully explored and the position of both parties expressed. Whether this was true, however, was a question of fact which the Board found adversely to the respondent. Since at both the meetings the respondent took the position that discussion of wage increases would be futile because it was financially unable to make them, and since it refused to discuss the other subjects at all, the Board was justified in concluding that the respondent had refused to bargain in good faith as the Act requires. Collective bargaining in compliance with the statute requires more than virtual insistence upon a prejudgment that no agreement could be reached by means of a discussion.

Section 8(d) of the Act defines "collective bargaining" as the "obligation of the employer and the representative of the employees to meet at

[1] A majority of the Board thought that § 8(d) of the Act, 29 U.S.C.A. § 158(d), absolved the respondent from the duty to bargain concerning group insurance since that matter had been discussed during the negotiations leading up to the contract. Therefore, the order sought to be enforced does not require the respondent to bargain as to insurance and we need not pass upon the correctness of this interpretation of § 8(d).

reasonable times and confer in good faith." This means cooperation in the give and take of personal conferences with a willingness to let ultimate decision follow a fair opportunity for the presentation of pertinent facts and arguments. This affirmative obligation was not satisfied by merely inviting the union to submit written offers for a settlement, nor by the bare assertion of a conclusion made upon facts undisclosed and unavailable to the union which was not acceptable without a presentation of sufficient underlying facts to show, at least, that the conclusion was reached in good faith. N.L.R.B. v. P. Lorillard Co., 6 Cir. 117 F.2d 921 [7 LRR Man. 475]; reversed on other grounds, 314 U.S. 512 [9 LRR Man. 410]; Cf. Globe Cotton Mills v. N.L.R.B., 5 Cir., 103 F.2d 91 [4 LRR Man. 621]. Consequently, we hold that the respondent's conduct amounted to an unfair labor practice and that it was lawfully required by the order to bargain with the union upon request as to wage rates and hours of employment.

[BARGAINING AS TO PENSIONS]

Furthermore, other than as above stated there had been no bargaining at all. Unless the respondent was right in its position that it could lawfully refuse to bargain as to pensions because the existing contract did not contain a reopening clause broad enough to include that subject, it is clear that its refusal to bargain as to them was also an unfair labor practice. We do not think the respondent could lawfully refuse.

Before the National Labor Relations Act was amended by the Taft-Hartley Act an employer was under a duty, upon request, to bargain with the representatives of his employees as to terms and conditions of employment whether or not an existing collective bargaining agreement bound the parties as to the subject matter to be discussed. See N. L. R. B. v. Sands Mfg. Co., 306 U. S. 332, 342 [4 LRR Man. 530]. However, § 8(d) of the amended Act, 29 U. S. C. A. § 158(d), narrowed this requirement by providing that the duty to bargain collectively "* * * shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract * * *" The respondent's position is that, except as to subjects expressly reserved for further negotiations in a reopening clause, any fixed period contract creates a static period in the entire industrial relationship between the employer and his employees, for the term of the contract, even as to aspects of that relationship which were not covered by that contract or even discussed in the negotiations leading up to it.

We, however, agree with the Board that § 8(d) cannot fairly be given such a broad effect. The purpose of this provision is, apparently, to give stability to agreements governing industrial relations. But, the exception thus created necessarily conflicts with the general purpose of the Act, which is to require employers to bargain as to employee demands whenever made to the end that industrial disputes may be resolved peacefully without resort to drastic measures likely to have an injurious effect upon commerce, and the general purpose should be given effect to the extent there is no contrary provision. Since the language chosen to describe this exception is precise and explicit, "terms and conditions contained in a contract for a fixed period," we do not think it relieves an employer of the duty to bargain as to subjects which were neither discussed nor embodied in any of the terms and conditions of the contract. Therefore, we hold that it was the respondent's statutory duty to bargain on the subject of pensions. In so deciding, however, as we have already indicated in commenting upon the Board's ruling concerning the group insurance issue, we do not intend to pass upon the effect, if any, on the duty to bargain, of mere previous discussion of a subject without putting any terms and conditions as to it into the contract.

[INFORMATION TO UNION]

There remains for consideration the validity of that part of the order which requires the respondent to substantiate its position, by furnishing information to the union, that it was financially unable to meet the union's demands. While we have not previously dealt with the precise question now raised, we think the rationale of our decision in N. L. R. B. v. Yawman & Erbe Mfg. Co., 187 F.2d 947 [27 LRRM 2524], covers this situation. We have already decided that the respondent did not fulfill its duty to bargain collectively when it refused to disclose pertinent facts to show that it had, in good faith, reached its decision that it could not afford to meet the union demands. We do not under-

stand this part of the order to require the respondent to do more than show its good faith in bargaining collectively.

To bargain collectively in compliance with the statute does not mean that an employer must produce proof to establish that he is right in his business decision as to what he can, or cannot, afford to do. He is left free to decided that himself and, at the end of the bargaining, may agree only insofar as he is willing in the light of all the circumstances. See § 8(d). The Board's order does not require the respondent to produce any specific business books and records but information to "substantiate" its position in "bargaining with the Union." As we interpret this, the requirement of disclosure will be met if the respondent produces whatever relevant information it has to indicate whether it can or cannot afford to comply with the Union's demands.

Enforcement granted.

In the Matter of Arbitration Between CITY OF SAN JOSE, Employer, and MUNICIPAL EMPLOYEES FEDERATION, AFSCME, LOCAL 101, Union.	OPINION AND AWARD Involving Hours of Work for Custodians at San Jose Municipal Airport.

Before EMILY MALONEY, Aribitrator

APPEARANCES

For the Employer	Frank D. LeSueur Employee Relations Officer City of San Jose 801 North First Street San Jose 95110
For the Union	James Gallagher Executive Director Municipal Employees Federation AFSCME, Local 101 715 North First Street San Jose 95112

PARTIES TO THE DISPUTE

CITY OF SAN JOSE (herein called "Employer" or "City") and MUNICIPAL EMPLOYEES FEDERATION, AFSCME, LOCAL 101 (herein called "Employee Organization" or "Union") are parties to a Memorandum of Understanding (Union Ex. 3). While the Memorandum of Understanding does not contain a grievance and arbitration procedure for the resolution of disputes arising thereunder, it was mutually agreed by the City and the Union that the dispute in this matter would be submitted to arbitration for final and binding resolution. Pursuant to that agreement, an arbitration hearing was conducted in San Jose, California, on January 22, 1975, before the undersigned arbitrator. Based upon the evidence and arguement presented at such hearing, the arbitrator decides as follows:

ISSUE

Did the Employer violate the Memorandum of Understanding when it changed the workshift of custodians at the San Jose Municipal Airport, on August 1, 1974, from 8 to 8-1/2 hours? If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF MEMORANDUM OF UNDERSTANDING

2.00 Purpose. It is the purpose of this Memorandum of Understanding to...set forth the full and entire understanding of the parties, reached as a result of meeting and conferring, regarding the wages, hours and other terms and conditions of employment of the employees covered by this Memorandum of Understanding...

***

4.01 Management Rights. The parties agree that no provision of this Memorandum of Understanding shall be so construed as to mean that any right vested in the City Council or in the Management of the City by law or by the City Charter, or inherent in the obligations to manage an enterprise, be abrogated, suspended, or impaired. Such rights shall be deemed to specifically include but not be limited to the following:

a. The right to determine the organization and mission of the City, its Departments, agencies, and units.

b. The right to determine the merits, necessity, or organization of any service or activity of the City.

c. The sole and absolute right to assign, reassign, revoke assignments of or withdraw assignments of City equipment, including motor vehicles, to or from employees during, after or before hours of duty, without consultation or meeting and conferring.

***

6.00 Full Understanding, Modification, Waiver. a...this Memorandum of Understanding sets forth the full and entire understanding of the parties regarding the matters set forth herein...

b. It is agreed by the parties that existing benefits provided by ordinance or resolution of the Council or as provided in the San Jose Municipal Code shall be continued subject however to the terms thereof without change unless expressly modified, amended or changed subsequent to approval of this Memorandum of Understanding.

c. It is the intent of the parties that ordinance, resolution, rules and regulations enacted pursuant to this Memorandum of Understanding be administered and observed in good faith.

d. Except as specifically otherwise provided herein, it is agreed and understood that each party hereto voluntarily and unqualifiedly waives its right, and agrees that the other shall not be required, to meet and confer with respect to any subject or matter covered herein or with respect to any other matters within the scope of meeting and conferring, during the period of the terms of this Memorandum....

(Union Ex. 3)

CITY ORDINANCE NO. 14459

SECTION 1. Section 2036.1 of...the San Jose Municipal Code is hereby amended by repealing said section in its entirety and adopting and adding a new section, as follows:

2036.1 Regular Hours. Except as hereinafter otherwise provided, each full-time employee shall be required to work at least forty (40) hours per week, or such other number of hours per week as the Council may determine by amendment hereof...

***

Subject to regulation and control by the City Manager, the head of each department of the City Government shall determine the days of the week and the hours of each day when each employee in his department or under his jurisdiction shall be required to work...

SECTION 2. The provisions of this ordinance shall be operative from and after January 1, 1969...

(City Ex. 3)

DISCUSSION

The essential facts in this matter are not in dispute. Custodians at the San Jose Municipal Airport had for some nine years prior to August 1, 1974, been assigned straight eight-hour shifts, three shifts around the clock. Within each eight continuous hours, the custodians had been permitted to eat a meal while remaining subject to call as work requirements necessitated. Effective August 1, 1974, the City changed the work schedule for these custodians to an 8-1/2 hour day within which time the custodians were given a duty-free, unpaid, one-half hour lunch period. The August 8, 1974, grievance filed by a number of the custodians protesting this change in work schedule has become the subject of this arbitration proceeding.

The only language in the Memorandum of Understanding relating to hours of work is contained in Section 4.04. This language was added during negotiations for the current Memorandum of Understanding and in essence recommends that Section 2036.1 of the Municipal Code be amended to permit assignment of employees to a 4-10 workweek where this is deemed feasible by the City following consultation with the Union.

A phrase "subject however to the terms thereof" was added to Section 6.00b of the current Memorandum of Understanding by the City to insure that "existing benefits" would be continued subject to the terms of the particular ordinance involved, which in this case, according to the City, was to insure that the City had the right to de-

termine the hours of work prescribed by Ordinance No. 14459. Insofar as the record reveals, there was no discussion at the bargaining table during negotiations for the current Memorandum of Understanding about the addition of or the intent of this new language.

POSITION OF THE UNION

It is the position of the Union that the current Memorandum of Understanding established the wages, hours and other terms and conditions of employment for the 1972-1975 period covered by the Memorandum: that by Section 6.00b the parties agreed that existing benefits were to continue and by Section 6.00d agreed that all matters covered by the Memorandum of Understanding were settled for the term of the Agreement. The eight-hour day for the custodians was, the Union maintains, an "existing benefit" and was referred to as such, or as an "incentive," in interviews of prospective employees. And while the hours of work are not set forth in the Memorandum of Understanding, the work schedule for custodians was a well-established practice which, absent repudiation during negotiations, must be considered a condition of employment implicitly agreed upon and thus made a part of the Memorandum of Understanding. Therefore, the Union argues, the City could not unilaterally effect a change in that work schedule during the term of the Memorandum of Understanding.

Further, the Union maintains, even if Ordinance No. 14495 can be considered to be a part of the Memorandum of Understanding, that ordinance, insofar as it reserves to management the right to determine hours of work, is invalid. The ordinance became effective January 1, 1969: but also on January 1, 1969, the Meyers-Milias-Brown Act. became effective. By the terms of the MMB, the absolute powers ascribed to the City in the ordinance regarding determination of hours of work became shared powers which can be exercised only through the meet and confer process.

Finally, the Union argues that there has not been the improved efficiency in operation as a consequence in the change of the work schedule that the City maintains but, rather, there has been a decrease in efficiency and a personal inconvenience to the employees involved. The Union seeks as a remedy in this arbitration restoration of the eight-hour work schedule in effect for the custodians involved prior to the City's August 1, 1974, change in that schedule.

POSITION OF THE CITY

According to the City, the work schedule for the custodians was changed on August 1, 1974, to facilitate manpower utilization, to provide better overlap coverage at shift changes, to permit the holdover of a custodian if necessary to cover an absent custodian on the incoming shift and to permit employees to enjoy an uninterrupted lunch period. However, the City maintains it has the authority within the terms of the Memorandum of Understanding and Ordinance No. 14459, without justification, to make such a change in work schedule, so long as its actions are not arbitrary and capricious.

The City points out that Section 6.00b of the preceding (1971) Memorandum of Understanding provided that "existing benefits within the scope of meeting and conferring which are provided by ordinance, resolution, rule or regulation shall be continued without change' (City Ex. 1). In 1972, according to the City, the phrase "subject to the terms thereof" was added to Section 6.00b for the specific purpose of insuring and clarifying that such "existing benefits" would only be changed if the particular ordinance vested management with the right to make a change. In this case, the City asserts Ordinance No. 14459 is effective and does reserve to management the right to determine hours of work. As to the relationship of the ordinance to the Meyers-Milias-Brown Act. the City maintains that Ordinance No. 14495, while effective January 1, 1969, was officially enacted on December 16, 1968, prior to the effective date of the Meyers-Milias-Brown Act. and, in fact, that portion of the ordinance having to do with the right of the City to determine hours of work had been in effect for some time before the ordinance was adopted.

Then, according to the City, the terms of that ordinance became a part of the Memorandum of Understanding through reference thereto in Section 6.00b. In other words, the hours of work for custodians was an "existing benefits(s) provided by ordinance... subject however to the terms thereof" and it was up to the Union if it wanted to restrict the City's right to determine the hours of work to challenge the validity of the ordinance and negotiate with respect to this subject during the last negotiations. It did not do so, the City asserts. Rather, the only matter discussed by the Union relating to hours of work concerned the possibility of a 10-hour day. Thus, the current Memorandum of Understanding must be considered to cover the hours of work as set fort

in the ordinance so that the City had the right, without asking the Union to meet and confer on this subject pursuant to 6.00d, to change the hours of work for custodians on August 1, 1974. There is no question here of past practice, the City contends, because the subject is covered by Section 6.00b of the Memorandum of Understanding.

In summary, then, the City contends that it had the right under the terms of the Memorandum of Understanding to change the hours of work for custodians, there was nothing arbitrary or capricious about its action, and, therefore, there has been no violation of the Memorandum of Understanding. If the arbitrator should hold otherwise, however, then the City believes that an appropriate remedy would be an order to the parties to meet and confer with respect to the hours of work for custodians.

OPINION

Whether the action taken by the City on August 1, 1974, is viewed as a change in an "existing benefit provided by ordinance" or the withdrawal of a benefit provided by long and consistent past practice, it is the opinion of the arbitrator that the City did not have the right to make such change, absent a willingness on the part of the Union to meet and confer pursuant to Section 6.00d of the Memorandum of Understanding.

If the City's action is viewed as the withdrawal of a benefit, and this seems to be the more reasonable characterization of the City's action, then the City was effecting a change in a benefit, or a condition of employment, which had through some nine years of consistent practice become an implicit term of the agreement and not subject to change during the period covered by the Memorandum of Understanding.

While it is difficult to construe the custodians' eight-hour work schedule as an "existing benefit privided by ordinance" nevertheless considered from this standpoint the arbitrator must discount the City's very persuasive arguement that it had the right to change the custodians' work schedule under Section 6.00b of the Memorandum of Understanding and Ordinance No. 14495. First of all, it is the opinion of the arbitrator that the terms of Ordinance No. 14495 reserving to management the right to determine hours of work did not survive the enactment of the Meyers-Milias-Brown Act.

It seems clear that the City in 1972 did not believe it had this right either, since it state that it added the words "subject to the terms thereof" to Section 6.00b of the current Memorandum for the specific purpose of insuring and clarifying that the benefits provided by ordinance could be changed by the City if the ordinance so provided.

Obviously, the City could through the meet and confer process have reserved the right in the Memorandum of Understanding to determine the hours of work. Whether or not the City did effectively do so by addition of the subject-to language to Section 6.00b is a close question. However, because the language of Section 6.00b, even with the subject-to language is not, in the arbitrator's opinion, clear on its face that the City thereby has the right to determine hours of work and because there was no communication of intent by the City/discussion between the parties during meeting and conferring with respect to the addition of this language, it seems more reasonable to conclude that the City has not by the language of Section 6.00b reserved the significant right to determine hours of work.

In view of the finding that the City did not have the right to change the hours of work for custodians on August 1, 1974, the arbitrator believes that it would be improper, if not beyond her jurisdiction in light of Section 6.00d, to order as a remedy in this case that the parties meet and confer with respect to this subject. The award shall therefore be as follows:

AWARD

The Employer violated the Memorandum of Understanding when it changed the work schedule of custodians at the San Jose Municipal Airport on August 1, 1974, from 8 to 8-1/2 hours. The work schedule of the custodians shall be restored to the practice which existed prior to the August 1, 1974, change.

The Arbitrator will retain jurisdiction in this matter in the event there is a dispute between the parties with respect to the implementation of this award.

Respectfully submitted,

January 30, 1975

Emily Maloney

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TAB E

PAST PRACTICE AND THE ADMINISTRATION OF COLLECTIVE BARGAINING AGREEMENTS

RICHARD MITTENTHAL*

The following exposition on the subject of past practices was originally presented as a paper before the Fourteenth Annual Meeting of the National Academy of Arbitrators. It is reprinted here with the kind permission of BNA Inc.[1] in the interest of furthering an understanding of this important area of concern to contract administration. The author, Richard Mittenthal is Chairman, Research and Education Committee, and a member of the Executive Committee, National Academy of Arbitrators.

At the National Academy meeting in Detroit two years ago, Archibald Cox suggested that before "a rationale of grievance arbitration" can be developed, more work must be done in identifying and analyzing the standards which serve to shape arbitral opinions.[1] This paper is a product of Cox's suggestion. Its purpose is to examine in depth one of the more important standards upon which so many of our decisions are based—past practice.

Custom and practice profoundly influence every area of human activity. Protocol guides the relations between states; etiquette affects an individual's social behavior; habit governs most of our daily actions; and mores help to determine our laws. It is hardly surprising, therefore, to find that past practice in an industrial plant plays a significant role in the administration of the collective agreement. Justice Douglas of the United States Supreme Court recently stated that "the labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the past practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." [2]

Past practice is one of the most useful and hence one of the most commonly used aids in resolving grievance disputes. It can help the arbitrator in a variety of ways in interpreting the agreement. It may be used to clarify what is ambiguous, to give substance to

* Attorney and counselor, Detroit, Michigan.

1 "Reflections upon Labor Arbitration in the Light of the Lincoln Mills Case," *Arbitration and the Law* (Washington: BNA Incorporated, 1959), p. 46.

2 *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-582, 34 LA 561, 564 (1960).

[1] Arbitration and Public Policy: Proceedings of the Fourteenth Annual Meeting, National Academy of Arbitrators, c 1961.
The Bureau of National Affairs, Inc., Washington D.C. 20037.

what is general, and perhaps even to modify or amend what is seemingly unambiguous. It may also, apart from any basis in the agreement, be used to establish a separate, enforceable condition of employment. I will explore each of these functions of past practice in some detail. And I will seek to describe the nature of a practice as well—that is, its principal characteristics, its duration, and so on.

I. The Nature of a Practice

The facts in a case may be readily ascertainable but the arbitrator then must determine what their significance is, whether they add up to a practice, and if so, what that practice is. These questions confront us whenever the parties base their argument on a claimed practice. They cannot be answered by generalization. For a practice is ordinarily the unique product of a particular plant's history and tradition, of a particular group of employees and supervisors, and of a particular set of circumstances which made it viable in the first place. Thus, in deciding the threshold question of whether a practice exists, we must look to the plant-setting rather than to theories of contract administration.

Although the conception of what constitutes a practice differs from one employer to another and from one union to another, there are certain characteristics which typify most practices. These characteristics have been noted in many arbitration decisions.[3] For example, in the steel industry, Sylvester Garrett has lucidly defined a practice in these words:

> A custom or practice is not something which arises simply because a given course of conduct has been pursued by Management or the employees on one or more occasions. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type situation. It must be shown to be the *accepted* course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be *accepted* in the sense of both parties having agreed to it, but rather that it must be *accepted* in the sense of being regarded by the men involved as the *normal* and *proper* response to the underlying circumstances presented.[4]

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[3] See, e.g., *Curtis Companies, Inc.*, 29 LA 434 (1957); *Celanese Corp. of America*, 24 LA 168 (1954); *Sheller Mfg. Corp.*, 10 LA 617 (1948).

[4] Sylvester Garrett, Chairman, Board of Arbitration, U.S. Steel—Steelworkers, Grievance No. NL-453, Docket No. N-146, Jan. 31, 1953. Reported at *2 Steelworkers Arbitration Bulletin* 1187.

In short, something qualifies as a practice if it is shown to be the understood and accepted way of doing things over an extended period of time.

What qualities must a course of conduct have before it can legitimately be regarded as a practice?

First, there should be *clarity* and *consistency*. A course of conduct which is vague and ambiguous or which has been contradicted as often as it has been followed can hardly qualify as a practice. But where those in the plant invariably respond in the same way to a particular set of conditions, their conduct may very well ripen into a practice.

Second, there should be *longevity* and *repetition*. A period of time has to elapse during which a consistent pattern of behavior emerges. Hence, one or two isolated instances of a certain conduct do not establish a practice. Just how frequently and over how long a period something must be done before it can be characterized as a practice is a matter of good judgment for which no formula can be devised.

Third, there should be *acceptability*. The employees and the supervisors alike must have knowledge of the particular conduct and must regard it as the correct and customary means of handling a situation. Such acceptability may frequently be implied from long acquiescence in a known course of conduct. Where this acquiescence does not exist, that is, where employees have constantly protested a particular course of action through complaints and grievances, it is doubtful that any practice has been created.

One must consider, too, the *underlying circumstances* which give a practice its true dimensions. A practice is no broader than the circumstances out of which it has arisen, although its scope can always be enlarged in the day-to-day administration of the

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A similar definition can be found in some judicial opinions.
In *Jarecki Mfg. Co.* v. *Merriam*, 104 Kan. 646, 180 p. 224 (1919), the court stated:
"Persons are presumed to contract with reference to a custom or usage which pertains to the subject of the contract. To constitute a custom which tacitly attends the obligation of a contract, the habit, mode, or course of dealing in the particular trade, business, or locality must be definite and certain; must be well settled and established; must be uniformly and universally prevalent and observed; must be of general notoriety; and must have been acquiesced in without contention or dispute so long and so continuously that contracting parties either had it in mind or ought to have had in mind, and consequently contracted, or presumptively contracted, with reference to it. . . ."
See also *McComb* v. *C. A. Swanson & Sons*, 77 Fed. Supp. 716, 734 (1948).

agreement. No meaningful description of a practice can be made without mention of these circumstances. For instance, a work assignment practice which develops on the afternoon and midnight shifts and which is responsive to the peculiar needs of night work cannot be automatically extended to the day shift. The point is that every practice must be carefully related to its origin and purpose.

And, finally, the significance to be attributed to a practice may possibly be affected by whether or not it is supported by *mutuality*. Some practices are the product, either in their inception or in their application, of a joint understanding; others develop from choices made by the employer in the exercise of its managerial discretion without any intention of a future commitment.

Subject Matter

Practices usually relate to some phase of the contractual relationship between the employer and his employees. They may concern such subjects as scheduling, overtime, promotions, and the uses of seniority, all of which are covered to some extent in the typical collective agreement. But practices may also involve extra-contractual considerations—from the giving of Thanksgiving turkeys and Christmas bonuses to the availability of free parking.

Still other practices, although this characterization may be arguable, have more to do with managerial discretion in operating a plant than with the employment relationship. For example, the long-time use of inter-departmental hand trucks for moving material might be regarded as a practice, and the truckers who do this work certainly have an interest in preserving this method of operation. But could it be seriously argued that this practice would prohibit the employer from introducing a conveyor belt to replace the hand trucks? Most agreements provide, usually in a management-rights clause, that methods of manufacture are solely within the employer's discretion.

There may even be practices which have nothing whatever to do with the employment relationship. The long-time assignment of a certain number of foremen to a given department might be viewed by some as a practice, but it could hardly preclude the employer from using fewer foremen. What I am suggesting here

is that the mere existence of a practice, without more, has no real significance. Only if the practice clarifies an imperfectly expressed contractual obligation or lends substance to an indefinitely expressed obligation or creates a completely independent obligation will it have some effect on the parties' relationship.

Because practices may relate to any phase of an employer's business, some parties have seen fit to spell out limitations on the kind of subject matter a practice may cover. In the steel industry, for instance, a practice is referred to as a "local working condition" and it is binding only if it provides "*benefits* . . . in excess of or in addition to" those provided in the agreement.[5] And in determining what constitutes a "benefit," steel arbitrators have applied an objective rather than a subjective test. Hence, whether the aggrieved employees like or dislike the practice in dispute is irrelevant. The decisive question, instead, is whether an ordinary employee in the same situation would reasonably regard the practice as a substantial benefit in relation to his job. If so, the practice may be an enforceable "local working condition."

The wide variety of possible subjects may make it difficult to decide the exact nature of a practice. Suppose that certain extra work which periodically arises in department X has, as a matter of practice, been performed by X's employees at overtime rates, but that this has always occurred when the entire plant was on a 40-hour week. Suppose too that this kind of practice is enforceable under the agreement. One day this extra work is made available when the plant is on a 32-hour week, and the employer gives the work to employees from other departments as well as from X so as to provide the maximum number of men with 36 hours' work. How is the practice to be described? The union says it is a *work assignment* practice, giving X's employees an exclusive claim to the disputed work whenever it is performed. The employer says it is an *overtime* practice, giving X's employees the disputed work only when it is to be performed at overtime rates.

The problem—the proper scope of the practice—is manifest. Was it intended that the practice apply without limitation to all levels of operation or was it intended that the practice be restricted to the precise situation in which it had previously been applied? Some help in formulating an answer may be found in the *purpose*

[5] Section 2 B-3 of the *U.S. Steel and United Steelworkers Agreement.*

behind the practice. Hence, if it could be shown that the purpose was to have the work done in department X alone and that it was mere coincidence that the practice had always been applied when the employees were on a 40-hour schedule, the broad interpretation urged by the union would seem to be correct. Absent such a showing, I would think the narrow interpretation would have to be adopted.

We must also be careful to distinguish between a practice and the results of a practice. Assume that a plant has two separate electrical crews, one for existing equipment and the other for new installations, and that overtime on a particular job has always been given to the crew which was actually working that job. Assume too that in implementing this practice over the years there has been a relatively equal distribution of overtime between the crews. From these facts, it cannot be said that equalization of overtime thereby became a practice. The equalization was simply one of the consequences, probably unintended, of applying the overtime assignment practice. If a practice were defined in terms not only of its subject matter but of its consequences as well, it would surely develop a breadth far beyond what was originally intended.

Proof

To allege the existence of a practice is one thing; to prove it is quite another. The allegation is a common one. But my experience indicates that where past practice is disputed, the party relying upon the practice is often unable to establish it. This is not surprising. For the arbitrator in such a dispute is likely to find himself confronted by irreconcilable claims, sharply conflicting testimony, and incomplete information. Harry Shulman expressed our dilemma in these words:

> The Union's witnesses remember only the occasions on which the work was done in the manner they urge. Supervision remembers the occasions on which the work was done otherwise. Each remembers details the other does not; each is surprised at the other's perversity; and both forget or omit important circumstances. Rarely is alleged practice clear, detailed, and undisputed; commonly, inquiry into past practice . . . produces immersion in a bog of contradictions, fragments, doubts, and one-sided views. . . .[6]

[6] H. Shulman, Umpire, *Ford Motor Co.-United Automobile Workers*, Opinion A-278, Sept. 4, 1952. Reported at 19 LA 237 (1952).

The arbitrator, abandoned in this kind of maze, is almost certain to decide the grievance on some basis other than past practice. The only means of resolving the confusion, short of credibility findings, is through written records of the disputed events. Such records may be the best possible evidence of what took place in the past. Unfortunately, records of scheduling, work assignments, etc. are seldom maintained for any length of time. And even when available, they may be incomplete or it may be difficult and costly to reduce them to some meaningful form. Considering these problems, it is understandable that practices are most often held to exist where the parties are in substantial agreement as to what the established course of conduct has been.

II. Functions of Past Practice

Clarifying Ambiguous Language

The danger of ambiguity arises not only from the English language with its immense vocabulary, flexible grammar and loose syntax but also from the nature of the collective bargaining agreement. The agreement is a means of governing "complex, many-sided relations between large numbers of people in a going concern for very substantial periods of time." [7] It is seldom written with the kind of precision and detail which characterize other legal instruments. Although it covers a great variety of subjects, many of which are quite complicated, it must be simply written so that its terms can be understood by the employees and their supervisors. It is sometimes composed by persons inexperienced in the art of written expression. Issues are often settled by a general formula because the negotiators recognize they could not possibly foresee or provide for the many contingencies which are bound to occur during the life of the agreement.

Indeed, any attempt to anticipate and dispose of problems before they arise would, I suspect, create new areas of disagreement and thus obstruct negotiations. Sooner or later the employer and the union must reach agreement if they wish to avoid the economic waste of a strike or lockout. Because of this pressure, the parties often defer the resolution of their differences—either by

[7] Cox, "The Legal Nature of Collective Bargaining Agreements," 57 *Mich. L. Rev.*, 1, 22 (1958).

ignoring them or by writing a provision which is so vague and uncertain as to leave the underlying issue open.

These characteristics inevitably cause portions of the agreement to be expressed in ambiguous and general terms. With the passage of time, however, this language may be given a clear and practical construction, either through managerial action which is acquiesced in by the employees (or, conceivably, employee action which is acquiesced in by management) or through the resolution of disputes on a case-by-case basis. This accumulation of plant experience results in the development of practices and procedures of varying degrees of consistency and force.

Those responsible for the administration of the agreement can no more overlook these practices than they can the express provisions of the agreement. For the established way of doing things is usually the contractually correct way of doing things. And what has become a mutually acceptable interpretation of the agreement is likely to remain so. Hence, the full meaning of the agreement may frequently depend upon how it has been applied in the past.

Consider, for example, an agreement which provides for premium pay for "any work over eight hours in a day." An employee works his regular 8 a.m. to 4 p.m. shift on Monday but works from 6 a.m. to 2 p.m. on Tuesday pursuant to a request by supervision. He asks for overtime for his first two hours (6 a.m. to 8 a.m.) on Tuesday. Whether his claim has merit depends upon how you construe the term "day." Did the parties mean a "calender day" as the employer argues, or did they mean a "work day," that is, a 24-hour period beginning with the time an employee regularly starts work, as the union argues?

It may be possible to resolve this ambiguity through resort to practice. How the parties act under an agreement may be just as important as what they say in it. To borrow a well-known adage, "actions speak louder than words." From the conflict and accommodation which are daily occurrences in plant life, there arises "a context of practices, usages, and rule-of-the-thumb interpretations" which gradually give substance to the ambiguous language of the agreement.[8] A practice, once developed, is the best evidence of what the language meant to those who wrote it.

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[8] *Eastern Stainless Steel Corp.*, 12 LA 709, 713 (1949).

By relying upon practice, the burden of the decision may be shifted from the arbitrator back to the parties. For to the extent to which the arbitrator adopts the interpretation given by the parties themselves as shown by their acts, he minimizes his own role in the construction process. The real significance of practice as an interpretive aid lies in the fact that the arbitrator is responsive to the values and standards of the parties. A decision based on past practice emphasizes not the personal viewpoint of the arbitrator but rather the parties' own history, what they have found to be proper and agreeable over the years. Because such a decision is bound to reflect the parties' concept of rightness, it is more likely to resolve the underlying dispute and more likely to be acceptable. A solution created from within is always preferable to one which is imposed from without.[9]

Implementing General Contract Language

Practice is also a means of implementing general contract language. In areas which cannot be made specific, the parties are often satisfied to state a general rule and to allow the precise meaning of the rule to develop through the day-to-day administration of the agreement.

For instance, the right to discipline and discharge is usually conditioned upon the existence of "just cause." Similarly, the right to deviate from a contract requirement may be conditioned upon the existence of "circumstances beyond the employer's control." General expressions of this kind are rarely defined. For no definition, however detailed, could anticipate all the possibilities which might take place during the term of the agreement.

But, in time, this kind of general language does tend to become more concrete. As the parties respond to the many different situations confronting them—approving certain principles and procedures, disputing others and resolving their disputes in the grievance procedure—they find mutually acceptable ways of doing things which serve to guide them in future cases. Instead of rearguing every matter without regard to their earlier experiences, acceptable principles and procedures are applied again and again.

And thus, practices arise which represent the reasonable expec-

[9] See Ralph Seward, "Arbitration in the World Today," *The Profession of Labor Arbitration* (Washington: BNA Incorporated, 1957), pp. 72-73.

tations of the parties. These practices provide a sound basis for interpreting and applying general contract language. They can be used to help determine whether a particular condition was actually "beyond the employer's control" or whether a particular employee's behavior was "just cause" for discipline.

Suppose, for example, that tardiness of less than five minutes has always been overlooked but that after it becomes extremely widespread, management disciplines a few employees without any advance notice of its change in policy. In view of this long toleration of tardiness, it is doubtful that there would be "just cause" for discipline. Plant practice thus injects something tangible into the "just cause" provision, giving employees a clear notion of what is acceptable and unacceptable in plant behavior. Of course, once the men are notified that tardiness will no longer be ignored the employer would be free to take reasonable disciplinary action.

Although, as I have just shown, discipline which is completely inconsistent with past practice is likely to lack "just cause," it does not follow that discipline must be perfectly consistent with past practice in order to establish "just cause."

Suppose that fighting in the plant has in the past resulted in disciplinary suspensions of two to five weeks and that those who have been so disciplined were all men with considerable seniority. Then, a recently hired employee starts a fight with no justification whatever and is discharged. The union may argue that because others had received suspensions, the discharge was too severe a penalty. But one must remember that there are degrees of culpability and that discharge is hardly the same penalty when applied to an employee with one year's seniority and to another with twenty years' seniority. The employer should not be precluded from discharging this man merely because on earlier occasions it had good reason to be lenient.

The point is that "it is not the fact of seeming inconsistency in past practice, but the cause of it, that ought to engage the arbitrator's attention." [10] Hence, what seems on the surface to be capricious administration of a disciplinary rule "may prove on closer

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[10] Benjamin Aaron, "The Uses of the Past in Arbitration." *Arbitration Today* (Washington: BNA Incorporated, 1955), p. 11. Also found in Reprint No. 50 (Los Angeles: Institute of Industrial Relations, USLA, 1955).

inspection to be a flexible and humane application of a sound principle to essentially different situations." [11]

Modifying or Amending Apparently Unambiguous Language

What an agreement says is one thing; how it is carried out may be quite another. A recent study at the University of Illinois revealed that differences between contract provisions and actual practice are not at all unusual.[12] Thus, an arbitrator occasionally finds himself confronted with a situation where an established practice conflicts with a seemingly clear and unambiguous contract provision. Which is to prevail? The answer in many cases has been to disregard the practice and affirm the plain meaning of the contract language.[13]

At the National Academy meeting in 1955, Ben Aaron forcefully argued that sometimes practice should prevail.[14] He posed a hypothetical situation which was based upon this contract provision:

> Where skill and physical capacity are substantially equal, seniority shall govern in the following situations only: promotions, downgrading, layoffs, and transfers.

He assumed that the consistent practice for five years immediately preceding the dispute has been to treat seniority as the controlling consideration in the assignment of overtime work and that a grievance has arisen out of the employer's sudden abandonment of that practice. He assumed further that the agreement vests in management the right to direct the working forces, subject only to qualifications or restrictions set forth elsewhere in the agreement, and that the parties have expressly forbidden the arbitrator to add to, subtract from, or modify any provision of the agreement.

The conventional analysis of the problem begins with the proposition that the contract should be construed according to the

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[11] *Ibid.*

[12] M. Derber, W. E. Chalmers, and R. Stagner, "The Labor Contract: Provision and Practice," *Personnel Magazine* (American Management Assn., Jan-Feb. 1958). Also found in Reprint No. 58 (Institute of Labor & Industrial Relations, Univ. of Illinois, 1958).

[13] See, e.g., *Sun Rubber Co.*, 28 LA 362, 368 (1957); *Price-Pfister Brass Mfg. Co.*, 25 LA 398, 404 (1955); *Bethlehem Steel Co.*, 21 LA 579, 582 (1953); *Tide Water Oil Co.*, 17 LA 829, 833 (1952). See also the celebrated case of *Western Union Telegraph Co.* v. *American Communications Assn.*, 299 N. Y. 177, 86 N. E. 2d 162, 12 LA 516 (1949).

[14] Aaron, *supra* note 10, at pp. 3-7.

parties' original intention. And the best evidence of their intention is generally found in the contract itself, that is, in the words which the parties themselves employed to express their intent. If these words are free from ambiguity and if their meaning is plain, there is no need to resort to interpretive aids such as past practice. This reasoning is well established in the law of contracts.[15]

In the hypothetical case, the contract asserts that seniority is controlling "in the following situations only: promotions, downgrading, layoffs, and transfer.." On its face, this language contains no ambiguity whatever. By using the word "only," a more exclusive term would be hard to imagine, the parties evidently intended seniority to apply in the four situations mentioned but in no others. Hence, pursuant to the plain meaning of this clause, seniority would not govern overtime assignments and any practice to the contrary would have to be ignored.

Aaron, however, says this may be too rigid an approach to the problem because it borrows principles from the law of contracts without giving adequate consideration to the unique characteristics of the collective bargaining contract and the relative flexibility with which even commercial contracts are construed today. He argues persuasively that no matter how clear the language of the collective bargaining contract seems to be, it does not always tell the full story of the parties' intentions.

Suppose, in our hypothetical case, the testimony reveals that the matter of overtime assignments was never considered during the negotiation of the seniority clause—either because the parties overlooked it under the mistaken impression that they had covered all possible contingencies or because the parties concerned themselves only with those situations they had previously experienced. Or suppose the parties simply found this seniority clause in some other agreement and adopted it without discussion. Any-

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[15] See the following excerpt from 55 *Am. Jur.* § 31:

"Perhaps the most fundamental of the rules which limit the introduction of a custom or usage . . . is that which denies the admissibility of such evidence where its purpose or effect is to contradict the plain, unambiguous terms . . . expressed in the contract itself or to vary or qualify terms which are free from ambiguity. . . . It [custom or usage] may explain what is ambiguous but it cannot vary or contradict what is manifest or plain. . . . An express written contract embodying in clear and positive terms the intention of the parties cannot be varied by evidence of usage or custom which either expressly or by necessary implication contradicts the terms of such contract."

one familiar with collective bargaining knows this sort of thing does happen. And the contract itself is not usually written by people trained in semantics. It is hardly surprising therefore to find in the typical contract an "inartistic and inaccurate use of words that have a precise and commonly accepted meaning in law." [16] The word "only" in the hypothetical case may merely be attributable to an inexperienced or over-eager draftsman.

Under these assumed circumstances, it cannot confidently be said that the parties intended to exclude overtime assignments from the scope of the seniority clause. Absent any original intention with respect to this problem, Aaron concludes that the long-standing practice of making overtime assignments by seniority should be controlling.

This conclusion appears to be supported by two different rationales. First, the argument seems to be that contract language is no clearer than the underlying intention of the parties.[17] Hence, where it is shown that their intention was uncertain or incomplete, the language cannot be considered truly ambiguous. It follows that past practice is being used not to contradict what is plain but rather to add to what is already a part of the agreement.

Second, the argument is that to adopt the overtime assignment practice "does not alter the agreement but merely takes note of a modification that has already been made either by the parties jointly or by the unilateral action of the employer tacitly approved by the union." [18] The practice, in short, amounts to an amendment of the agreement.

I find much merit in what Aaron says. And there are several reported decisions which indicate his views are shared by others as well.[19] The real question, however, is whether as serious a matter as the modification of clear contract language can be based on practice alone. Some arbitrators have held, I think with good reason, that practice should prevail only if the proofs are sufficiently strong to warrant saying there was in effect *mutual*

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16 Aaron, *supra* note 10, at p. 5.

17 As Judge Cardozo put it, "few words are so plain that the context or the occasion is without capacity to enlarge or narrow their extension."

18 Aaron, *supra* note 10, at p. 6.

19 See, e.g., *Metropolitan Coach Lines*, 27 LA 376, 383 (1956); *Smith Display Service*, 17 LA 524, 526 (1951).

agreement to the modification.[20] The parties must, to use the words in one decision, "have evinced a positive acceptance or endorsement" of the practice.[21] Thus, I believe that the modification is justified not by practice but rather by the parties' agreement, the existence of which may possibly be inferred from a clear and consistent practice.

None of this reasoning is radical. The notion that the collective bargaining contract is a "living document" has already won wide acceptance. Those responsible for a contract are free to change it at any time by adding an entirely new provision, by rewriting an existing clause, or by reinterpreting some section to give it a meaning other than that which was originally intended. Grievance settlements often result in "understandings that are as durable, or more so, than the actual terms of the labor contract. . . ."[22]

If a contract is susceptible to change in these ways, why shouldn't it be equally susceptible to change by reason of practice, at least where the practice represents the joint understanding of the parties? After all, the only ground for recognizing the modification or amendment of a contract is some mutual agreement. And it can be strongly argued that the *form* the agreement takes is not important. Whether it be a formal writing, an oral understanding, or a long-standing practice, so long as each is supported by mutuality, the parties have indeed chosen to change their contract.

It is also worth emphasizing that Aaron's hypothetical case just illustrates a situation where practice conflicts with the apparent meaning of a seemingly unambiguous provision. But what of a situation where practice conflicts with the real meaning of a truly unambiguous provision?

Suppose, for instance, that a contract says "seniority shall not govern the assignment of overtime work," that the parties meant

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20 See, e.g., *National Lead Co.*, 28 LA 470, 474 (1957); *Gibson Refrigerator Co.*, 17 LA 313, 318 (1951); *Texas-New Mexico Pipe Line Co.*, 17 LA 90, 91 (1951); *Merrill-Stevens Dry Dock & Repair Co.*, 10 LA 562, 563 (1948); *Pittsburgh Plate Glass Co.*, 8 LA 317, 332 (1947). For still another viewpoint, see Pearce Davis' comments on Aaron's hypothetical case. He stated he too would consider the overtime assignment practice to be enforceable but only if it were established "that the practice had been initiated by actual discussion and agreement of both parties." *Supra* note 10, at p. 15.

21 *Bethlehem Steel Co.*, 13 LA 556, 560 (1949).

22 George Taylor, "Effectuating the Labor Contract through Arbitration," *The Profession of Labor Arbitration* (Washington: BNA Incorporated, 1957), pp. 20-21.

to restrict the application of seniority, that a practice of distributing overtime according to seniority later developed, and that this practice was not initiated until the union had stated in discussions with the employer that it approved of this means of distributing overtime. On these facts, would the employer's unilateral discontinuance of the practice constitute a contract violation?

Applying the rationale stated in Aaron's paper, I would find no violation on the ground that practice can be decisive only if there is some uncertainty, however slight, with respect to the parties' original intention. My hypothetical case contains no such uncertainty, the parties' intention being perfectly obvious. Yet, if the "living document" notion is carried to its logical conclusion, a violation may exist on the ground that the practice, being a product of joint determination, amounts to an amendment of the contract and that thereafter the practice could only be changed by mutual agreement.

Some may complain that the contract is so clear and compelling here that no room is left for consideration of past practice. However, as Williston has explained in his famous treatise on contracts, "if the meaning of the contract is plain, the acts of the parties cannot prove an interpretation contrary to the plain meaning" but nevertheless "such conduct of the parties . . . may be evidence of a subsequent modification of their contract." [23]

As a Separate, Enforceable Condition of Employment

Past practice may serve to clarify, implement, and even amend contract language. But these are not its only functions. Sometimes an established practice is regarded as a distinct and binding condition of employment, one which cannot be changed without the mutual consent of the parties. Its binding quality may arise either from a contract provision which specifically requires the continuance of existing practices or, absent such a provision, from the theory that long-standing practices which have been accepted by the parties become an integral part of the agreement with just as much force as any of its written provisions.

There are different kinds of contract provisions regarding past practice. Some merely state that practices shall govern one small

[23] 3 Williston, *Contracts* (rev. ed., 1936), § 623.

phase of the employment relationship. For instance, "bidding on job vacancies shall be in accordance with past practice." Others broadly embrace practices with little or no qualification. For instance, "all practices and conditions not specified in this contract shall remain the same for the duration of the contract." [24] Still others require that practices be continued during the term of the agreement but allow management to change or eliminate a practice upon the occurrence of certain stated conditions.

No discussion of this subject would be complete without some mention of the experiences of the basic steel industry. The typical steel agreement provides that "any local working conditions in effect which have existed regularly over a period of time under the applicable circumstances . . . shall remain in effect for the term of this Agreement. . . ." [25] In this way, there has been incorporated into the steel agreements a wide variety of practices affecting wages, crew sizes, relief time, work assignments, and many other matters.[26]

The "local working conditions" clause is thus the source of important rights and obligations, many of which are somewhat obscured by the bustle of daily plant operations. It is this uncertainty as to the nature and extent of the commitment which seems most disturbing to steel management. However, a "local working condition" is not by nature unalterable. It may be changed or eliminated *either* by mutual agreement *or* by the employer if it can establish (1) that it has through the exercise of managerial discretion changed or eliminated "the basis for the existence of the local working condition" and (2) that a reasonable causal relationship exists between the change in the basis for the working condition and the change in the working condition itself.

The steel agreements thus seek to balance the employee's interest in preserving benefits which derive from established prac-

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[24] See Gerard Reilly, "Labor Law for Practitioners," *Labor Law Journal*, p. 23, (CCH, Jan. 1957) for the attitude of many management attorneys to clauses of this kind.

[25] The contract language quoted in this paragraph and in the following footnote can be found in Section 2B of the *U.S. Steel and United Steelworkers Agreement* and Article One, Section 3 of the *Republic Steel and United Steelworkers Agreement.*

[26] "Local working conditions" are defined in the steel agreements as "specific practices or customs which reflect detailed application of the subject matter within the scope of wages, hours of work, or other conditions of employment and includes local agreements, written or oral, on such matters."

tices and the manager's interest in being able to alter practices to suit changing industrial circumstances and thereby enhance efficiency. The "local working conditions" clause is, in short, a compromise between stability on the one hand and flexibility on the other.

I would like to illustrate the application of this clause with a hypothetical case. Suppose that certain mill equipment has been run by five men for many years, that this arrangement was originally based upon supervision's evaluation of the amount of work involved, and that the five-man crew has come to be recognized as a "local working condition." If technological improvements are made in the equipment and if these improvements substantially decrease the crew's workload, it has been held that the employer will have changed "the basis for the existence of the local working condition." Hence, it will be free to change the "local working condition" itself, that is, to reduce the crew size. The only proviso is that a reasonable "cause-effect" relationship exist between the change in the basis for the practice and the change in the practice itself.

However, even without technological improvements, the employer may be confident that the operation can be adequately performed with four men instead of five by reassigning duties among the crew members or by eliminating some of their idle time. Or the employer may belatedly discover that the original supervisory estimates of the work involved were completely wrong and that the crew should never have been larger than four men. But these circumstances, it has been held, do not change "the basis for the existence of the local working condition" and hence do not justify a reduction in crew sizes. Such a reduction must almost be based upon some technological advance, either in equipment or in manufacturing processes.

A "local working condition," in other words, need not yield to greater efficiency alone. Furthermore, the "local working conditions" clause places a premium on prompt and careful judgment in any area affecting conditions of employment. Where, for instance, an improved manufacturing process warrants a crew reduction but management fails to take any action, its failure may ultimately result in a new "local working condition" which will saddle the operation with the old crew. Thus, an employer is

forced to live with an error or a mistake in judgment once it becomes embedded in a "local working condition."

To this extent, the clause may prevent management from realizing optimum efficiency, but management must bear some of the responsibility for this result. This hypothetical case indicates the kind of problems which may arise in the administration of a past practice provision.

Most agreements, however, say nothing about management having to maintain existing conditions. They ordinarily do not even mention the subject of past practice. The question then is whether, apart from any basis in the agreement, an established practice can nevertheless be considered a binding condition of employment. The answer, I think, depends upon one's conception of the collective bargaining agreement. To use Harry Shulman's words, "is the agreement an exclusive statement of rights and privileges or does it subsume continuation of existing conditions?" [27]

Employers tend to argue that the only restrictions placed upon management are those contained in the agreement and that in all other respects management is free to act in whatever way it sees fit. Or to put the argument in the more familiar "reserved rights" terminology, management continues to have the rights it customarily possessed and which it has not surrendered through collective bargaining. If an agreement does not require the continuance of existing conditions, a practice, being merely an extra-contractual consideration, would have no binding force regardless of how well-established it may be. It follows that management may change or eliminate the practice without the union's consent.

Unions take an entirely different view of the problem. They emphasize the unique qualities of the collective bargaining agreement and the background against which the agreement was negotiated, particularly those practices which have come to be accepted by employees and supervisors alike and have thus become an important part of the working environment. The agreement is executed in the light of this working environment and on the assumption that existing practices will remain in effect. There-

[27] "Reason, Contract and Law in Labor Relations," 68 *Harv. L. Rev.* 999, 1011 (1955). Reprinted in *Management Rights and the Arbitration Process* (Washington: BNA Incorporated, 1956), p. 169.

fore, to the extent that these practices are unchallenged during negotiations, the parties must be held to have adopted them and made them a part of their agreement.[28]

Many arbitrators have, at some time in their careers, been confronted by these arguments. Some have held that the agreement is the exclusive source of rights and privileges; [29] others have held that the agreement may subsume continuation of existing conditions.[30] The latter is the more prevalent view. Those who follow it have prohibited employers from unilaterally changing or eliminating practices with regard to efficiency bonus plans,[31] paid lunch periods,[32] wash-up periods on company time,[33] maternity leaves of absence,[34] free milk,[35] and home electricity at nominal rates.[36]

The reasoning behind these decisions begins with the proposition that the parties have not set down on paper the whole of their agreement. "One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages." [37]

Thus, the union-management contract includes not just the written provisions stated therein but also the understandings and mutually acceptable practices which have developed over the years. Because the contract is executed in the context of these understandings and practices, the negotiators must be presumed to be fully aware of them and to have relied upon them in striking their bargain. Hence, if a particular practice is not repudiated during negotiations, it may fairly be said that the contract was

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28 See "Management's Reserved Rights: A Labor View," *Management Rights and the Arbitration Process* (Washington: BNA Incorporated, 1956), pp. 118, 126.

29 See, e.g., *National Distillers Products Corp.*, 24 LA 500 (1953); *Donaldson Co., Inc.*, 20 LA 826 (1953); *New York Trap Rock Corp.*, 19 LA 421 (1952); *Byerlite Corp.*, 12 LA 641 (1949); *M. T. Stevens & Sons Co.*, 7 LA 585 (1947).

30 See, e.g., *Fruehauf Trailer Co.*, 29 LA 372 (1957); *Morris P. Kirk & Son, Inc.*, 27 LA 6 (1956); *E. W. Bliss Co.*, 24 LA 614 (1955); *Phillips Petroleum Co.*, 24 LA 191 (1955); *Northland Greyhound Lines, Inc.*, 23 LA 277 (1954); *International Harvester Co.*, 20 LA 276 (1953); *American Seating Co.*, 16 LA 115 (1951); *California Cotton Mills Co.*, 14 LA 377 (1950); *Franklin Assn. of Chicago*, 7 LA 614 (1947).

31 *Libby, McNeill & Libby*, 5 LA 564 (1946); *Pullman-Standard Car Mfg. Co.*, 2 LA 509 (1945).

32 *E. W. Bliss Co.*, 24 LA 614 (1955).

33 *International Harvester Co.*, 20 LA 276 (1953).

34 *Northland Greyhound Lines, Inc.*, 23 LA 277 (1954).

35 *Ryan Aeronautical Co.*, 17 LA 395 (1951).

36 *Phillips Petroleum Co.*, 24 LA 191 (1955).

37 Archibald Cox, "Reflections Upon Labor Arbitration," 72 *Harv. L. Rev.* 1482, 1499 (1959).

entered into upon the assumption that this practice would continue in force. By their silence, the parties have given assent to "existing modes of procedure." [38] In this way, practices may *by implication* become an integral part of the contract.[39]

Cox not only agrees with this view but states the argument more strongly. In asserting that the words of the contract cannot be the exclusive source of rights and duties, he emphasizes the following point:

> Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words.[40]

The common law of the shop would include, at the very least, long-standing practices in the plant.

None of this is incompatible with ordinary contract law. Williston says that a usage, in our jargon a practice, is admissible "for the purpose of adding a new element or term or incident, whichever one is pleased to call it, to the expressed terms of the contract" and that "it may be shown that a matter concerning which

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[38] In this connection, note the analysis made by Douglass V. Brown in "Management Rights and the Collective Agreement," *Proceedings of the First Annual Meeting of the Industrial Relations Research Association,* pp. 145-155 (IRRA, 1949). Brown expressed his argument in these words:

> "But when all of the provisions are written, it will be found that many matters which affect conditions of employment are not specifically referred to. Does this mean that these matters are of no concern to the parties, or that the agreement has no meaning with respect to them? I think not. On some of these matters, the parties are satisfied with existing modes of procedure, conciously or unconsciously. On others, one party or the other may be dissatisfied but may be unable to devise better modes. On still others, one party may have preferred an alternative but may have been unable to secure agreement from the other party, or may have been unwilling to pay the price necessary for acceptance. In any event, the omission of specific reference is significant.
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> ". . . The agreement, no matter how short, does provide a guide to modes of procedure and to the rights of the parties on *all* matters affecting the conditions of employment. Where explicit provisions are made, the question is relatively simple. But even where the agreement is silent, the parties have, by their silence, given assent to a continuation of the existing modes of procedure."

[39] This implication of course would not be possible if it conflicted with the express language of the contract. For example, if a contract said "the written provisions constitute the entire agreement of the parties," it would be difficult to imply that the parties meant to make practices a part of their contract.

[40] Cox, *supra* note 37.

the written contract is silent, is affected by a usage with which both parties are chargeable." [41]

Indeed, some courts have decided that when an employee is hired or an agent appointed, the nature of his duties and his compensation as well may not be stated but may nevertheless be fixed by what is customary and reasonable.[42] In one case, a practice between railroads and their employees was held admissible to establish an implied agreement to pay time and one-half for overtime work.[43]

But this theory, insofar as it relates to the collective bargaining agreement, is open to criticism. To repeat, the majority view is that established practices which were in existence when the agreement was negotiated and which were not discussed during negotiations are binding upon the parties and must be continued for the life of the agreement. This is said to be an implied condition of the agreement. In the courts, implications of this kind are "based on morality, common understanding, social policy, and legal duty expressed in tort or quasi-contract." [44]

These considerations, however, are not much help to arbitrators. If we are the servants of the parties alone and not the public, I doubt that "social policy" would be a sound basis for drawing an implication. If our job is to seek out the parties' values and not to impose others' values upon them, I doubt that "morality" would provide the basis for an implication. If our powers arise from the parties' agreement and not from the labor laws, I doubt that a "legal duty" found in such legislation would be relevant.

Consider, for instance, the legal duty to bargain under the Labor-Management Relations Act. Apart from the question of whether we may enforce that duty, the real issue is "whether the practice may be changed without mutual consent when bargaining has failed to achieve consent." [45] Thus, the arbitrator's power

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41 Williston, *supra* note 23, at § 652.

42 See *Venembury* v. *Duffey*, 177 Ark. 663, 7 S.W. 2d 336 (1928) (broker's commission fixed by practice); *Voell* v. *Klein*, 184 Wis. 620, 200 N.W. 364 (1924) (authority of sales agent to accept used car as part payment for new one held established by practice of automobile dealers).

43 *McGuire* v. *Interurban Ry.*, 99 Ia. 203, 200 N.W. 55 (1924).

44 Shulman, *supra* note 27, at pp. 1011-1013. The analysis made in this paragraph is based upon Shulman's paper.

45 *Ibid.*

to establish implied conditions derives not from the superior authority of the law but rather from the parties' will, from their "common understanding." He may find implications which "may reasonably be inferred from some term of the agreement" [46] or even from the agreement as a whole.

The implication here that existing practices must be continued until changed by mutual consent is drawn from the nature of the agreement itself and from the collective bargaining process. It would be justified, I am sure, wherever there is a real or tacit understanding during negotiations that existing practices would be continued. While such an understanding may exist in some relationships, I think Shulman is probably correct in concluding that:

> It is more than doubtful that there is any general understanding among employers and unions as to the viability of existing practices during the term of a collective agreement. . . . I venture to guess that in many enterprises the execution of a collective agreement would be blocked if it were insisted that it contain a broad provision that 'all existing practices, except as modified by this agreement, shall be continued for the life thereof, unless changed by mutual consent.' And I suppose that execution would also be blocked if the converse provision were demanded, namely, that 'the employer shall be free to change any existing practice except as he is restricted by the terms of this agreement.' The reasons for the block would be, of course, the great uncertainty as to the nature and extent of the commitment, and the relentless search for cost-saving changes. . . .[47]

It is one thing to say, as Shulman suggests, that the implication is warranted where the evidence indicates that the parties had a "common understanding" to continue existing practices; it is quite another to say, as the majority suggest, that the implication is warranted because it may be assumed, unless otherwise stated in negotiations, that the parties had such a "common understanding." [48] The difference in viewpoints is clear. Shulman wants some proof of what the majority ordinarily assumes.

Shulman's approach places a heavy burden on anyone who

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[46] *Ibid.*

[47] *Ibid.*

[48] Or to take this one step further, as Cox suggests, it may be assumed, *unless otherwise stated in the agreement,* that the parties had such a "common understanding." Cox, *supra* note 37.

claims that a practice is a binding condition of employment. Think of the difficulty one might encounter in trying to establish that the unstated assumption of the negotiators on both sides of the table was to continue existing practices. The majority approach, on the other hand, comes close to engrafting a "past practice" clause onto the typical collective agreement without regard to the actual assumptions of the negotiators. Their silence at the bargaining table is presumed to constitute assent to existing conditions, whether they thought of this or not.

There are other possibilities too. We may find that the parties had no "common understanding" to continue practices in general but did have a "common understanding" to continue a particular practice. Much of this discussion has related to practices in general. Yet, an arbitration case rarely poses so broad a problem. We are usually asked to decide only whether a specific practice, say, a paid lunch period, must be continued in effect. Where possible, the answer should be as narrow as the question. To the extent to which the answer goes further and seeks to determine whether the agreement subsumes the continuation of existing conditions, the arbitrator risks deciding far more than the parties want him to decide. The dangers are magnified too by the fact that the arbitrator is not likely to elicit a clear picture of the assumptions upon which the agreement was negotiated.

Still another problem exists. Those of us who accept the principle that an agreement may require the continuance of existing practices recognize that this principle cannot be allowed to freeze *all* existing conditions. For instance, the long-time use of hand-controlled grinding machines could hardly be regarded as a practice prohibiting the introduction of automatic grinding machines. Or the long-time use of pastel colors in painting plant interiors could not preclude management from changing to a different color scheme. Plainly, not all practices can be considered binding conditions of employment.

Thus, while we are willing to imply that practices are a part of the agreement, we are apprehensive of the breadth of the implication. What seems correct from a theoretical point of view does not always make sense from a practical point of view. Arbitrators, accordingly, have accepted the implication but sought to limit it to just certain kinds of practices. The difficulty is to

determine what kind of rational line, if any, can be drawn between those practices which may be incorporated into the agreement and those which may not.

Some decisions enforce only those practices concerning "major" conditions of employment as contrasted to "minor" conditions.[49] But the test seems inadequate for several reasons. To begin with, it is vague and inexact. What is major to one group of employees may be minor to all the others; what is major from the standpoint of morale may be minor from the standpoint of earnings and job security. There is no logical basis for distinguishing between major and minor conditions, unless the arbitrator is to concern himself only with serious violations of the agreement.

More important, this kind of test encourages arbitrators "to commence their thinking with what they consider a desirable decision and then work backward to appropriate premises, devising syllogisms to justify that decision. . . ."[50] That is, if an arbitrator decides to enforce the practice he calls it a major condition, and if he decides otherwise he calls it a minor condition. To this extent, the test provides us with a rationalization rather than a reason for our ruling.

The Elkouris have suggested a comparable test.[51] They would enforce only those practices which involve "employee benefits"; they would not prohibit changes in practices which involve "basic management functions." This test, however, is no more convincing than the major-minor test. It suffers from the same defects. It too encourages the arbitrator to work backwards from his decision, thus providing him with a rationalization rather than a reason for his ruling. To enforce a practice all he need

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[49] See, e.g., *Pan Am Southern Corp.*, 25 LA 611, 613 (1955); *Phillips Petroleum Co.*, 24 LA 191, 194 (1955); *Continental Baking Co.*, 20 LA 309, 311 (1953); *General Aniline & Film Corp.*, 19 LA 628, 629 (1952). Cox and John Dunlop, in an article dealing with national labor policy, urged that "a collective bargaining agreement should be deemed, unless a contrary intention is manifest, to carry forward for its term the major terms and conditions of employment, not covered by the agreement, which prevailed when the agreement was executed." See "The Duty to Bargain Collectively During the Term of an Existing Agreement," 63 *Harv. L. Rev.* 1097, 1116-1117 (1950).

[50] Jerome Frank, "Experimental Jurisprudence and the New Deal," 78 *Cong. Rec.* 12412, 12413 (1934).

[51] Elkouri & Elkouri, *How Arbitration Works* (Washington: BNA Incorporated, 1960), pp. 274-275.

say is that it concerns employee benefits. But the fact is that most practices which create such benefits are likely to impinge upon some basic management function.

Consider a situation where the employer wishes to reduce a long-established crew-size based upon a recent engineering survey of his plant. How is the crew-size practice to be characterized? It involves the direction of the working force and the determination of methods of operation, which are customary management functions, but it also involves the job security of one or more members of the crew, a very real employee benefit. In the closer cases, this test provides no satisfactory guidance. Besides, it seems to me that if the parties have in effect agreed to the continuation of a particular practice, it should be binding regardless of its subject matter.

A few decisions enforce the practice if it involves a "working condition" rather than a "gift" or a "gratuity." [52] This distinction is meaningful only in that class of cases which concern employee bonuses or other extra-contractual employee compensation. Apart from its limited applicability, however, this test does suggest that what is important here is not the subject matter of the practice but rather the extent to which the practice is founded upon the agreement of the parties.

A better test, I think, is suggested by what Shulman said in a decision [53] he made as umpire under the Ford-UAW agreement, an agreement which did not require the continuance of existing practices. He urged that the controlling question in this kind of case is whether or not the practice was supported by "mutual agreement." He explained his position in these words:

> A practice thus based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is past practice but rather to the agreement in which it is based.
>
> But there are other practices which are not the result of joint

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[52] See *Fawick Airflex Co.*, 11 LA 666, 668-669 (1948).

Bonuses were held to be an integral part of the wage structure in the following cases: *Nazareth Mills, Inc.*, 22 LA 808 (1954); *Felsway Shoe Corp.*, 17 LA 505 (1951). Bonuses were held to be gratuities in the following cases: *American Lava Corp.*, 32 LA 395 (1959); *Rockwell-Standard Corp.*, 32 LA 388 (1959); *Bassick Co.*, 26 LA 627 (1956).

[53] Shulman, *supra* note 6.

> determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. Being the product of managerial determination in its permitted discretion, such practices are, in the absence of contractual provisions to the contrary, subject to change in the same discretion. . . . But there is no requirement of mutual agreement as a condition precedent to a change of a practice of this character.
>
> A contrary holding would place past practice on a par with written agreement and create the anomaly that, while the parties expend great energy and time in negotiating the details of the Agreement, they unknowingly and unintentionally commit themselves to unstated and perhaps more important matters which in the future may be found to have been past practice.[54]

Under this test, only a practice which is supported by the mutual agreement of the parties would be enforceable. Such a practice would be binding, regardless of how minor it may be and regardless of the extent to which it may affect a traditional function. Absent this mutuality, however, the practice would be subject to change in management's discretion.

Although this seems a sound way of distinguishing between enforceable and non-enforceable practices, one might understandably ask what constitutes "mutual agreement." Is it necessary to establish an express understanding or is it sufficient to show that the practice is of such long standing that the parties may properly be assumed to have agreed to its continuance? In other words, to what extent may the required "mutuality" be implied from the parties' actions or from their mere acquiescence in a given course of conduct?

Even the Shulman test does not provide us with a complete answer to this extremely vexing problem. I suspect that we would be far more likely to infer "mutuality" in a practice concerning "employee benefits" than in one concerning "basic management functions." To this extent, Shulman and the Elkouris may well have something in common.

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[54] *Ibid.* See also *International Harvester Co.*, 20 LA 276 (1953).

III. Duration and Termination of a Practice

Once the parties become bound by a practice, they may wonder how long it will be binding and how it can be terminated.

Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For, as I explained earlier in this paper, if a practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.

The inference is based largely on the parties' acquiescence in the practice. If either side should, during the negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of a new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding.

Consider next a well-established practice which serves to clarify some ambiguity in the agreement. Because the practice is essential to an understanding of the ambiguous provision, it becomes in effect a part of that provision. As such, it will be binding for the life of the agreement. And the mere repudiation of the practice by one side during the negotiation of a new agreement, unless accompanied by a revision of the ambiguous language, would not be significant. For the repudiation alone would not change the meaning of the ambiguous provision and hence would not detract from the effectiveness of the practice.

It is a well-settled principle that where past practice has established a meaning for language that is subsequently used in an agreement, the language will be presumed to have the meaning given it by practice. Thus, this kind of practice can only be terminated by mutual agreement, that is, by the parties rewriting the ambiguous provision to supersede the practice, by eliminating the provision entirely, etc.

Consider finally the effect of changing circumstances on the

viability of a practice during the contract term. Where the conditions which gave rise to a practice no longer exist, the employer is not obliged to continue to apply the practice. Suppose, for instance, that crane operators who handle extremely hot materials have for years been given a certain amount of relief time during their shift and that after installing an air-conditioning unit in one of the crane cabs the employer refuses to give any more relief time to the operator of that crane. Whether the employer's action is justifiable depends upon the reason behind the relief time practice.

If relief was given because of the extreme heat alone, there would be good reason for denying any relief to the operator in the air-conditioned cab. The circumstances underlying the practice would no longer be pertinent to this particular craneman. If, on the other hand, relief was given because of the high degree of concentration and care demanded in running these cranes there would be good reason to continue relief time for this craneman. The circumstances underlying the practice would still be relevant to his situation, even though he now has the benefit of air-conditioning.

In other words, a practice must be carefully related to the conditions from which it arose. Whenever those conditions substantially change, the practice may be subject to termination.

Conclusion

Through past practice, the arbitrator learns something of the values and standards of the parties and thus gains added insight into the nature of their contractual rights and obligations. Practices tend to disclose the reasonable expectations of the employees and managers alike. And as long as our decision is made within the bounds of these expectations, it has a better chance of being understood and accepted.

The ideas expressed in this paper may be useful as a general guide to the uses of past practice in administering the collective agreement. They do not provide an easy formula for resolving disputes; they are no substitute for a thorough and painstaking analysis of the facts. In the problem areas of past practice, there are so many fine distinctions that the final decision in a case will

rest not on any abstract theorizing but rather on the arbitrator's view of the peculiar circumstances of that case.

No matter how successful we may be in systematizing the standards which shape arbitral opinions, we must recognize that considerable room must be left for "art and intuition," [55] for good judgment. Perhaps an IBM computer may someday be able to write this kind of paper, but I doubt that it will ever be able to exhibit the kind of good judgment arbitrators have shown in answering complex grievance disputes.

[55] Cox, *supra* note 37, at p. 1500.

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TAB F

PRECONTRACT NEGOTIATIONS

The negotiations that precede and lead into the development of the collective bargaining agreement can have an important, if not determinative, effect on the interpretation of the agreement. This section of the manual contains the chapter, "Precontract Negotiations," of the book, Arbitration and Collective Bargaining: Conflict Resolution in Labor Relations, by Paul Prasow and Edward Peters.[1/] It is reprinted here with the kind permission of the publishers, McGraw-Hill Book Company (copyright 1970).

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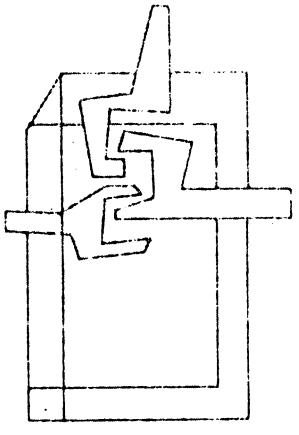
[1]Dr. Paul Prasow is the former Associate Director of Institute of Industrial Relations, UCLA.

Chapter 9

Precontract negotiations



■ It is axiomatic in contract interpretation that the framing of the written provisions consists of acts of the negotiating parties, acts which represent their mutual intent. The genesis of intent is mental, a state of mind. But as a state of mind, the intent of a negotiator is rarely susceptible of direct proof. Intent must ordinarily be inferred from the facts, from behavior, whether it be by word or deed. The assertion by a negotiator of an intent which was not disclosed by him when contract language was written is irrelevant and immaterial. Intent must be communicated by some objective means. In the words of one arbitrator, "It's not your innermost thoughts, but what you said or did or didn't do that establishes your intent when the language is interpreted."

BARGAINING HISTORY DISCLOSES INTENT

It follows, then, that the formulation of words to convey meaning is as overt a course of conduct as the production of goods and the rendering of services. Therefore the bargaining history of a contract—the discussions of the nego-

tiators as well as their other actions in the negotiating sessions—comprises a kind of practice that gives meaning to language in dispute.

One example of the decisive role of bargaining history in resolving a contract dispute is provided by the following controversy in a giant aerospace plant. The issue was phrased in a joint submission agreement as follows:

> **Is the Company in violation of Article IV, Section 2, Paragraph (b), by requiring Stewards and Chief Stewards to obtain separate passes for each contact made for Union duties?**[1]

Pertinent Contract Provision

> ARTICLE IV, SECTION 2, PARAGRAPH (B)
>
> **. . . Each representative of the Union shall report to his regular place of work (1) at the commencement of his regular shift, (2) after any lunch period, and unless absent from his regular place of work in accordance with the provisions of this Article, shall remain there during working hours, unless permission of his supervisor not to so report has been given.**[2]

Two unions are dominant in the aerospace industry. They are strongly grievance-minded, the processing of grievances being their life's blood. Chief stewards, and in some plants even stewards, customarily spend a large part of their working day away from their jobs investigating and processing employee grievances. The controversy in the instant case centered on the company's insistence on stricter control over the movements of union representatives. Where before they had been issued passes by supervision to make multiple contacts, a new policy limited the passes to single visits. After each separate visit the steward had to report back to his supervisor for another pass to make the next contact.

Company's Reasons for Change

The new system of granting passes to union representatives was established primarily to regulate a situation which was subject to abuse. The company did not intend to interfere with stewards carrying out legitimate activities. The company freely granted permission for a steward to leave his place of work, but it required a separate pass for each contact. According

[1] *Douglas Aircraft Co. v. United Auto. Workers, Local 148,* Dec. 12, 1962, 40 LA 201, Arbitrator Paul Prasow, BNA, Inc.
[2] *Ibid.,* 202.

to the company, this merely affected the manner or method of giving permission. The contract did not deprive the company of the right to require a separate pass for each visit. The new method of issuing passes was considered more efficient. It permitted a better check on the stewards' time, and it reduced waste and conflicting practices in various departments. The company claimed it was entitled to exercise such control over its personnel as long as such action was not in violation of the union's privileges or rights, as spelled out in the agreement. Union stewards were, of course, full-time employees and were expected to perform production work. The time they spent on in-plant union activities was paid for by the company, except that any time in excess of one hundred hours per month for 600 employees was shared with the union on a 50 percent basis.

From 1958 to 1962, Multiple Contacts On One Pass Were Permitted

The arbitrator reviewed the bargaining history of article IV, section 2(b), beginning with October, 1962, when the new policy was enunciated, and going back to the year 1956. For a number of years prior to 1962, the practice had been for supervision to release from their regular work assignment stewards or chief stewards who requested permission to contact other employees in connection with appropriate union activity. The supervisor would issue a form entitled "Employee Pass–Union Activity," which was used by the steward to make one or more contacts with other employees in the course of carrying out union activities. It was not unusual for the steward to make multiple employee contacts on one pass. During 1962, the practice was changed in a number of departments. The new practice required the stewards to report back to their regular place of work and obtain individual passes for each separate contact made for union duties. On August 2, 1962, the union filed a grievance alleging that the changed practice violated the agreement. On October 8, 1962, the company enunciated the changed practice as a uniform policy for all departments in the plant.

Prior to 1958, Contract Language (Requirement 3) Limited Each Pass to a Single Contact

Although article IV, section 2(b), was silent on the matter in dispute, the provision had not always been silent. Prior to negotiation of contract changes in 1958, article IV, section 2(b), had read as follows:

> Each representative of the Union shall report to his regular place of work
> (1) at the commencement of his regular shift,
> (2) after any lunch period, and
> (3) *immediately upon completion of any duties as a Union representative.* [Italics supplied.][3]

It is important to note that requirement 3 was removed from the contract effective May 19, 1958, expiration date of the agreement between the parties. From that time until approximately January, 1962, the record showed that multiple contacts by stewards were generally permitted, and that this policy prevailed in all departments until 1962. The changed practice (prohibition of multiple contacts) did not become a plant-wide policy until 2½ months after signing of the new agreement on July 23, 1962.

After Four Years, the Company Reinstituted Requirement 3 Unilaterally as a Management Reserved Right and Not by Negotiation

The company contended that reinstatement of requirement 3 was a legitimate exercise of managerial discretion, in accordance with company rights as expressed in article II, sections 2(a) and 2(b), the Management's Reserved Rights provision.

In his opinion the arbitrator replied that:

> Where the contract is silent on a particular point, the management's rights provision does not automatically take precedence over any other consideration. Other pertinent factors may be involved which have to be examined. The record in this case shows that prior to the 1958 negotiations, the contract between the parties expressly provided that the Union representative shall report to his regular place of work ". . . immediately upon completion of any duties as a Union representative." The Union argues *that this requirement was dropped during the 1958 negotiations in order to remove a restriction on shop steward mobility which management is now endeavoring to reinstitute unilaterally outside of negotiations.* [Italics supplied][4]

There was nothing in the record of the 1958 negotiations or subsequently which contradicted the union's interpretation. For four years, from 1958 until October 8, 1962, the practice of the parties, and the administrative policy of the company supported the union's contention. No explanation had been offered by the company for the removal of requirement 3 from the contract negotiated in 1958.

[3] *Ibid.*
[4] *Ibid.*, 204.

II. IT IS PRESUMED THAT WHEN THE PARTIES CHANGE THE LANGUAGE, THEY INTEND TO CHANGE THE MEANING

The arbitrator concluded that the parties must have had some motivation for taking the affirmative action in 1958 of deleting the third requirement from article IV, section 2(b). He commented:

> ***It is an accepted principle in arbitration that when the parties change the language of their Agreement, there is a presumption that they intended a changed meaning.*** **[Italics supplied.][5]**

The company argued that even if it had agreed to remove requirement 3 during the 1958 negotiations, this acquiescence in itself did not prevent it from reinstating the requirement at any future time as a company policy under the management-rights section. In other words, the company was not precluded for all time from reestablishing the requirement if such a step was deemed necessary for efficient operations and maintenance of adequate controls.

Arbitrator Rules: Requirement 3 Was Removed by Negotiations and Must Be Reinstituted by Negotiations

In principle, said the arbitrator, he would fully affirm the company's right to reinstate requirement 3 if the company deemed such a step necessary. However, the matter at issue was not the company's objective, but rather the method by which the objective had been attained. Under ordinary circumstances, appropriate plant rules could be promulgated by the company under the management-rights section provided such rules were not in conflict with the agreement. But, said the arbitrator, these were not ordinary circumstances:

> In the light of the 1958 change of contract language, and the subsequent practice of multiple contacts by Stewards until 1962, the Arbitrator is of the opinion that requirement No. 3 cannot be reinstated unilaterally. It seems to the Arbitrator that the appropriate method of reinstating requirement No. 3 would be through contract negotiations. Otherwise, it would be possible to reimpose unilaterally as plant rules specific conditions or requirements which had been deleted from the Contract through mutual agreement of the parties in negotiations.
>
> It is the Arbitrator's opinion that having once agreed in the give and take of contract negotiations to drop requirement No. 3, as was done in

[5] *Ibid.*

> 1958, the Company cannot now in 1962 unilaterally reimpose, outside of contract negotiations, that selfsame requirement.[6]

III. THE CONDUCT OF THE PARTIES DURING THE CONTRACT TERM CAN ALSO DISCLOSE THEIR INTENT

Not only can the conduct of the parties during contract negotiations illuminate their mutual intent; their conduct during the term of the contract can be equally crucial. Consider a practice initiated by management during a contract term, a practice covered by ambiguous language or mentioned not at all. A union charged with awareness of the new practice, if it keeps silent for an undue length of time, may be deemed by its inaction to have acquiesced in the practice. The binding nature of the practice becomes strongly reinforced if the union maintains its silence throughout a subsequent negotiation of the contract.

Another aspect of bargaining history which can be controlling is the settlement of grievances spawned by conflicting interpretation of contract language. An agreement on such grievances may become a binding precedent for future interpretations of the language in dispute.

A withdrawal of a grievance, however, will generally not constitute acquiescence to management's position if the union announces that its withdrawal is made "without prejudice" and with intent to press for a solution at a later time either by negotiations or by arbitration. A failure by the union to resolve the issue in a subsequent contract negotiation may fatally impair its attempt to keep management's action from becoming a binding practice.

IV. THE INTENT OF THE PARTIES WHEN THE LANGUAGE WAS NEGOTIATED IS A PRIMARY CRITERION FOR ITS INTERPRETATION

In general, arbitrators will scrutinize closely utterances of the parties entered into the record as well as their other activities during the contract-making process. There is no higher standard for interpreting ambiguous language than conclusive proof of what the language meant to the parties when it was formulated. Such proof is often adduced by inference. Thus an attempt by a party in negotiations to reform ambiguous language to bring it into conformity with its interpretation can be a hazardous undertaking. If a pro-

[6] *Ibid.*, 205.

posal to clarify the language in question should fail, the party making the proposal will become highly vulnerable in a subsequent arbitration to a charge that it is trying to get from an arbitrator an interpretation it was unable to obtain in negotiations.

V. THE CASE OF THE STOLEN TOOLS

The resolution of a claim by a machinist that he be reimbursed for stolen tools highlights a typical application of the foregoing principle. The circumstances leading to the dispute may be summarized as follows: The grievant was one of approximately thirty machinists employed by the company. These machinists reported to work at a variety of locations throughout the plant. Some worked in the machine shop, and others were assigned from a central pool to specific areas in the plant for varying periods of time. For some time prior to the disputed incident, the grievant had been assigned to the compressor room. At the close of his shift on Friday, April 13, 1965, the grievant placed his personal toolbox, along with those of three other machinists, on a table in the compressor room and covered it with a canvas. His toolbox was locked. When he returned to work the following Monday, he found his toolbox has been pried open and approximately $75 worth of tools had been stolen. An investigation was conducted by the company, but the tools were never recovered.

The union charged that the company failed to provide adequate storage space for such tools and thereby violated section XXIX, paragraph (8), "General Conditions," of the then applicable agreement: "The Company agrees to furnish storage space for hand tools owned by employees." The union claimed the grievant was entitled to reimbursement for the stolen tools. The company denied any contract violation and disclaimed any liability.

As was to be expected, the union pegged its claim on the contractual requirement that the company "furnish storage space for hand tools owned by employees." The term "storage space," argued the union, implied a safe storage place. Quoting from the union's position as reported by the arbitrator:

> For example, the Grievant was required to leave his toolbox in the Compressor Room, covered only by a canvas, because there was no other place to put them. At this location, his toolbox was accessible to any number of employees who could walk in and out of the Compressor Room without being seen. The fact that he left them there, and that

> other employees have also done so for a considerable period of time, does not establish this to be an adequate provision for tool storage, as the Company has maintained. The Union asserts that, in the entire plant, there are virtually no sufficiently protected areas for tool storage.[7]

However persuasive may have been the merits of the grievant's claim, its entire foundation was undermined by a past history of unsuccessful attempts by the union to write language into the contract providing reimbursement for stolen tools. The impartial arbitrator as chairman of a tripartite arbitration board issued the following opinion:

> The Board, in carrying out its function of ascertaining the meaning of the disputed Contract provisions, must first look to the applicable language of the Agreement to see if the intention of the parties can be determined. When the language is clear, its provisions govern. It is only when the Agreement is not clear on the disputed points that Arbitrators resort to other criteria of interpretation such as past practice, negotiating history, etc., in an effort to determine and give effect to the mutual intention of the parties.
>
> In this case, the Contract is silent on the question of whether or not the Company is obligated to replace an employees' stolen tools and therefore, it is necessary to examine other indicia of intention. Where, as here, the subject has arisen during negotiations, the discussions on the point can be highly illuminating and in this case they are decisive.

A Party Cannot Get in Arbitration What It Failed to Get in Negotiations

> It is clear from the record that during the negotiations in 1952 leading to the first Contract, when the theft problem was particularly acute, the Union proposed that "The Company replace tools . . . lost on the job." . . . During the 1956–57 negotiations, the Union proposed that the Company "Replace tools stolen." . . . These proposals were considered, discussed, and rejected. Against this background, the omission of a provision for the replacement by the Company of stolen tools is very meaningful. In the light of the bargaining history on this point, the conclusion is inescapable that the parties did not intend to make the Company responsible for the replacement of stolen tools. This Board would be exceeding its authority were it to add to the contract by interpretation what had been so clearly rejected during negotiations.[8]

It should be noted in the foregoing case that there was no record cited of the company ever having reimbursed an employee for stolen tools. And

[7] *Am. Potash & Chem. Corp. v. Int'l Ass'n of Machinists, Desert Lodge 886,* Oct. 17, 1966, 47 LA 574, 575–576, Arbitrator Howard S. Block (Chairman), BNA, Inc.
[8] *Ibid.,* 566.

now a hypothetical question suggests itself: What if the reverse had been true? What if the union could have cited a valid past practice of company reimbursement for stolen personal tools? In that hypothetical case, the past practice would have been controlling, and the arbitration board would have interpreted the company's obligation "to furnish storage space for hand tools" to mean "safe storage space," entitling the grievant in this instance at least to reimbursement for stolen tools.

A Failure to Bring Language into Conformity with the Past Practice Does Not Invalidate the Practice

"But," a dissenting reader might say, "what of the union's unsuccessful attempts to bring the language of section XXIX(8) into conformity with the past practice? Did not management's refusal to reform the language during negotiations render a prior practice null and void?" Such reasoning would be unassailable if the contract were silent on the benefit. But where there is language, ambiguous language to be sure, covering the benefit, then the past practice is inseparably joined to the language to give objective expression to the mutual intent of the parties. As pointed out in a subsequent chapter,[9] the mere repudiation of such a practice is not enough to change the meaning of the language. The responsibility devolves upon the party repudiating the practice to secure revisions bringing the language into conformity with its new interpretation.

VI. THE CASE OF THE SEVEN-MEMBER GRIEVANCE COMMITTEE

We proceed now to another case where a company was charged with attempting to secure arbitral endorsement of a practice it was unable to write into the contract. At issue was the company's insistence that a union grievance committee be limited to a maximum of five members. The union complained that the company violated the agreement when it refused to meet with a union grievance committee of seven representatives. The matter was brought to a head on or about September 1, 1953, when, upon arriving at the scheduled meeting place, the company found that seven union representatives had assembled as a grievance committee. The superintendent informed the union that the company would listen to the union's

[9] See Chap. 14, pp. 274–280.

case as soon as the committee members were reduced to five or less as was the custom in the past. The union refused to reduce its committee from seven to five, and the meeting thereupon broke up. No agreement as to the size of the committee could be reached by the parties.

A Practice of Five Members Did Not Preclude a Committee of Seven

Although the contract placed no limits on the size of the union committee, the record was clear that with some few exceptions the committee had customarily been held to five members. However, more crucial to the arbitrator than the predominant practice was an unsuccessful attempt by the company to negotiate language restricting the size of the union committee. The following excerpt summarizes his principal reason for sustaining the union's position:

> The record in this case indicates that in prior negotiations attempts were made to include language in the Agreement limiting the number of Union Committeemen that might be present at grievance meetings. Apparently such attempts were unsuccessful, since the same language (establishing no such limitations) appeared in subsequent agreements. The Arbitrator is in no position to impose a limitation which was not arrived at in negotiations or by agreement of the parties. Although the Company's desire to limit the number of Union participants to a size suitable for efficient and rational consideration of the subject is certainly a legitimate and proper managerial aim, this matter must be resolved through mutual determination between the parties. What may appear to be reasonable for one situation, may be totally unreasonable in another case. Where there are no stated limitations in the contract, a reasonable number of grievance committee representatives will usually depend upon the facts and circumstances of the particular situation.[10]

It must be reiterated in the foregoing case that the contract was silent on the issue to be decided. The arbitrator had to consider whether the custom of negotiating with a five-member committee was an internal union matter, which could be unilaterally changed, or whether it was a binding practice. The failure of the company's efforts in negotiations to get language limiting the committee's size was decisive. The element of mutuality, an essential element of a binding practice, was demonstrably absent. The union's custom of negotiating with a five-member committee was held to be its own affair, subject to reasonable alterations.

[10] *Am. Smelting & Ref. Co. v. United Steelworkers, Local 4347,* Oct. 15, 1954, unpublished arbitration award, Arbitrator Paul Prasow.

Had There Been Language Limiting the Committee to Five, The Arbitrator Would Have Upheld the Company

Two questions now suggest themselves. First, had there been language regulating the size of the union committee, even highly ambiguous language, would the arbitrator have made the same decision? The answer would be an unqualified no. Assuming there had been ambiguous language covering the issue, all the essential elements would have then been present in the American Smelting case that had been present in the American Potash case of the stolen tools. The arbitrator would have held that a predominant practice of negotiating with a five-member committee had given meaning to an ambiguous provision regulating the size of the committee and that the practice was so inseparably joined to the language that the company's unsuccessful efforts to clarify the language would still leave the meaning of the provision unimpaired.

The Torrington Principle Does Not Apply Because of the Nature of the Issue

The second question that suggests itself relates to the principle expounded in the Torrington decision[11] of management's right, when the contract is open for negotiations, to withdraw a benefit not covered by any language. Suppose, with the contract silent, the company had not tried to write in language restricting the size of the union committee, but had made an oral declaration that henceforth it would deal with a union committee of not more than five. Would the onus have then been on the union, consonant with the Torrington principle, to get language into the contract removing the company's restriction on the committee size, or at least to get the company to withdraw orally its declaration?

The answer is that because of the nature of the issue the Torrington principle is not applicable to the American Smelting case. The size of a union committee, assuming it is not expanded out of all reasonable proportions, is an essential aspect of union recognition in collective bargaining. As between a five-member and a seven-member committee, it is difficult to regard the difference as an employee benefit—even an employee benefit of no monetary cost to the employer. The number of bargaining representatives to be designated should, within reason, be the exclusive prerogative of the respective parties. For the union's custom of negotiating with a five-

[11] *Torrington Co. v. Metal Prods. Workers, Local 1645*, 237 F. Supp. 139, (1965). For additional discussion of this case, see Chap. 3, pp. 38–39, and Chap. 14, pp. 276–279.

member committee to be converted by a unilateral declaration of management into a binding practice would constitute an unwarranted interference with the union's internal decision-making process.

The Size of the Committee Was a Purely Internal Union Matter

Such an interference with the internal operation of a union would be analogous to an employer strategem frowned upon by arbitrators and by the National Labor Relations Board. We refer to the refusal of some employers to make a significant offer in negotiations unless the union agrees to have the offer voted on by the membership in a secret-ballot election. At first blush, the employer's condition would appear to be quite reasonable and morally justified. From a more sophisticated point of view, the condition might seem to be designed to hamper the union's strategic flexibility. The timing and the method of presenting employer offers to a union membership may have a great deal to do with generating employee support for the union. In the American Smelting case Arbitrator Prasow decided for the union because of the company's unsuccessful attempts in negotiations to write language limiting the union committee; but even if the company had not impaired its position in negotiations, he would have still held that the size of the committee, within reasonable limits, was solely the internal affair of the union.

VII. PROMISSORY ESTOPPEL DEFINED

Another course of conduct in negotiations subject to arbitral review involves the legal principle of "promissory estoppel." The estoppel principle has been lucidly enunciated in several law dictionaries. In Bouvier's Law Dictionary we find:

> He who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted.[12]

In Black's Law Dictionary we find:

> Estoppel in its broadest sense is penalty paid by one perpetrating wrong by known fraud or by affirmative act which, though without fraudulent intent, may result in legal fraud on another. . . .

[12] John Bouvier, *Bouvier's Law Dictionary and Concise Encyclopedia,* 8th ed. (3d revision by Francis Rawle), Vernon Law Book Company, West Publishing Company, St. Paul, Minn., 1914, p. 1081.

> An estoppel arises when one by acts, representations, admissions or silence intentionally induces another to change his position for the worse.[13]

III. THE CASE OF THE DEFERRED INEQUITY INCREASE

A typical application of the estoppel principle to resolve a controversy was made at a major television studio. At issue was the compensation for script secretaries. During contract negotiations the union had argued that the script secretaries were entitled to an inequity increase over and above their classification rate because in the timing of television productions they had assumed responsibilities which had normally belonged to the associate directors. As reported by the impartial chairman of the arbitration board:

> At that time the Company proposed that the matter be deferred until the Union's claim could be looked into, and if it were found that the Script Sec.etaries were doing work beyond that called for in their job description, an upward salary adjustment would be made, or the additional duties would be taken away. The Union states that, relying on these assurances, it deferred its demand until after the Company's investigation had taken place. At some time after the signing of the 1955 contract, the Company announced the results of its investigation as indicating that the Script Secretaries were not being required to do work in any significant degree beyond their job description.[14]

The Company Is Estopped from Declaring the Issue Inarbitrable

The first matter before the arbitrator was a motion by the company to dismiss the union's complaint as not subject to arbitration. If the arbitrator were to find for the union, argued the company, the only remedies open to him would be either to create a new job classification or to increase the wages of the Script Secretary Classification, and both remedies would be in violation of the plain meaning of the following contract language:

> It is . . . agreed that terms of a new agreement or changes in wages, hours or working conditions shall not be determined by arbitration.[15]

The arbitrator denied the company's motion by invoking the promissory-estoppel principle. Quoting again from his opinion:

[13] Henry Campbell Black, *Black's Law Dictionary*, 4th ed., West Publishing Company, St. Paul, Minn., 1951, p. 649.

[14] *Columbia Broadcasting Sys. v. Office Employes Int'l Union, Local 174*, May 9, 1956, unpublished arbitration award, p. 7, Arbitrator Paul Prasow (Chairman).

[15] Article 18, 1955 contract between the parties.

> An examination of the entire record reveals that it was as a result of the Company's own suggestion that the Union was persuaded to defer the matter to a time subsequent to the signing of the contract. The Company's proposal to postpone the issue until the validity of the Union's claim could be determined, carried with it the assurance or commitment that the controversy would be treated as a classification matter subject to the contract grievance and arbitration procedures. This is amply supported by testimony of Company witnesses at the hearing. As a result, the Union ceased its efforts to attain a settlement of the issue through the traditional pressures of contract negotiations. In the opinion of the Arbitration Board, or a majority thereof, the Company is now estopped from claiming that the controversy is not arbitrable.
>
> . . . To now sustain the Company's motion on dismissal would be to say in effect that there is no meaningful procedure or terminal point to resolve a disputed issue which, except for the Company's acknowledged commitment to treat the matter as a classification issue, subject to contract arbitration as a terminal point to grievance adjustment, might have been resolved through the normal processes of contract negotiations. Accordingly, the motion to dismiss is denied.[16]

IX. THE CASE OF THE HOLIDAY-PAY ELIGIBILITY PROVISION

Another example of how decisive the estoppel principle can be is provided by an arbitral opinion resolving a controversy over employee eligibility for holiday pay. The pertinent contract language stated clearly that a regular employee with more than thirty days service "shall if he shall have worked the regular scheduled workday . . . prior to the occurrence of such holiday and his scheduled workday subsequent to such holiday, receive eight hours pay at his regular hourly rate for each such holiday. . . ." A separate contract section included a provision that "an additional day of pay or time off shall be allowed where a holiday occurs within a vacation schedule."

Did the Language Exclude from Eligibility Sickness, Excused Absence, and Death in the Family?

At issue was the departure by the company in the case of two aggrieved employees of a long-established practice of giving holiday pay to employees who did not work their regular scheduled work day before or after the holiday because of sickness, excused absence, or death in the family. The testimony of union witness Mr. E. was accepted at face value by the arbitrator because it went unrebutted by the company. Mr. E. confirmed that there was a past practice of granting holiday pay to those on excused absence or

[16] *Columbia Broadcasting Sys. v. Office Employees Int'l Union, Local 174*, pp. 8–9.

absent because of sickness or death in the family. Such testimony of a practice unsupported by the clear language of the contract would not of itself have been controlling. What did carry decisive weight was Mr. E.'s unrebutted version of what had transpired in the prior contract negotiations. The arbitrator ruled that statements of district manager L. in the negotiating sessions justified the invocation of the promissory-estoppel principle.

Crucial Testimony by Witness E. Was Accepted Because It Went Unrebutted

In upholding the union's position, the arbitrator said that since there was no contradiction of the important points made by Mr. E. on behalf of the union, he had to accept such evidence as entirely uncontroverted. The arbitrator noted that ordinarily the testimony of Mr. E. on behalf of the union would be regarded as self-serving statements as to past practice and the manner in which the previous district manager, Mr. L., interpreted the pertinent contract clauses. However, since the testimony was not in any way challenged or disproved, if it was erroneous, by company records, the arbitrator accepted it as fact and as an admission against interest by the company.

According to the arbitrator, Mr. E. had testified that from 1956 until 1959 the district manager on behalf of the company emphatically stated that holidays would be paid even if a person did not work the day before and/or the day after, provided such an employee was excused or was ill or had suffered a death in his immediate family. Mr. E. had further testified that the district manager expressed severe displeasure that the union even raised this point and did not trust management sufficiently to take into account the universally recognized exceptions under which an employee generally receives holiday pay although he may not work the day before and/or the day after such holiday. The arbitrator noted that on no less than four occasions during the hearing, Mr. E. stressed that Mr. L. on his own initiative had added, without any prompting from the union, an extra feature, namely, "the death of a member of an employee's immediate family," as warranting holiday pay in addition to absence due to illness or excuse.

X. THE DOCTRINE OF ESTOPPEL

Quoting from the arbitrator's opinion upholding the union:

> This case seems most unusual, interesting and important, in that it affords in our view a rather perfect situation in which the doctrine of

> estoppel may justly be invoked and applied. True, the contract language is completely silent relative to excuses and does state that an individual must have worked the day before and the day after such holiday; it also provides that if a person is on vacation when such holiday occurs he will receive pay for that holiday. We cannot at all ignore the statements attributed to Mr. L. when such alleged statements evidently are completely supported by past practices. The Union did not press the point of spelling out the usual provisions which would have incorporated the three circumstances referred to by Mr. L., namely, sickness, excuse or death. The Union had every right to rely upon the unequivocal expression by Mr. L. of how he would interpret and apply the pertinent contract clauses. On the basis of all the foregoing, the fact that the Union had every right to rely upon the statement of the district manager, Mr. L., as well as the doctrine of estoppel, we have no choice in the subject case but to sustain in its entirety the position and the contention of the Union and to deny the Company position involving a narrower construction entirely at variance with the Company's past practice and own interpretation of tne pertinent clauses in past years. If the application and interpretation of this clause which is identical with previous clauses is to be made sharply at variance with such past practice, then one of two things must be present: (1) The Company must not clearly inform and lead the Union to believe that the pertinent clauses would be interpreted as they have been in the past. (2) Or contract language in the next contract must plainly indicate, and under these circumstances, affirmatively so, that the past practice and application of these contract clauses will in the future be different and then spell that out accordingly and affirmatively. Jurisdiction is retained only for the purpose of clarification deemed necessary by the parties.[17]

Williston on the Implication of the Completeness of a Written Provision

Of particular interest in the foregoing case is that the arbitrator accepted testimony adding to the terms of a written provision even though an implication could have been fairly drawn that the written provision embodied the complete understanding of the parties. The word "implication" is used in the sense explicated by the following passage from Samuel Williston:

> A written promise to pay $50 is not in terms contradicted by an oral promise to pay $25 more, but the natural implication from the written promise is irresistible that $50 is the whole cash payment which the promisor is to make. This implication arises because as a matter of actual practice, one who was intending to promise $75 would put his promise in the form of a single promise to pay that sum, rather than in

[17] *Grief Bros. Cooperage Corp. v. Int'l Ass'n of Machinists, District 9*, Apr. 11, 1960, 34 LA 283, 285, Arbitrator Joseph M. Klamon, BNA, Inc.

that of a written promise to pay $50 and a separate agreement to pay $25 in addition.[18]

XI. PAROL EVIDENCE RULE DEFINED

The principle discussed by Williston is fundamental to the "parol evidence rule." This frequently invoked rule provides that where two parties have entered into a contract and have expressed it in writing which they intend as the final and complete statement of that contract, no evidence, oral or written, of *prior* understandings or negotiations is admissible to contradict or vary the written contract.[19]

The parol evidence rule, it should be reiterated, excludes evidence of *prior* understandings, but it does not relate to, or prevent proof of, oral understandings entered into *after* the written contract becomes effective, even when the written contract expressly provides that its provisions can only be changed or eliminated by a subsequent agreement in writing.

It would appear, therefore, that in the case previously cited, the parol evidence rule would not have been applicable to the contract interpretation in the first instance. The union's estoppel claim was based upon oral assurances given by the district manager which amounted to an oral commitment long *after* the holiday eligibility provisions had been drawn up. But even if the assurances of district manager L. had preceded the framing of the holiday eligibility provisions, the parol evidence rule could not have been successfully invoked because of exceptions to the rule. Parol evidence is admissible to show that the written contract when signed by the parties was voidable for fraud, mistake, duress, undue influence, incapacity, or illegality. A promissory estoppel is invoked as a protection against a promise which even though without fraudulent intent may result in fraud by legal definition. It follows then that whenever there is a clear, convincing, undeniable basis for a promissory estoppel, at least one exception to the parol evidence rule must be present—legal fraud. Another exception might well be undue influence. At the risk of being repetitive, it cannot be overstressed with respect to oral understandings that the parol evidence rule applies only to those understandings reached *before* the written instrument becomes effective. Oral understandings made *after* the contract is executed by the parties do not come under the parol evidence rule.

[18] Walter H. E. Jaeger, *A Treatise on the Law of Contracts*, 3d ed. (replacing revised ed. by Samuel Williston), Baker, Voorhis & Co., Mount Kisco, N.Y., 1957, vol. 4, sec. 639, p. 1050.

[19] Laurence P. Simpson, *Simpson on Contracts*, Hornbook Series, West Publishing Company, St. Paul, Minn., 1954, p. 225.

The Stationary Engineers' Lunch Case Reexamined

To illustrate, let us reexamine a case reported earlier, the case involving the controversy at a large rubber company over a lunch break for stationary engineers.[20] The contract language unambiguously provided a half-hour lunch period for all employees, excluding certain classifications. Stationary engineers were not one of the classifications excluded, although, as a matter of fact, the stationary engineers had never had a formal lunch break, even before the company had been unionized. When the first union contract was being negotiated the company had tried to list the stationary engineers among the exclusions, but union spokesmen had objected.

"No, no," they said, "we need every vote we can get to ratify this contract. Let's not stir anything up unnecessarily with language excluding the engineers. We won't disturb the practice, we promise you, but don't write it in the contract."

XII. ONLY UNDERSTANDINGS MADE PRIOR TO THE CONTRACT EXECUTION COME UNDER THE PAROL EVIDENCE RULE

The question now arises, would such an oral promise be admissible as evidence in a later arbitration? On a strict application of contract law, it would not be admissible under the parol evidence rule, or if it were allowed into the record, it would normally be given no weight. To strict constructionists the oral understanding would be inadmissible because it was made prior to execution of the contract.

What now, if, in a subsequent contract negotiation years later, the company again tried to list the stationary engineers among the lunch-break exclusions, and was put off by the same argument and the same promise from the union that the practice would remain undisturbed? Would this new oral understanding be admissible as evidence? Our answer is definitely yes. From any point of view the parol evidence rule would not apply to the new oral understanding because it would have been reached in negotiations *after* the lunch-break provision had been *originally* negotiated by the parties.

Two Types of Prior Oral Understandings

To summarize, an important distinction must be made between two purposes for which prior oral understandings are advanced in arbitration:

[20] See Chap. 4, pp. 49–50.

1 A prior oral understanding may be offered in evidence to contradict the clear language of a written provision. The written provision taken as a complete and, above all, as an indivisible entity is characterized as a spurious agreement; the prior oral understanding, offered as a substitute, is purported to be the true agreement between the parties.
2 A prior oral understanding may be offered in evidence, not to contradict the language as such of a written provision, but to contradict an implication that the provision is the entire bargain made by the parties. The provision is not complete, it is argued, because it does not include additional benefits arrived at by prior oral understandings.

Arbitrators are much more prone to accept parol evidence in the latter instance then they are to admit parol evidence which directly contradicts clearly written provisions and which impugns the validity of these written provisions by attempting to reform the contract.

XIII. THE CASE OF MEMORIAL DAY PREMIUM PAY

A dispute over holiday pay at a unionized golf and country club was highlighted by the union's attempt to prove that a prior oral understanding had been reached which contradicted the plain meaning of the following written provision:

> *Section 6.* **The following days shall be observed as holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day.**
>
> **Employees working any of the above holidays shall be paid at the overtime rate of one and one-half times the straight time rate herein specified.**[21]

At issue in arbitration was the union's claim that the compensation for work on Memorial Day, a contract holiday, should have been 2½ times the straight-time rate for hours worked. The employer pointed to the clear language of section 6 which specified that compensation for the holiday should be 1½ times the straight-time rate. The union argued that the facts leading to the controversy presented a classic case of promissory estoppel. The arbitrator reviewed the pro and con testimony at the hearing and found that at the initial negotiating meeting for the first contract, the union asked for 2½ times the straight-time hourly rate on specified holidays similar to that required in the contract with another golf course. The union claimed that at that first meeting the company agreed to pay the 2½-times rate if the union would accept contract language which specified the holiday rate as only 1½ times the straight-time rate.

[21] *Del E. Webb Corp., Almaden Golf & Country Club v. Bldg. Serv. Employees Union, Local 77*, Jan. 17, 1967, 48 LA 164, Arbitrator Adolph M. Koven, BNA, Inc.

On its part, the company testified that at the negotiations it pointed out that the operation of a golf course required a seven-day-week, fifty-two-weeks-a-year schedule and that the premium rate demanded by the union was too expensive and unrealistic. The company also stated that it did not want Saturdays and Sundays to carry any premium rate.

According to the record, an informal meeting between a company and a union representative was held shortly after that first meeting. The union testified that the company again promised to pay the higher rate if its language was used in the contract and that because of this promise the union agreed to the "one-and-one-half" holiday-pay language in the contract. The company denied that any such promise was ever made.

A second negotiation meeting was held, at which time a company counterproposal was allegedly made which included the 1½-times rate, the rate which appeared in the final contract. The union testified that after the contract was fully negotiated but before it was signed, the company again informally promised the union the higher rate. The contract in its final form, incorporating the 1½-times-rate language, was typed and prepared by the union.

The arbitrator, to understate the fact, was not persuaded by the union's argument; he disallowed the union's holiday-pay claim on seven separate grounds. We excerpt from the arbitration his dissertation on four of those grounds, pertinent to the subject of the chapter:

Was a Valid Estoppel Created?

> The Union seeks to enforce what it says was an informal and oral promise to pay two and one-half times the straight time hourly rate for specified holidays in the face of a clear Contract provision calling only for time and one-half.
>
> The Union's case falters for the following reasons: First, though it is true that arbitrators will sometimes decide issues specifically on the basis of estoppel (21 LA 199, 203; 20 LA 130, 136; 18 LA 306, 307; 17 LA 654, 661) to apply that doctrine, all the required elements of the doctrine must be present. In its usual application, estoppel is based upon a representation of fact which the party is not permitted to deny. The doctrine of promissory estoppel is distinct, and applies even though there is no misrepresentation: one who makes a promise upon which another justifiably relies may be bound to perform it, despite lack of consideration; i.e., the estoppel is a substitute for consideration. For instance, where it was undisputed that the employer gave an oral assurance on a matter during contract negotiations to induce the union to agree on a contract and end a strike, it was held that an estoppel had been created against the employer since the union had changed its position, suffering detriment, in reliance upon the assurance. Accordingly,

the employer was held bound by the oral assurance, which limited the number of employees the employer could reclassify under a provision of the contract (*International Harvester Co.*, 17 LA 101, 103; to similar effect, 18 LA 306, 307).

Arbitrator Rules a Promissory Estoppel Was Not Proved

But a basic and essential precondition for invoking the doctrine of promissory estoppel is conclusive evidence that a promise was actually made. This basic precondition is lacking in the present dispute. All that we have is an uncorroborated and unresolvable confrontation of conflicting testimony. The result is that the Union failed to satisfy its burden of unequivocally and preconditionally providing that a promise had been made. It therefore cannot begin to look to the doctrine of promissory estoppel for relief since the element of reliance, not to speak of justifiable reliance, cannot arise in the absence of convincing proof that a promise was actually made in the first instance. But even if one concludes that a promise was actually made and that it was actually relied upon, a finding of justifiable reliance would be unwarranted. The parties in this dispute were not novices at their trade of collective bargaining. They knew about such techniques as side letters and if the promise was reasonably intended to be taken as a binding and enforceable obligation, either the promise would have been reduced to writing or made in a context beyond an extremely informal get-together by only two men. The net result is that under these circumstances no conclusion of justifiable reliance can follow.

Language Unequivocally Provided for Holiday Pay at Time and a Half

Second, where language of an agreement is clear and unequivocal, that language will generally not be given a meaning other than expressed. Parties to a contract are generally charged with full knowledge of its provisions and of the significance of its language (7 LA 708, 711; 3 LA 229, 232) and the clear meaning of the language is generally enforced even though the results are harsh or contrary to the original expectations of one of the parties (28 LA 557, 558; 20 LA 756, 758–759; 13 LA 110, 114). In the case at bar, the language is obviously clear and unambiguous, and on its face, specifically provides for time and one-half for holiday pay.

Arbitrator Concludes Parol Evidence Rule Is Applicable

[Next,] . . . a written contract consummating previous oral and written negotiations is deemed under the parol evidence rule to embrace the entire agreement, and, if the writing is clear and unambiguous, parol evidence will not be allowed to vary the contract (See Wigmore, *Evidence*, paragraph 2400; *United Drill and Tool Co.*, 28 LA 677, 679–683). This

> is said to be a rule of substantive law which when applicable defines the limits of a contract (2 Williston, *Contracts*, paragraph 631). Since the writing is clear and unambiguous and since none of the recognized exceptions to the parol evidence rule are present, the rule is obviously applicable in the present situation and operates to the disadvantage of the Union.
>
> [Next,] where an agreement is not ambiguous, it is improper to modify its meaning by invoking the record of prior negotiations (18 LA 916, 918; 3 LA 753, 756). If a party attempts but fails in contract negotiations to include a specific provision in the agreement, an arbitrator will hesitate to read such provision into the agreement through the process of interpretation (27 LA 126, 128; 24 LA 224, 228; 21 LA 699, 702–703). Again, the unambiguous and clear character of the holiday premium pay provision precludes any modification, even if the Union's view of prior negotiations on this point is favored.[22]

Oral Understandings on Major Matters Should Be Avoided

The arbitrator's comment on the union's failure to secure a binding promise by the use of side letters was a point well taken. Oral, or gentlemen's, agreements on minor matters are unavoidable, but on major matters they should be discouraged as a source of disruption in the collective-bargaining relationship. Even when there are good reasons for not writing a major matter directly into the contract, it can be made binding for all practical purposes by the use of side letters. Side letters enable one or both of the parties to make binding (or at least not easily repudiated) concessions to each other without damaging their own or other people's interests at some other place. Thus a nationwide company can grant travel time, let us say, to a skilled group of employees in the sprawling Los Angeles area without publicly making it a precedent for its employees in other cities who do not need the travel allowance. Or a union can through side letters grant temporary relief on a costly fringe benefit to a newly unionized employer without incurring the wrath of a large group of unionized employers in the industry who are paying the fringe benefit.

Not All Promises Come under the Estoppel Principle

Another point made in the golf and country club arbitration deserving of elaboration is the element of consideration as it relates to the promissory-estoppel principle. The arbitrator noted that "one who makes a promise upon which another justifiably relies may be bound to perform it, despite lack of consideration. . . ." It should not be assumed from this statement

[22] *Ibid.*, 166–167.

that any and all promises made in collective bargaining justify invoking the estoppel principle.

XIV. THE CASE OF THE HOLIDAY SWAP

For example, there was the promise made by a local-union official to the industrial relations director of a manufacturing firm. For the first time in years the company was operating three shifts, filling a subcontract on a high-priority order for the Air Force. Late in October, the industrial relations director said to the union official: "We need your help. We don't want to shut down on Veterans Day, but we will if we have to. We don't want to pay the premium rate for working a contract holiday. We bid too close to the margin on this subcontract to pay premium rates. We'd appreciate it no end if you'd agree just this one time to make the holiday the Friday after Thanksgiving. Let us operate Veterans Day as a normal work day at straight time, and in exchange we'll shut down the day after Thanksgiving and make it a paid holiday. That gives everyone a four-day weekend. How about it?"

The union official pondered the proposal. "I don't think the membership will mind," he said. "If you're in that much of a bind, I'll okay the swap right now."

A week before Veterans Day, he reported his assent to the union executive board expecting a routine endorsement. Much to his discomfiture, he was reversed.

"Nothing doing," he was told by union militants. "Friday after Thanksgiving is not a contract holiday. We want 2½ times the straight-time rate for working Veterans Day. Any other arrangement is just chiseling us out of premium pay."

The industrial relations director, when told that the holiday swap had been vetoed by the union executive board, did not spare the union official. "You can't do this to me," he railed at him. "You're the top hand in the union, and you made a deal with me. I'm going to hold you to our agreement if I have to take it to arbitration."

Exchange of Consideration Was Lacking in the Holiday Swap

Even if it were assumed (an assumption by no means warranted) that the union official had the authority to waive the contract provision making Veterans Day a paid holiday with a premium rate when worked, there was still lacking an essential element of a binding agreement, namely, an

exchange of consideration. If the request to substitute the Friday after Thanksgiving for Veterans Day had been initiated by the union or had otherwise been acknowledged by it as a concession, then the arrangement would have been binding. In fact, however, the arrangement was a one-sided accommodation by the union to a request of management, with no apparent benefit acknowledged by the union, and hence the exchange of consideration necessary for a binding agreement was notably absent.

Estoppel Principle Requires That the Promise Must Be a Reasonable One

As to a promissory estoppel, the industrial relations director would have had to do more than prove that a promise had been made to him. He would have had to establish first that the promise was one which could be reasonably relied upon. To illustrate by exaggeration, a person would be singularly deficient in judgment were he to rely on a promise that he would be transported around Cape Horn in a 12-foot sailboat. The promise must be one on which the proverbial "reasonable and prudent" person of the law casebooks could justifiably rely.

By Relying on the Promise, the Promisee Must Have Suffered Damage

Assuming, as in this case, that the promise could have been justifiedly relied upon (both the industrial relations director and the promisor had shared this belief), a second element of promissory estoppel would have had to be present. The industrial relations director would have had to prove that he had been misled to his own detriment by the promise—that by relying on the promise he had in some way irreparably impaired his situation. It must be stressed that it is not enough for the one seeking to invoke the promissory-estoppel principle to prove that he has been damaged. He must show that the damage was suffered because he had acted or failed to act as a result of the promise—that the damage was not an inevitable consequence of his situation, but could have been avoided if he had not justifiably relied on the promise. The damage could be as simple as being deprived of the option of shutting down on Veterans Day to avoid paying the premium rate set by contract. The company might, for example, be compelled to operate on the holiday at premium pay because of irrevocable commitments made to suppliers or customers—commitments made because of a promise that it could operate the holiday at straight-time pay. The inability of management to prove that damage of this kind had been incurred prompted the company counsel to advise against arbitration, and the matter was dropped.

No Clear-Cut Trend in Arbitration On Admissibility of Parol Evidence

In general it has not been possible, from an examination of published arbitrations, to discern a clear-cut trend on the admissibility of parol evidence to establish a promissory estoppel. Some arbitrators (a minority, to be sure) have been adamant in applying the parol evidence rule to exclude both oral and written, prior and collateral, understandings which contradicted the clear language of a contract or which amended a written provision that appeared on its face to be the complete agreement of the parties. Other arbitrators have rejected parol evidence which contradicted clear language but have admitted parol understandings which amended but did not contradict clear language. Still other arbitrators have gone all the way in admitting parol evidence to establish a claimed promissory estoppel. Edgar A. Jones, Jr., notes, moreover: "The modern judicial and legislative trend is definitely to dilute the parol evidence rule as an exclusionary device in litigation."[23]

XV. AGENCY DISCUSSED: THE CASE OF THE WAGE REOPENER

The matter of agency, specifically the authority of representatives of the negotiating parties to make binding agreements for their respective organizations, was mentioned only in passing in the case of the proposed swap of the Veterans Day holiday for the Friday after Thanksgiving. We turn now to a controversy over wages for a fuller treatment of the powers vested in an authorized agent to conduct precontract negotiations within the limitations imposed upon him when he acts on his own.

At issue was a contract wage-reopening provision, section (g) of article XIII, which read in part:

> The Union and the Company shall each have the right during the term of this agreement to reopen the general wage rates and vacation pay only for negotiation and to terminate this agreement by giving a sixty (60) days written notice of such intention to the other party.[24]

The dispute focused on conflicting interpretations of the phrase "general wage rates." The company argued before the arbitrator that the phrase

[23] Edgar A. Jones, Jr., "Problems of Proof in the Arbitration Process: Report of West Coast Tripartite Committee," *Problems of Proof in Arbitration: Proceedings of the Nineteenth Annual Meeting, National Academy of Arbitrators*, BNA, Inc., 1966, p. 174.
[24] *Metalcraft Prods. Co. v. United Furniture Workers, Local 1010*, Apr. 12, 1956, 26 LA 433, 434, Arbitrator Paul Prasow, BNA, Inc.

referred only to the guaranteed minimum rate for each classification as set forth in the contract—that incentive rates were excluded from consideration both by interpretation and by an oral understanding arrived at with an authorized union official when the wage reopener had been negotiated.

The Unratified Gentlemen's Agreement

As proof of the oral understanding, the company submitted in evidence a letter from Mr. G., a deposed business manager of the local union, acknowledging that a crucial consideration of the company's improved wage offer in previous contract bargaining had been his acquiescence to an oral understanding that incentive rates would not be part of the wage-reopening provision. The fervent indignation with which the union denounced Mr. G.'s letter was genuine. Ninety-five percent of the employees were on piecework, and had undoubtedly been unaware of any private understanding excluding incentive pay from the wage reopener. Even more to the point, the members of the union negotiating committee who had participated in the framing of the wage-reopening provision denied to a man any knowledge of the purported side deal between Mr. G. and the company. The following excerpts from the arbitrator's opinion sustaining the union show how he sought to resolve the issue while steering clear of the ticklish matter of agency posed by the problem:

Customary Usage of the Phrase "General Wage Rates" Includes Incentive Rates

> Where incentive rates are part of a wage system, it is customary industry practice to include them as a subject of negotiations along with the minimum or base rates. A more restrictive interpretation which excludes incentive rates from negotiations, although sometimes provided for in a wage reopening clause, is not the common or prevailing practice. The word "general" in itself, either from the dictionary definition or customary usage, implies a broad or widespread coverage, rather than one specifically limited in application. Thus it would appear that the burden of establishing that the term "general wage rates" is intended to apply only to minimum rates, falls upon the party asserting this limitation. The reason is that such a narrow interpretation tends to be in conflict with the ordinary and popularly accepted meaning of the phrase. If it were the intent to exclude incentive rates from negotiations under the wage reopening clause in this agreement, appropriate language to this effect has not been inserted to make explicit such intent. . . .
>
> . . . In determining the issue, consideration must be given to the circumstances leading up to the agreement as well as to the contract lan-

guage itself. There is a sharp conflict in testimony as to the understanding reached during negotiations on the meaning and intent of the phrase "general wage rates." The chief negotiator for the Company has testified that there was an oral understanding just prior to signing the contract to the effect that general wage rates would not include incentive rates as an item for negotiation under the wage reopening clause. The Company supports this contention by submitting in evidence a letter from Mr. G., the Chief negotiator for the Union during the negotiations on this agreement, in which he states that "it was not intended to include incentives in the wage re-opener as shown in Section (g) of Art. XIII." On the other hand, two Union witnesses, who also participated in the same negotiations, as members of the Union's negotiating committee, testified that it was not their understanding that general wage rates would exclude incentive rates. Further that had it been made clear to them that such an exclusion was intended, they would not have signed a two-year contract.

Arbitrator Rules Mr. G.'s Letter Is Insufficient Proof Of an Understanding to Exclude Incentive Rates

The Arbitrator has examined the record carefully with respect to the conflicting evidence and testimony on this point. Although it is quite possible that an oral understanding may have existed as claimed by the Company, it is not clear from the record whether such an oral agreement was understood and accepted by the Union negotiating committee as a whole, or by the membership when it ratified the agreement. Such evidence as does appear in the record would seem to indicate that the members of the Union negotiating committee accepted the written agreement at its face value without apparent awareness that incentive rates were to be specifically excluded from consideration during negotiations under the wage reopening clause. It seems to the Arbitrator that when an oral understanding appears to be a modification of the language of a written contract, and a counter claim is made that the alleged understanding was not held or accepted by the other party, there must be strong and compelling evidence to establish the existence of the oral understanding.

The Union has strongly objected to the introduction of Mr. G.'s letter in this proceeding on the grounds that he was expelled from membership in the Union and has now established himself as the head of an independent union which seeks to compete with Local 1010; and thus his letter would be a completely self-serving document. In the Arbitrator's opinion, Mr. G.'s letter in itself is insufficient to establish the existence of the alleged oral understanding, since he did not appear as a witness at the hearing and was not subject to cross-examination or interrogation by the Arbitrator. It is clear from the record that the oral understanding which may have been reached with Mr. G. was never reduced to writing, nor did it become a formal part of the agreement between the parties, and its existence cannot actually be verified. In the absence of more

> substantial evidence, the Arbitrator cannot consider the alleged oral understanding as modifying the language of the agreement.[25]

Colloquy between the Authors On the Wage-Reopener Case

"Paul, you found for the union in the Metalcraft Products arbitration principally on the basis that the company had not presented convincing proof that it had come to an oral understanding with Mr. G. to exclude incentive pay from the wage reopener. Suppose the company had produced such proof, proof beyond question that an oral understanding had been reached. Would you have upheld the company?"

"No, not on a private understanding with Mr. G. At the very least, the understanding should have been ratified by the union negotiating committee, if not the general membership."

"Then why didn't you tackle the issue head on and rule that the oral understanding, even if proved, was not binding?"

"That was almost fifteen years ago. Arbitration criteria governing agency in collective bargaining weren't as well defined then as they are today. It was just too much for me to research and lay out broad guidelines for an oral understanding which had not been proved. I wasn't in an innovative mood at the time—not in that case."

"Generally speaking, Paul, what are the principal restrictions on the authority of union representatives to act on their own?"

"In the main, arbitrators would be dead set against understandings made by union representatives to waive or alter the express provisions of a contract—especially provisions involving employee benefits. They'd have to get ratification from the membership for such understandings to be valid. Arbitrators will not approve of wheeling and dealing with employee benefits provided for in the contract, unless these understandings are okayed by a vote of the bargaining unit. There are exceptions, of course."

"Such as?"

"Well, if the union representative has prior authority by virtue of the organization's constitution and bylaws. Officials of certain railroad unions, for example, have the constitutional authority to negotiate contracts and sign them without ratification. Membership is scattered geographically over a wide area, and it's often hard to assemble a representative meeting. The union's theory of democracy is that if the membership doesn't like the contract negotiated for them, they can vote their officials out of office in the next election."

[25] *Ibid.*, 436–437.

"Can you suggest other important exceptions?"

"Not exceptions; I'd rather give the general rule. In collective bargaining, as in commercial law, people may be, in lawyer's language, 'clothed with ostensible or apparent authority' to act for their respective organizations. Shop stewards, grievance chairmen, personnel directors, plant managers have the authority to settle grievances on the spot—within limits, of course. A first-line foreman or a shop steward can't make or change major policies that are properly the responsibility of higher echelons in the grievance structure. But both parties are charged with knowledge of those decision-making areas of authority which are well-known facts of their collective-bargaining relationship. An employer is responsible for the coercive actions of a company representative who can hire, fire, and effectively direct the work force. A union is responsible for the actions of its major officers, especially paid officials. However, a union cannot ordinarily be held responsible for the conduct of its individual members, unless it is proved they were acting with the knowledge of and at the behest of the organization."

XVI. PRECONTRACT INTENT UNDISPUTED: THE CONTROVERSY OVER STEAMSHIP-BAGGAGE HANDLING

A study of precontract negotiations as a primary guide to contract interpretation must necessarily focus on basic criteria such as promissory estoppel, the parol evidence rule, and principles of agency. To conclude this discussion, a case is now presented involving a contract provision the intent of which was unquestioned in precontract negotiations. The employer was a steamship line operating a passenger vessel of Canadian registry which included in its regular itinerary various California and Mexican ports. In December, 1965, the company signed a contract with the Marine Cooks and Stewards Union (MCS) giving the union the right to handle all passenger-baggage handling—on embarkation, from the passenger on the dock to his stateroom; on debarkation, from the stateroom to a dock location designated by the passenger. The assignment of complete jurisdiction over passenger-baggage handling to MCS was unambiguously spelled out in section 2 of the contract.[26]

The company could not have been unaware of the likelihood that its assignment of total jurisdiction over passenger luggage to MCS would

[26] "Scope of Contract Work Assignment: The Employees will assist or relieve Steward Department personnel in their normal duties; also the handling of passenger baggage being discharged from the Company's vessels to the dock and being taken abroad from the dock to said vessels."

bring about an encounter with the Pacific Coast Longshoremen's Union. Sharp jurisdictional conflict has characterized the relationship between the sailors and the longshoremen of the Pacific Coast for over three decades. It would not be easy to dissuade the longshoremen from asserting their traditional jurisdiction over passenger-baggage handling from the dock to the gangway on embarkation and from the gangway to the dock on debarkation. It is reasonable to assume, therefore, that the company relied not only on the support of MCS but also on a strong legal position based on clear contract language to deter the longshoremen from resorting to economic reprisals.

When the ship docked at Long Beach, California, not surprisingly to those aware of the longshoremen's penchant for direct action, all cargo handling was halted precipitously over the assignment of carrying passenger baggage. The company capitulated quickly and reassigned the baggage handling (except for shipside operations, which were not in dispute) to the longshoremen.

The arrangement was an unhappy one for the company. With MCS handling baggage on the ship and longshoremen handling baggage to and from the gangway and the dock, the double handling by rival unions required a duplication in costs. The company turned reproachfully to MCS, insisting it was the responsibility of the union to extricate it from an untenable jurisdictional tangle. The union invoked arbitration when the company talked of nullifying section 2 of the contract if the union did not take whatever steps were necessary to make possible its enforcement.

In analyzing the arguments of the parties, the arbitrator felt impelled to note at the outset that one area not in dispute was the meaning of the contract language covering the assignment of baggage handling. He noted that it would be difficult to conceive of how a disagreement on the meaning of section 2 could exist because the language of this section, as MCS correctly pointed out and the company conceded, clearly and unambiguously assigned the baggage handling in question to MCS. The arbitrator then went on to say:

> What then is the issue between the parties? Namely, that the Company has failed to carry out the express provisions of the Agreement. The Company argues that it has been frustrated in its desire to effectuate the mutual intent of the parties to this arbitration by a counter claim of jurisdiction made by the Longshoremen.
>
> At this point the Arbitrator must evaluate his own authority to rule in the instant case. The scope of an Arbitrator's authority is bounded by the written agreement of the parties. His function is restricted to the interpretation and application of the pertinent provisions to the dispute.

> The Company's defense is based solely on the economic sanctions which might result from its enforcement of a written instrument, the meaning of which is not contested by the parties to this arbitration.

Arbitrator Refuses to Enforce the Agreement

> The enforcement of a Collective Bargaining Agreement as distinguished from the interpretation and application of that Agreement is not a part of an Arbitrator's function. The question presented in this proceeding is not one of interpretation and application, but rather one of enforcement. The Arbitrator is restricted to the resolution of conflicts over the meaning of an agreement, and no dispute exists between the instant parties in that regard. The resolution of this dispute, the Arbitrator ventures to suggest, must be sought before an appropriate agency such as the NLRB or the Courts; it cannot be found in an arbitration proceeding.[27]

The arbitrator then concluded that the agreement was clear and unambiguous and no dispute existed between the parties as to its meaning; therefore there was no arbitrable issue in the case. Since the arbitrator ruled that no dispute existed, he simply referred the entire matter back to the parties.

SUMMARY

When called upon to interpret ambiguous language, the arbitrator's primary responsibility is to determine, if possible, the mutual intent of the parties. He may accomplish this objective by inquiring how the parties themselves have interpreted the language during the term of the agreement (*past practice*); or he may review the bargaining history of the agreement—what the parties said and did during making of the agreement (*precontract negotiations*).

The bargaining history—the discussions and actions of the parties as well as other significant circumstances which led to the making of the agreement —may provide valuable clues to the meaning of the language in dispute. The parties' conduct prior to signing the contract may reveal their mutual intent just as clearly as their activities during the contract term.

The arbitrator's study of precontract negotiations as a guide to interpretation of ambiguous language is often based upon the legal principles of promissory estoppel, the parol evidence rule, and the criteria of agency. In

[27] *Princess Cruises Co. v. Marine Cooks & Stewards Union*, Mar. 28, 1966, unpublished arbitration award, pp. 6–7, Arbitrator Howard S. Block.

essence, *promissory estoppel* prevents a person from repudiating his promises and inferential declarations made during negotiations which caused another person to change his position to his disadvantage because he was relying on the first person's conduct or statements. The *parol evidence rule* provides that where the parties have entered into a written agreement which they intend to be the final and complete statement of their contract, then no evidence, oral or written, of *prior* understandings or negotiations is admissible to contradict or change the terms of the written agreement. *Agency* refers primarily to the authority of representatives of the negotiating parties to make binding agreements for their respective principals.

G

TAB G

THE DUTY OF FAIR REPRESENTATION

The chapter entitled "The Duty of Fair Representation" contained in this section appeared originally in *The Developing Labor Law.* It is reprinted here with the permission of the publishers.[1/]

Subsequent to the publication of *The Developing Labor Law,* there have been further developments involving the duty of fair representation. For example, a number of new rulings and interpretations of civil rights and anti-discrimination law have had a significant impact on the duty of fair representation. For this reason, the reader's attention is again directed to the more recent work in this field, *Equal Employment Opportunity and Affirmative Action in Labor-Management Relations--A Primer,* published by the UCLA Institute of Industrial Relations as part of this series of training manuals funded under the Intergovernmental Personnel Act.[2/] The primer is a valuable supplement to the more general treatment of these obligations presented in this section.

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[1]Copyright 1971, American Bar Association, published as "A BNA Book," The Bureau of National Affairs, Inc., Washington, D.C. 20037.

[2]Geraldine Leshin, Institute of Industrial Relations, UCLA, 1976.

Another important recent development has been the further definition of union responsibilities under the fair representation doctrine recently handed down in *Ruzicka vs. General Motors, et al.*[3] In this decision the Sixth Circuit U.S. Court of Appeals ruled that a union could be held responsible for acts of "negligence" as well as "bad faith" in unfair representation proceedings. The court rejected an earlier and widely held view that bad faith must be ". . .read into the separate and independent standards of 'arbitrary' or 'discriminatory' treatment." It held, instead, that ". . .a total failure to act, whether negligent or unintentional...is behavior so egregious that, as in the case of bad faith, hostile discrimination, arbitrariness, or perfunctoriness, the union should be held responsible."

It is clear that the interpretation in Ruzicka greatly broadens the responsibility of a union in its duty of fair representation and further extends management's liability over matters which it may be deemed moot due to a union's inaction. For this reason, the Ruzicka decision is included in the appendix to this section along with a number of other benchmark decisions referred to in the BNA work.[4]

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[3] See Appendix: *Ruzicka vs. General Motors Corp.*, International Union U.A.W. and Local Union 166, U.A.W., 6th US CA 1975.

[4] See Appendix: *Steele vs. Louisville & Nashville R.R.; Wallace Corp. vs. NLRB; Ford Motor Co. vs. Huffman; Vaca et al vs. Sipes.*

CHAPTER 27

THE DUTY OF FAIR REPRESENTATION

I. SOURCE OF THE DUTY

Although the statute does not explicitly declare such a duty, it has long been recognized that the National Labor Relations Act imposes upon unions a duty to act fairly toward the employees whom they represent. This duty of fair representation [1] was first

[1] This subject has been popular among legal writers. *See:* Aaron, *The Union's Duty of Fair Representation Under the Railway Labor and National Labor Relations Acts*, 34 J. AIR L. & COM. 167 (1968); Aaron, *Some Aspects of the Union's Duty of Fair Representation*, 22 OHIO STATE L. J. 39, 63 (1961); Blumrosen, *Duty of Fair Representation*, 15 LAB. L. J. 598 (1964); Blumrosen, *Employee Rights, Collective Bargaining, and Our Future Labor Problem*, 15 LAB. L. J. 15 (1964); Blumrosen, *Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy*, 13 RUTGERS L. REV. 631 (1959); Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Controls of the Worker-Union Relationship*, 61 MICH. L. REV. 1435 (1963); Carter, *The National Labor Relations Board and Racial Discrimination*, 2 L. IN TRANS. Q. 87 (1965); Comment, *Applicability of LMRDA Section 101(a)(5) to Union Interference with Employment Opportunities*, 114 U. PA. L. REV. 700 (1966); Cox, *The Duty of Fair Representation*, 2 VILL. L. R. 151 (1957); Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956); Dunau, *Employee Participation in the Grievance Aspect of Collective Bargaining*, 50 COLUM. L. REV. 731 (1950); Ferguson, *Duty of Fair Representation*, 15 LAB. L. J. 596 (1964); Givens, *Federal Protection of Employee Rights Within Unions*, 29 FORDHAM L. REV. 259 (1960); Gould, *Negro Revolution and the Law of Collective Bargaining*, 34 FORDHAM L. REV. 207 (1965); Hanslowe, *The Collective Agreement and the Duty of Fair Representation*, 14 LAB. L. J. 1052 (1963); Hanslows, *Individual Rights in Collective Labor Relations*, 45 CORNELL L. Q. 25 (1959); Herring, *The "Fair Representation" Doctrine: An Effective Weapon Against Union Racial Discrimination?*, 24 MD. L. REV. 113 (1964); Katzman, *Labor Law—Duty of Fair Representation—NLRA Section 8(b)(1)(A)*, 45 B. U. L. REV. 141 (1965); Lewis, *Fair Representation in Grievance Administration: Vaca v. Sipes*, SUPREME CT. REV. 81 (1967); Molinar, *National Labor Relations Act and Racial Discrimination*, 7 B. C. IND. & COM. L. REV. 601 (1966); Murphy, *The Duty of Fair Representation Under Taft-Hartley*, 30 MO. L. REV. 373 (1965); Note, *Union's Duty of Fair Representation: Does It Exist and Who Should Enforce It?*, 9 VILL. L. REV. 306 (1964); Note, *Labor Law—National Labor Relations Act—Violation of the Duty of Fair Representation in an Unfair Labor Practice*, 78 HARV. L. REV. 679 (1965); Note, *Labor Law—National Labor Relations Act—Union's Duty of Fair Representation Not Implicit in Section 7—Discrimination Based on Other than Union Membership*

established by the Supreme Court in a series of cases arising under the Railway Labor Act.[2] Subsequently, the doctrine was also applied to the NLRA.[3] The leading and earliest case was *Steele v. Louisville & N.R.R.*,[4] which involved a suit by a Negro railroad fireman to set aside a seniority agreement negotiated by his union which discriminated against Negroes. The suit had been brought in the Alabama courts, and the supreme court of that state held that the complaint did not state a cause of action.

The Supreme Court approached the problem by indicating that if the Railway Labor Act conferred exclusive bargaining authority on a union "without any commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature, which is subject to constitutional limitations. . . ." [5] The Court avoided these constitutional difficulties by holding that the act implicitly "expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." [6]

Not a Violation of Section 8(a)(3), 18 VAND. L. REV. 268 (1964); Note, *Administrative Enforcement of the Right to Fair Representation: The Miranda Case*, 112 U. PA. L. REV. 711 (1964); Note, *Refusal to Process a Grievance, the NLRB, and the Duty of Fair Representation: Plea for Pre-emption*, 26 U. PITT. L. REV 593 (1965); Rosen, *Fair Representation, Contract Breach and Fiduciary Obligations: Unions, Union Officials and the Worker in Collective Bargaining*, 15 HASTINGS L. J. 391 (1964); Sherman, *Union's Duty of Fair Representation and the Civil Rights Act of 1964*, 49 MINN. L. REV. 771 (1965); Sovern, *Legal Restraints on Racial Discrimination in Employment*, (Twentieth Century Fund 1966); Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563 (1962); Sovern, *Race Discrimination and the National Labor Relations Act: The Brave New World of Miranda*, N.Y.U. 16TH ANN. CONF. ON LAB. 3 (1963); Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 HARV. L. REV. 529 (1963); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. REV. 362 (1962); Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L. J. 1327 (1958); Wolk, *The Decline of Individual Rights*, 16 LAB. L. J. 266 (1965); Wyle, *Labor Arbitration and the Concept of Exclusive Representation*, 7 B. C. IND. & COM. L. REV. 783 (1966); Yablonski, *Refusal to Process a Grievance, the NLRB and the Duty of Fair Representation: A Plea for Pre-emption*, 26 U. PITT. L. REV. 593 (1965).

[2] 44 Stat. 577 (1926), as amended by 48 Stat. 1185 (1934), 49 Stat. 1189 (1936), 54 Stat. 785, 786 (1940), 64 Stat. 1238 (1951), 78 Stat. 748 (1964), and 80 Stat. 208 (1966); 45 USC §§151-88.

[3] Ford Motor Co. v. Huffman, 345 US 330, 31 LRRM 2548 (1953); Syres v. Oil Workers, Local 23, 350 US 892, 37 LRRM 2068 (1955).

[4] 323 US 192, 15 LRRM 708 (1944). *See also* Tunstall v. Loco. Firemen, 323 US 210, 15 LRRM 715 (1944); Graham v. Bhd. of Loco. Firemen, 338 US 232, 25 LRRM 2033 (1949); Bhd. of R.R. Trainmen v. Howard, 343 US 768, 30 LRRM 2258 (1952).

[5] Steele v. Louisville & N.R.R., 323 US 192, 198, 15 LRRM 708 (1944).

[6] *Id.* at 202-03.

The Court acknowledged that "the statutory representative of a craft is [not] barred from making contracts which may have unfavorable effects on some members of the craft represented." [7] But a bargaining representative must not make discriminatory contracts based on irrelevant or invidious considerations such as race, the Court said. When such a violation of the duty of fair representation occurs, an injured employee may "resort to the usual judicial remedies of injunction and award of damages when appropriate. . . ." [8]

Although the duty of fair representation developed mainly in cases arising under the Railway Labor Act, it was not long before the same duty was found to exist under the National Labor Relations Act. Indeed, in a case decided the same day as *Steele*, the Court suggested such a duty, indicating that under the NLRA, bargaining agents are "charged with the responsibility of representing . . . [the employees'] interests fairly and impartially." [9] In 1953, in *Ford Motor Co. v. Huffman*,[10] the Court, in a case arising under the National Labor Relations Act, readily applied the same principles which it had previously developed in Railway Labor Act cases.

One question raised in *Huffman* that was not controlled by the RLA cases has come to the forefront: Is the duty of fair representation under the NLRA enforceable by the courts or by the NLRB? No parallel question arises under the RLA because no corresponding administrative enforcement machinery exists under that act. In *Huffman* the Court acknowledged the existence of this issue and chose to avoid it because it had not been raised below, but also because the Court was able to decide the case in favor of the union on the merits, thus obviating the necessity of resolving the jurisdictional problem.[11]

But the problem remains. And technically it is still unresolved, for in the 1967 *Vaca v. Sipes* case [12] the Supreme Court implied, but declined to state specifically, that a breach of a union's duty of fair representation is an unfair labor practice under Section 8(b)

7 *Id.* at 203.
8 *Id.* at 207.
9 Wallace Corp. v. NLRB, 323 US 248, 255, 15 LRRM 697 (1944).
10 345 US 330, 31 LRRM 2548 (1953).
11 345 US at 332, note 4.
12 386 US 171, 64 LRRM 2369 (1967). *See* Feller, *Vaca v. Sipes One Year Later*, N.Y.U. 21ST ANN. CONF. ON LAB. 141 (1969).

of the NLRA. One of the issues in the case was whether a court has jurisdiction over a breach of the duty if such breach is deemed to be an unfair labor practice, or even *arguably* an unfair labor practice. Among the reasons given by the Supreme Court for upholding the jurisdiction of the courts to decide such cases was that it could not assume from the NLRB's "tardy assumption of jurisdiction" [13] in unfair representation cases that Congress "intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative." [14] The Court had reference to the fact that the Board waited until late 1962 before deciding that such a breach of duty constituted an unfair labor practice.[15]

The jurisdictional aspects of the *Vaca* case are discussed below.[16] But the decision is also significant for its exposition of the requirements which the duty of fair representation imposes upon a union in processing an employee's grievance under a collective bargaining contract.

The case involved a suit for damages brought by an employee against his union. The employee had been discharged for reasons of health. The union had processed his grievance through the pre-arbitration steps of the grievance procedure but, in the light of conflicting medical opinion concerning the grievant's capacity to work, declined to take the case to arbitration. The trial court had set aside, on the ground of exclusive NLRB jurisdiction, a jury verdict awarding actual and punitive damages, but the Missouri Supreme Court ordered the verdict reinstated, concluding that the jury could properly have found that the union had arbitrarily failed to represent the plaintiff in the handling of his grievance by refusing to take his case to arbitration.[17] The United States Supreme Court reversed.

13 *Id.* at 183.
14 *Ibid.*
15 *See* Miranda Fuel Co., 140 NLRB 181, 51 LRRM 1584 (1962), notes 42-49 *infra*.
16 The case is also treated in this chapter under Remedies *infra*.
17 The action was instituted by Benjamin Owens, Jr., an employee of a packing company, against his union in a class action. The trial resulted in a jury verdict for plaintiff in the amount of $7,000 actual and $3,300 punitive damages. The trial court set aside the judgment on the verdict and entered judgment for the defendants on grounds of federal preemption. Plaintiff appealed to the intermediate court of appeals, which affirmed the judgment (plaintiff died while the appeal was pending, and Sipes, his administrator, was substituted as appellant). The Missouri Supreme Court reversed and ordered reinstatement of the verdict and judgment for plaintiff. Sipes v. Vaca, 397 SW2d 658, 61 LRRM 2054 (Mo Sup Ct, 1965).

After disposing of the jurisdictional issue, the Court turned its attention to the substantive nature of the duty of fair representation. It indicated that the critical focus of inquiry is the good faith of the union in the handling of the grievance. Reiterating that a breach of the statutory duty occurs when the union's conduct in representation is "arbitrary, discriminatory, or in bad faith," [18] it took note of the "considerable debate over the extent of this duty in the context of a union's enforcement of the grievance and arbitration procedures in a collective bargaining agreement. . . ." [19]

> Some have suggested that every individual employee should have the right to have his grievance taken to arbitration. Others have urged that the Union be given substantial discretion (if the collective bargaining agreement so provides) to decide whether a grievance should be taken to arbitration, subject only to the duty to refrain from patently wrongful conduct such as racial discrimination or personal hostility.
>
> Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, *we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement.*[20]

Finding authority in the Taft-Hartley provisions creating the Federal Mediation and Conciliation Service,[21] the Court declared that

> [i]n providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures.[22]

The Court pointed out that by allowing the union to negotiate the settlement of grievances within the stated limits, the parties would be assured that similar grievances were treated consistently

18 386 US at 207.

19 *Id.* at 190-191.

20 *Ibid.* (Emphasis added.)

21 "Final adjustment by a method agreed upon by the parties themselves is . . . the desirable method of settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." LMRA §203 (d), 29 USC §173 (d).

22 386 US at 191.

"and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved . . . ," thereby enhancing the union's interest as bargaining agent.[23]

Applying these standards to the union's decision that the grievance lacked sufficient merit to justify arbitration,[24] the Court concluded that no breach of fair representation had occurred. For one thing, the Missouri tribunals had focused upon the wrong question by considering the merits of the grievance, *i.e.*, whether the grievant was fit to work, rather than whether the union had acted unfairly.

The governing substantive principle for the case was that *both* union and employer liability depended upon allegations and proof of breach of contract by the employer *and* breach of the duty of fair representation by the union in the handling of the grievance process.

From *Steele* to *Vaca*, the historical development of the doctrine of fair representation, including its substantive components, has depended primarily on court decisions. Only in later years has the Labor Board contributed any cases. To present a total picture, this Chapter traces the evolution of the doctrine through both the courts and the Board.

II. JURISDICTION TO ENFORCE THE DUTY

A. The Court Cases

Consideration of the question of the appropriate forum in which to enforce the duty of fair representation under the National Labor Relations Act has until recently reflected the origin of the duty under the Railway Labor Act. In *Steele*, the Supreme Court declared that "in the absence of any available administrative remedy, the right here asserted . . . is of judicial cognizance." [25] The "judicial cognizance" of which the Court spoke was the con-

23 *Ibid.*

24 The union had arranged for a medical examination at union expense, which resulted in an opinion adverse to the grievant.

25 323 US at 207.

current jurisdiction of state and federal courts.[26] As stated by one commentator:

> Since the employees are asserting a federal right arising under a law regulating commerce, the action may be brought in a federal district court without diversity of citizenship, and regardless of the amount in controversy. Alternatively, the employees may sue in a state court of general jurisdiction and take any federal question to the Supreme Court of the United States either by certiorari or in appropriate cases by appeal.[27]

As noted above, the Court in *Huffman*[28] analogized the duty of a bargaining agent under Section 9(a) of the NLRA to that of a representative under Section 2, Fourth, of the Railway Labor Act.[29] Subsequently, in *Syres v. Oil Workers Union*,[30] the Supreme Court reversed, *per curiam*, the Fifth Circuit's holding[31] that a class action brought by employees alleging discriminatory representation should be dismissed for lack of jurisdiction in the absence of diversity of citizenship.

Many actions alleging breach of the duty have been entertained in the courts without reference to the possibility of NLRB jurisdiction.[32] Occasionally the issue was raised, but since the Board did not hold until 1962 that it had jurisdiction to remedy a violation of the duty as an unfair labor practice, the courts tended to assume that enforcement of the duty was not within the Board's authority.[33]

B. The Labor Board Cases

1. Representation Cases. Once the court-imposed obligation of fair representation had been placed upon unions, the NLRB was

26 Bhd. of R.R. Trainmen v. Howard, note 4 *supra*, Graham v. Bhd. of Loco. Firemen, note 4 *supra*, and Tunstall v. Loco. Firemen, note 4 *supra*, originated in federal district courts; Steele v. Louisville & N.R.R., note 2 *supra*, in the Alabama Circuit Court.
27 Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 170 (1957).
28 345 US 330, 31 LRRM 2548 (1953).
29 48 Stat 1187 (1934), 45 USC §152, Fourth.
30 350 US 892, 37 LRRM 2068 (1955).
31 223 F2d 739, 33 LRRM 2290 (CA 5, 1955).
32 *See, e.g.*, Trotter v. Amalgamated Ass'n of St. Ry. Employees, 309 F2d 584, 51 LRRM 2124 (CA 6, 1962), *cert. denied*, 372 US 943, 52 LRRM 2673 (1963); Hardcastle v. W. Greyhound Lines, 303 F2d 182, 50 LRRM 2239 (CA 9, 1962), *cert. denied*, 371 US 920, 51 LRRM 2616 (1962); Stewart v. Day & Zimmermann, Inc., 294 F2d 7, 48 LRRM 2989, (CA 5, 1961); Ostrofsky v. Steelworkers, 171 F Supp 782, 43 LRRM 2744 (D Md 1959), *affirmed per curiam*, 273 F2d 414, 45 LRRM 2486 (CA 4, 1960), *cert. denied*, 363 US 849 (1960).
33 *See, e.g.*, Berman v. Nat'l Maritime Union, 166 F Supp 327 (SD NY, 1958).

confronted with cases in which it was asked to revoke the certifications of unions which had failed to represent all employees fairly. In *Hughes Tool Co.*[34] a Board majority, following the reasoning of *Steele*, held that a union certified under Section 9 assumes

> the basic responsibility to act as a genuine representative of *all* the employees in the bargaining unit. . . . To hold otherwise, in view of the language of Section 9, would be to allow the exclusive position of the representative obtained through the authority of the Act to be used in a manner detrimental to the very employees the statute is designed to protect."[35]

The Board therefore concluded that "the duty of equal representation . . . is inherent in the exclusive representation status accorded by the statute."[36] In consequence, it ordered the certification of the union revoked unless the unfair conduct ceased immediately.[37]

Chairman Herzog and Member Peterson dissented in the *Hughes* case, maintaining that Congress, in the 1947 Taft-Hartley amendments, had only "sought to proscribe certain union behavior which it considered inimical to sound collective bargaining," and that hence the Board had no right "to prohibit other conduct which might appear . . . to interfere with employees' rights."[38]

The majority's assertion of the Board's right to revoke a certification of representation upon a failure of the union to represent all employees in the unit has prevailed.[39] The Board has also held that an otherwise valid contract executed by a union which does not represent all employees fairly will not serve as a bar to an intervening representation petition.[40]

2. Unfair Labor Practice Cases. Although the Board at an early date was called upon to decide in a representation proceeding the consequences of a union's failure to represent employees fairly,[41] it was not until late 1962, in *Miranda Fuel Co., Inc.*,[42] that the

34 104 NLRB 318, 32 LRRM 1010, 1232 (1953).
35 *Id.* at 325.
36 *Ibid.*
37 A similar conclusion had been reached in a pre-Taft-Hartley case. *See* Larus & Bro. Co., 62 NLRB 1075, 16 LRRM 242 (1945).
38 104 NLRB at 331.
39 Pittsburgh Plate Glass Co., 111 NLRB 1210, 35 LRRM 1658 (1955); A. O. Smith Corp., 119 NLRB 621, 41 LRRM 1153 (1957).
40 Pioneer Bus Co., 140 NLRB 54, 51 LRRM 1546 (1962). *See* Chapter 8 *supra*.
41 Larus & Bro. Co., note 21 *supra*; Hughes Tool Co., note 19 *supra*.
42 140 NLRB 181, 51 LRRM 1584 (1962).

Board, by a three-to-two majority, held that similar conduct was an unfair labor practice in violation of Sections 8(b)(1)(A) and 8(b)(2). *Miranda* involved a union's decision to reduce an employee's seniority for reasons which the NLRB found to be arbitrary, though unrelated to the employee's attachment to the union. The majority reasoned that the obligation imposed by Section 9 to represent *all* employees fairly and impartially must be read into the rights which were guaranteed employees by Section 7. According to the majority's reasoning, any default in the performance of the Section 9 duty amounts to an infringement of a Section 7 right, and is therefore a violation of Section 8(b)(1)(A). Moreover, the Board held that when an employer accedes to a union's request which violates the duty of fair representation, the employer thereby violates Section 8(a)(1) as well.[43]

In addition, the Board held that such conduct by the union violates Section 8(b)(2) and by the employer violates Section 8(a)(3).[44] The Board reasoned that any arbitrary union action which adversely affects an employee tends to encourage or discourage union membership, even if "the moving consideration does not involve the specific union membership or activities of the affected employee." [45]

Chairman McCulloch and Member Fanning dissented, arguing that while the Board did have authority, under Section 9, to insure compliance with the duty of fair representation "by withholding or revoking certifications in situations where the duty . . . has been egregiously flouted," [46] no such authority exists in a Section 10 proceeding to remedy unfair labor practices. Moreover, the dissenters noted, "the courts have furnished, and do furnish, a remedy," and "Congress has throughout the years indicated no dissatisfaction with this remedial scheme." [47]

The Second Circuit denied enforcement in *Miranda,* but without any majority position on the question of whether a violation of the duty of fair representation is an unfair labor practice. Judge

[43] *See* Chapter 5 *supra* for a general discussion of interference under §§8(a)(1) and 8(b)(1)(A).
[44] *See* Chapter 6 *supra* for a general discussion of discrimination under §§8(a)(3) and 8(b)(2).
[45] 140 NLRB at 188.
[46] 140 NLRB at 200.
[47] 140 NLRB at 202.

Medina said that the Board's jurisdiction is limited to cases where "the union or the employer . . . [has] committed some act the natural and foreseeable consequence of which is to be beneficial or detrimental to the union," [48] and that other forms of unfair or discriminatory action by a union are remediable only in the courts.[49] Judge Lumbard concurred in the result without reaching the question. Judge Friendly, in dissent, agreed with the Board majority with respect to the Section 8(b)(2) violation, but did so on the basis of an orthodox 8(b)(2) and 8(a)(3) analysis rather than in terms of the duty of fair representation.

Subsequently, in *Independent Metal Workers Union (Hughes Tool Co.),*[50] the Board ruled that a union's failure to process an employee's grievance because of his race was an unfair labor practice under Sections 8(b)(1)(A), 8(b)(2), and 8(b)(3). The Board majority there expressly asserted that the duty was enforced by the courts under the Railway Labor Act solely because, under that Act, there was no administrative enforcement machinery:

> When the Supreme Court enunciated the duty of fair representation in *Steel* and *Tunstall,* . . . which were Railway Labor Act cases, the Court emphasized in each case the lack of an administrative remedy as a reason for holding that Federal courts constitute a forum for relief from breaches of the duty. In this connection, it should be noted that provisions of the Railway Labor Act which are substantially identical to certain unfair labor practice provisions of the National Labor Relations Act are enforceable by the Federal courts, not an administrative agency. . . . After enactment of the Taft-Hartley Act . . . an administrative remedy became available in our view. . . .[51]

The majority added another string to its *Miranda* bow by relying not only upon Sections 8(b)(1)(A) and 8(b)(2) but also upon Section 8(b)(3). The Board thus adopted the theory that a union's statutory duty to bargain in good faith is owed to the employees whom it represents as well as to the employer, and that a breach of the duty of fair representation constitutes bad-faith bargaining.

In subsequent decisions the Board has continued to apply the doctrine that breach of the duty of fair representation is an

[48] 326 F2d at 176.
[49] 326 F2d at 175-180.
[50] 147 NLRB 1573, 56 LRRM 1289 (1964). For discussion of the duty of fair representation in relation to a union's duty to bargain, *see* Chapter 11 *supra.*
[51] 147 NLRB at 1575.

unfair labor practice.[52] Two of these cases have been enforced by the Fifth Circuit. In *Local 12, United Rubber Workers v. NLRB*,[53] a unanimous panel of the court adopted the Board's view that a breach of the duty of fair representation violates Section 8 (b) (1) (A) of the Act. The court therefore found it unnecessary to pass on the contention that such conduct also violates Sections 8 (b) (2) and (3). Subsequently, in *NLRB v. Local 1367, Int'l Longshoremen's Ass'n (Galveston Maritime Ass'n)*,[54] a divided panel of the same court followed *Rubber Workers*. In the later case Judge Hutcheson dissented and District Judge Choate concurred, but reluctantly, indicating that he regarded the *Rubber Workers* case as a "dangerous precedent" and that judicial enforcement of the duty of fair representation was the "preferable procedure." The Supreme Court denied review of both the *Rubber Workers* and the *Longshoremen's* cases.[55] The Court thus retains its options regarding the Board's unfair-labor-practice jurisdiction over fair representation cases.

The Court of Appeals for the District of Columbia Circuit has also reviewed the Board's assertion that violation of a union's duty of fair representation constitutes an unfair labor practice under Section 8(b) of the Act. In *Truck Drivers, Local 568 (Red Ball Motor Freight, Inc.)*,[56] it affirmed a Board order finding that a union had violated Section 8(b)(1)(A) by announcing, during an election campaign, that it would adamantly refuse to dovetail seniority lists consisting of members of the two rival organizations involved. The case originated from a representation proceeding

[52] Cargo Handlers, Inc., 159 NLRB 321, 62 LRRM 1228 (1966); UAW, Local 453 (Maremont Corp.), 149 NLRB 482, 57 LRRM 1298 (1964); Local 12, United Rubber Workers (Goodyear Tire & Rubber Co.), 150 NLRB 312, 57 LRRM 1535 (1964), *enforced*, 368 F2d 12, 63 LRRM 2395 (CA 5, 1966), *cert. denied*, 389 US 837, 66 LRRM 2306 (1967); Local 1367, Int'l Longshoremen's Ass'n (Galveston Maritime Ass'n, 148 NLRB 897, 57 LRRM 1083 (1964), *enforced*, 368 F2d 1010, 63 LRRM 2559 (CA 5, 1966), *cert. denied*, 389 US 837, 66 LRRM 2307 (1967); Red Ball Motor Freight, Inc., 157 NLRB 1237, 61 LRRM 1522 (1966), *enforced sub nom.*, Truck Drivers, Local 568 v. NLRB, 379 F2d 137, 65 LRRM 2309 (CA DC, 1967); Int'l Union of Electrical Workers, Local 485 (Automotive Plating Corp.), 170 NLRB No. 121, 67 LRRM 1609 (1968), *modified*, 183 NLRB No. 131, 74 LRRM 1396 (1970); Houston Maritime Ass'n, Inc., 168 NLRB No. 83, 66 LRRM 1337, *reversed for insufficiency of evidence*, 426 F2d 584, 74 LRRM 2200 (CA 5, 1970); Port Drum Co. (OCAW Local 4-23), 170 NLRB No. 51, 67 LRRM 1506 (1968), *modified*, 180 NLRB No. 90, 73 LRRM 1068 (1970).

[53] Note 52 *supra*.

[54] *Ibid.*

[55] 368 F2d 1010; *cert. denied*, 389 US 837, 66 LRRM 2306 (1967); 389 US 837, 66 LRRM 2307 (1967).

[56] *See* note 52 *supra*.

which was necessitated by the consolidation of two bargaining units. In reviewing the ensuing unfair labor practice case initiated by the union which had lost the election, the court of appeals concluded (1) that breach of the duty of fair representation is an unfair labor practice, (2) that arbitrarily placing a minority group at the bottom of the seniority list would be a breach of that duty, (3) and that threatening to breach the duty during an organizational campaign for "the purely political motive of winning an election by a promise of preferential representation to the numerically larger number of voters" [57] "inevitably introduced improper influences into the election process tantamount to restraint or coercion contemplated by Section 7." [58] The court therefore affirmed the Board's finding that such threats violated Section 8(b)(1)(A).

C. Preemption—Courts and/or Board

The jurisdictional significance of the Board's position becomes apparent when the *Miranda-Hughes Tool* doctrine is considered in conjunction with the preemption doctrine. The latter doctrine, on the basis of the Supremacy Clause and a finding of legislative intent, declares that the NLRB has exclusive jurisdiction to remedy unfair labor practices, and that "[w]hen an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." [59] Hence, the Board's assertion of jurisdiction, instead of resulting in the creation of an additional forum for the redress of the duty, might conceivably have led to a determination that the Board's jurisdiction is exclusive. A division of authority had developed on this point prior to the Supreme Court's decision in *Vaca v. Sipes*. The Court in *Vaca* assumed, without deciding,[60] that the Board had the power to remedy breaches of the duty of fair representation and upheld the

[57] 379 F2d at 143.

[58] *Id.* at 145.

[59] San Diego Bldg. Trades Council v. Garmon, 359 US 236, 245, 43 LRRM 2838 (1959). *See* Chapter 29 for a general discussion of the doctrine of federal preemption and its exceptions.

[60] According to the D.C. Circuit's reading of *Vaca*, "[a] necessary premise of the Supreme Court majority's statement that Labor Board jurisdiction in such cases does not exclude court relief was its explicit assumption that unfair representation is an unfair labor practice." Truck Drivers Local 568 (Red Ball Motor Freight, Inc.), 379 F2d 137, 142, 65 LRRM 2309 (CA DC, 1967).
See Chapter 29 *infra* for additional discussion of the preemption aspects of *Vaca*.

jurisdiction of the courts to remedy such breaches.[61] This result had been foreshadowed in the Court's decision in *Humphrey v. Moore*.[62] In that case a state court had enjoined the dovetailing of the seniority rosters of two companies dealing with the same local union. An exchange of operating rights between the companies had resulted in the elimination of one of the firms from the local's geographical jurisdiction. Subsequently, the "dovetailing" of seniority had been directed by a joint employer-union committee authorized by a multi-employer contract to decide grievances arising under the agreement.[63] The plaintiffs claimed that their rights under the contract had thereby been violated and that the agreement of the joint committee was void because the union had breached its duty of fair representation when it made the agreement. The Supreme Court dealt with the preemption problem by treating the case as essentially a suit to enforce a collective bargaining agreement:

61 For cases which had upheld the exclusivity of Board jurisdiction, *see, e.g.*, Mendicki v. UAW, 61 LRRM 2142 (D Kan, 1965); Stout v. Constr. & Gen. Laborers Dist. Council, 226 F Supp 673, 55 LRRM 2464 (1963); Knox v. UAW, 223 F Supp 1009, 54 LRRM 2661 (ED Mich, 1963), *affirmed*, 351 F2d 72, 60 LRRM 2253 (CA 6, 1965); Cosmark v. Struthers Wells Corp., 412 Pa 211, 194 A2d 325, 54 LRRM 2333 (1963), *cert. denied*, 376 US 962, 55 LRRM 279 (1964); Webster v. Midland Elec. Corp., 43 Ill App 2d 359, 193 NE 2d 212, 54 LRRM 2616 (1963), *cert. denied*, 377 US 964, 56 LRRM 1416 (1964). Operating Engineers v. Cassida, 376 SW2d 814, 55 LRRM 2383 (Tex Civ App, 1964), *writ of error denied*, 58 LRRM 2448 (Tex Sup Ct, 1964), *cert. denied*, 380 US 955, 58 LRRM 2720 (1965). *Cf.* Green v. Los Angeles Stereotypers, No. 58, 356 F2d 473, 61 LRRM 2419 (CA 9, 1966); Hiller v. Liquor Salesmen Local 2, 338 F2d 778, 57 LRRM 2629 (CA 2, 1965); Wheatley v. Teamsters Union, 15 Utah2d 80, 387 P2d 555, 55 LRRM 2133 (1963).

Some commentators seem to favor concurrent jurisdiction based upon a pragmatic concern with respect to the effectiveness of remedies. One scholar, after enumerating some of the procedural difficulties inherent in court action, observes that "experience has demonstrated a judicial tendency to defer to almost any arrangement to which union and management agree, in the interest of promoting collective bargaining at the expense of the rights of the employees." Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435, 1517 (1963). Another authority stresses that "private suits are not an effective sanction unless financed by an organized group." (COX, note 27 *supra* at 173.) Professor Sovern, who earlier had noted that "if the exclusive jurisdiction principle is now extended to suits to enforce the duty of fair representation, it would itself interfere with the policies and administration of federal labor legislation" [Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563, 610 (1962)], has more recently in a post-*Miranda* sequel concluded that "the high cost of suing has effectively sapped the right to be represented fairly of much of its efficacy," Sovern, *Racial Discrimination and the National Labor Relations Act: the Brave New World of Miranda*, 16TH ANN. CONF. ON LAB. 3, 6 (1963). *See also* Feller, *Vaca v. Sipes One Year Later*, N.Y.U. 21ST ANN. CONF. ON LAB. 141 (1969).

62 375 US 335, 55 LRRM 2031 (1964).

63 *See* Gen. Drivers, Local 89 v. Riss & Co., 372 US 517, 52 LRRM 2623 (1963).

> Although there are differing views on whether a violation of the duty of fair representation is an unfair labor practice under the Labor Management Relations Act, it is not necessary for us to resolve that difference here. Even if it is, or arguably may be, an unfair labor practice, the complaint here alleged that Moore's discharge would violate the contract and was therefore within the cognizance of federal and state courts, . . . subject, of course, to the applicable federal law.[64]

The Court squarely faced the jurisdictional issue in *Vaca* and upheld the authority of the courts, both state and federal, to entertain fair representation suits. The majority opinion stressed that the duty of fair representation was judicially created and noted the possibly inadequate remedial powers of the Board in cases of this type. In keeping with prior rulings, the Court further held that the employee's suit would have been a Section 301 suit even if the employee had to prove an unfair labor practice by the union.[65] Thus, whatever the authority of the NLRB to enforce the duty of fair representation, it is not exclusive. The Court deemed it desirable that one tribunal—the court which hears such a case—have all the parties and issues before it. It concluded that the applicable law in such cases is federal law.

64 375 US at 344. *See* Dowd Box Co. v. Courtney, 368 US 502, 49 LRRM 2619 (1962); Smith v. Evening News Ass'n, 371 US 195, 51 LRRM 2646 (1962); Carey v. Westinghouse Electric Corp., 375 US 261, 55 LRRM 2042 (1964); *see also* discussion of the relation of §301 suits for enforcement of collective agreements to the doctrine of federal preemption, Chapter 29 *infra*, and to the enforcement of agreements under §301 generally in Chapter 17 *supra*. It should be noted that the employee's suit in *Vaca* was based on a collective agreement, and that the Supreme Court compared fair representation cases to §301 cases for purposes of demonstrating that the doctrine of federal preemption was inapplicable:

"For the fact is that the question of whether a union has breached its duty of fair representation will in many cases be a critical issue in a suit under L.M.R.A. §301 charging an employer with a breach of contract." 386 US at 183.

But query: Will concurrent jurisdiction between Board and courts also exist where the employee alleges a breach of fair representation outside the context of an executed collective bargaining agreement? The Court in *Vaca* did not limit its holding to §301 situations; *but see* Local 100, United Ass'n v. Borden, 373 US 690, 53 LRRM 2322 (1963); Operating Engineers v. Cassida, 376 SW2d 814, 55 LRRM 2383 (Tex Civ App, 1964), *writ of error denied*, 58 LRRM 2448 (Tex Sup Ct, 1964), *cert. denied*, 380 US 955, 58 LRRM 2720 (1965); *see* Lewis, *Fair Representation in Grievance Administration: Vaca v. Sipes*, SUPREME CT. REV. 81, 99 (1967):

"[E]ven if all unfair representation claims are within the jurisdiction of the courts, cases like *Borden* can be recognized by inquiring whether conduct alleged to reflect unfair representation constitutes an arguable unfair labor practice even if the judicially created duty of fair representation is ignored. In the absence of a substantial §301 claim, such cases should remain within the exclusive jurisdiction of the Board."

65 *See* note 64 *supra*.

Another aspect of the preemption problem is posed by the situation in which conduct violative of the duty of fair representation may also be violative of some other legal duty enforceable by the courts. In those situations courts would have pendant jurisdiction. For example, federal courts have jurisdiction under Title I of the Labor-Management Reporting and Disclosure Act [66] to remedy violations of the "bill of rights of members of labor organizations," and in a suit claiming violation of such rights arising in connection with a breach of the duty of fair representation it seems clear that the court would also have jurisdiction to hear the claim of unfair representation.[67]

The enactment of Title VII of the Civil Rights Act,[68] proscribing discriminatory employment practices by unions and employers on the basis of race, religion, national origin, and sex, establishes still another forum for relief from conduct that might also constitute a breach of the duty of fair representation. Title VII authorizes suits to be brought in the federal district courts after exhaustion of the administrative conciliation procedures of the Equal Employment Opportunities Commission. Although dual regulation and overlapping jurisdiction may result, Title VII does not appear to preempt Labor Board and court jurisdiction over the duty of fair representation.[69]

[66] 73 Stat 522 (1959), 29 USC §§411-415.

[67] Thus, a suit would lie under Section 101(a)(1) of the LMRDA on a claim that members of a labor organization had been deprived of their equal rights under the union's constitution to vote on the ratification of a collective bargaining agreement and also that negotiation and enforcement of particular terms of the agreement violate the duty of fair representation.

[68] 78 Stat 253 (1964), 42 USC §§2000(e) 1-15 (1964). *See* Gould, *Seniority and the Black Worker: Reflections on Quarles and its Implications*, 47 TEX. L. REV. 1039 (1969); Jones, *Racial Discrimination in Employment and in Labor Unions*, LABOR LAW DEVELOPMENTS 1970 (Sw. Legal Foundation 16th Ann. Lab. Law Inst.) 179 (1970).

[69] This view is supported by the legislative history of the statute. A Justice Department memorandum presented to the Senate by Senator Joseph S. Clark during that body's discussion of Title VII stated in part:

"Nothing in title VII or anywhere else in this bill affects rights and obligations under the NLRA and the Railway Labor Act. The procedures set up in title VII are the exclusive means of relief against those practices of discrimination which are forbidden as unlawful employment practices by sections 704 and 705. Of course, title VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes. If a given action should violate both title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction. . . . At any rate, title VII would have no effect on the duties of any employer or labor organization under the NLRA or under the Railway Labor Act, and these duties would continue to be enforced as they are now. . . ." 110 CONG. REC. 7207 (1964).

III. NATURE OF THE DUTY

Whatever forum is utilized to enforce the duty of fair representation, the problem of defining the scope and nature of the duty is essentially the same.

In the *Steele* case, the Court said that the union's duty is to "exercise fairly the power conferred upon it, in behalf of all those for whom it acts, without hostile discrimination against them." [70] The Court decreed that the union's power had to be exercised "fairly, impartially, and in good faith" [71] and that "discriminations based on race alone are obviously irrelevant and invidious." [72]

The Court imposed the same duty upon a bargaining agent selected under the NLRA, observing in *The Wallace Corp. v. NLRB* [73] that

> [t]he duties of a bargaining agent selected under terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. [74]

Senator Clark added that Title VII "would not affect the present operation of any part of the National Labor Relations Act or rights under existing labor laws." 110 CONG. REC. 7207 (1964).

See also 110 CONG. REC. 13652 (1964), reporting the Senate's rejection of Senator Tower's proposal to make Title VII "the exclusive means whereby any department, agency, or instrumentality in the executive branch of the Government, or any independent agency of the United States, may grant or seek relief from, or pursue any remedy with respect to, any employment practice of any employer, employment agency, labor organization, or joint labor-management committee covered by this title, if such employment practice may be the subject of a charge or complaint filed under this title." *Cf.* Civil Rights Act of 1964, §1103.

The National Labor Relations Board has already concluded in Local 12, United Rubber Workers, 150 NLRB 312, 57 LRRM 1535 (1964), that its "powers and duties are in no way limited by Title VII." 150 NLRB at 321.

See generally, Fuchs and Ellis, *Title VII: Relationship and Effect on the National Labor Relations Board*, 7 B. C. IND. & COM. L. REV. 575 (1966). *See also* Sherman, *Union's Duty of Fair Representation and the Civil Rights Act of 1964*, 49 MINN. L. REV. 771 (1965). It is there concluded that the NLRB's asserted jurisdiction to enforce the duty of fair representation should yield to the extent of overlap with the Civil Rights Act. 49 MINN. L. REV. at 815-820.

[70] 323 US at 203.

[71] *Id.* at 204.

[72] *Id.* at 203.

[73] 323 US 248, 15 LRRM 697 (1944).

[74] 323 US at 255; *see also* Hughes Tool Company v. NLRB, 147 F2d 69, 15 LRRM 852 (CA 5, 1945).

The Board in *Miranda* [75] adopted the same standard that had been established judicially in *Steele* and *Wallace*. The Board stated that in its opinion "Section 7 thus gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment." [76]

Similar language is to be found in *Vaca v. Sipes,* where the Court noted that a "breach of the statutory duty occurs . . . when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." [77] At the same time the decision recognized a necessary area of union discretion, subject, of course, to the good-faith requirement, in the processing of employee grievances. The Court stated that "[t]hough we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration. . . ." [78]

Thus the duty imposed by the Board and the courts leaves a significant area of discretion to be exercised by the union. Even in the *Steele* case the Court recognized that the duty of fair representation "does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented." [79] The Court observed:

[75] 140 NLRB 181, 51 LRRM 1584 (1962). *See* Feller, note 61 *supra* at 167, for a discussion of the Court's use of the term "arbitrary" to describe the union's duty. (". . . [T]he word 'arbitrary' can be as broad as the courts want to make it. My guess is that in the years to come the courts will make 'arbitrary' quite broad indeed, at least in discharge cases which the union refuses to arbitrate." *Ibid.*)

[76] 140 NLRB at 185; *see also* Hughes Tool Company, 104 NLRB 318, 32 LRRM 1010, 1232 (1953), and cases cited in note 52 *supra.*

[77] 386 US at 207.

[78] *Id.* at 191. The Court observed that "[i]f the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, . . . [and a] significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully." *Id.* at 191-192.

In *Figueroa v. Trabajadores Packinghouse,* 425 F2d 281, 74 LRRM 2028, 2032 (CA 1, 1970), it was held that an "arbitrary and perfunctory handling by a union of an apparently meritorious grievance is not acceptable under the standard of fair representation."

[79] 323 US at 203.

> Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, or the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit.[80]

The latitude available to the union in the exercise of its statutory duty as exclusive bargaining representative was set forth by the Court in the following guidelines in *Ford Motor Co. v. Huffman:*

> Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals. . . . Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.[81]

The key problem in every fair-representation case is to determine whether the specific factual situation shows "hostile discrimination" based on "irrelevant and invidious" considerations,[82] or falls within the "wide range of reasonableness" [83] granted bargaining agents.

Under the decisions, it is now quite clear that the duty of fair representation applies to all phases of collective bargaining. The duty is applicable both to the negotiation of collective agreements and to the processing of grievances arising under such agreements. In one of the cases arising under the RLA, the Supreme Court spelled out the continuous bargaining process involved in representation by a union:

[80] *Ibid.*

[81] 345 US 330, 337-338, 31 LRRM 2548 (1953).

[82] Steele v. Louisville & N.R.R., 323 US 192, 203, 15 LRRM 708 (1944).

[83] Ford Motor Co. v. Huffman, 345 US 330, 338, 31 LRRM 2548 (1953).

> The bargaining representative's duty not to draw "irrelevant and invidious" distinctions among those it represents does not come to an abrupt end . . . with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among other things, it involves day to day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by the contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement.[84]

In the context of an early Railway Labor Act case, the Supreme Court indicated that the latitude of the union for action with respect to contract administration and processing of grievances pursuant to a contract is not as broad as its authority for negotiation of a labor agreement.[85] However, subsequent decisions of both the Board and the courts have failed to expressly note this distinction. Nor was such a distinction mentioned in *Vaca v. Sipes*, which involved a claim of improper union failure to process a grievance to arbitration.[86] The cases reviewed herein generally uphold similar broad union power in both the administration and the negotiation of contracts. They also indicate that a similar duty of fair representation rests upon the union in both situations. However, a *caveat* should be noted: While the duty may be similar, the scope of the union's discretion will be limited by the nature of the grievance. Grievances involving individual job rights, as opposed to the collective interest involved in contract negotiations and in certain grievances concerning contract interpretation, provide fewer options for the bargaining representative in reaching settlements with the employer.

Although the authority of unions to negotiate and subsequently to enforce contracts is broad, the duty of fair representation, which has evolved in case law since 1944, establishes definite limitations upon that authority.

84 Conley v. Gibson, 355 US 41, 46, 41 LRRM 2089 (1957).

85 Elgin, Joliet & Eastern Ry. Co. v. Burley, 325 US 711, 16 LRRM 749 (1945). The Court held that statutory status as bargaining agent under the Railway Labor Act, without further authorization from the employee, did not confer upon the union the authority to settle an employee's back-pay grievance before the National Railroad Adjustment Board.

86 The Court's failure to follow *Burley*, note 85 *supra*, without however citing it, may indicate that *Burley* will be confined to its facts, which involved formal representation of claimants before the NRAB. The Court in *Vaca* declared:
"[W]e do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement." 386 US at 191.

Certainly racial discrimination is a violation of the union's duty.[87] And although no decided cases have involved the issue, without question discrimination because of an employee's religion or national origin, being based on irrelevant considerations, would constitute a similar breach of the duty. It is also clear that a failure to represent fairly occurs where discrimination is motivated by internal union political differences.[88]

Other forms of discrimination present more difficult problems. For example, is discrimination based on age a breach of the duty?[89] Is there a failure to represent fairly when discrimination against an individual employee results from an unpopular political position which he has taken, the effect of which has been to disrupt plant harmony? Or, is there a violation of the duty when a union negligently, but not intentionally, fails to file or appeal a grievance on time? These are but a few of the types of situations that must eventually be resolved by the Board and the courts.

The courts have generally sustained union decisions and actions taken in good faith and without malice. Thus, it was held not to be a violation of the duty (1) to give seniority credit for military service to veterans even though they did not previously work for the employer,[90] (2) to initiate pension plans and other programs of forced retirement even though job rights of older employees built up through years of service were eliminated,[91] (3) to grant union officials seniority preference over longer-service employees

87 Steele v. Louisville & N.R.R., 323 US 192, 15 LRRM 708 (1944); Hughes Tool Company, 104 NLRB 318, 32 LRRM 1010, 1232 (1953); Local 1367, Int'l Longshoremen's Association, 148 NLRB 897, 57 LRRM 1083 (1964); Local 12 United Rubber Workers, 150 NLRB 312, 57 LRRM 1535 (1964); UAW (Maremont Corporation), 149 NLRB 482, 57 LRRM 1298 (1964); Cargo Handlers, Inc., 159 NLRB 321, 62 LRRM 1228 (1966). Houston Maritime Ass'n, Inc., 168 NLRB No. 83, 66 LRRM 1337, *reversed for insufficiency of evidence*, 426 F2d 584, 74 LRRM 2200 (CA 5, 1970). *See* Gould, *Black Power in the Unions: The Impact Upon Collective Bargaining Relationships*, 79 YALE L. J. 46 (1969). *Cf.* Tanner Motor Livery Ltd., 148 NLRB 1402, 57 LRRM 1170 (1964), *remanded*, 349 F2d 1, 59 LRRM 2784 (CA 9, 1965), *affirmed in Supplemental Decision*, 166 NLRB No. 35, 65 LRRM 1502 (1967); *see* Chapter 6, note 53, *supra*.

88 Int'l Union of Electrical Workers (Automotive Plating Corp.), 170 NLRB No. 121, 67 LRRM 1609 (1968), modified, 183 NLRB No. 131, 74 LRRM 1396 (1970), where the Board found that the real reason for a union's refusal to process an employee's grievance was his outspoken opposition at a union meeting to a policy of the union business manager. *See* notes 105-106 *infra*.

89 *See* Age Discrimination in Employment Act of 1967, 29 USC 621-634.

90 Ford Motor Co. v. Huffman, 345 US 330, 31 LRRM 2548 (1953).

91 Goodin v. Clinchfield R.R., 229 F2d 578, 37 LRRM 2515 (CA 6, 1956), *cert. denied*, 351 US 953, 38 LRRM 2160 (1956).

in layoff situations,[92] or (4) to dovetail seniority lists of two merging companies.[93]

In similar fashion, the Board since its *Miranda*[94] decision has sustained the broad range of authority granted to a union acting as the exclusive representative of all employees in the unit. Thus, neither "the Union's classification of employees on the basis of permanent residence and the Union's insistence on differences in compensation based on distance from home to work" nor the attempt to "police and enforce" these contractual provisions was held to be "arbitrary or invidious."[95]

The Board also concluded that where the purpose of certain contractual provisions was to attempt to give "work of the trade to those who presumably needed it, rather than to those who held full-time positions elsewhere," the classification of an employee as "not at trade" was not "arbitrary and invidious." Instead, such action was held to be based upon "a reasonable classification of employees."[96]

In another case the Board held that a union which incorporates into a collective bargaining agreement a provision which "seeks to restrict the transfer of employees from one category to another" is presumptively within the "wide range of reasonableness" allowed to a statutory bargaining representative. Such conduct by the union was deemed as not "inconsistent with its duty fairly to represent all employees in the bargaining unit."[97]

In still another instance the Board absolved a union of a claimed violation of its duty when the union enforced a bylaw which by practice between the union and the employer had become a rule of employment. Since the bylaw was "justified by non-discriminatory business purposes [and] by non-discriminatory attempts to benefit all the represented employees," the Board determined that its enforcement fell within the area of permissible union action.[98]

92 Aeronautical Lodge 727 v. Campbell, 337 US 521, 24 LRRM 2173 (1949).
93 Humphrey v. Moore, 375 US 335, 55 LRRM 2031 (1964).
94 140 NLRB 181, 51 LRRM 1584 (1962).
95 Millwrights' Local 1102, United Bhd. of Carpenters & Joiners of America, AFL-CIO (Planet Corporation), 144 NLRB 798, 801, 54 LRRM 1136 (1963). *Cf.* Bricklayers Local 28 (Plaza Builders, Inc.), 134 NLRB 751, 49 LRRM 1222 (1961).
96 N.Y. Typographical Union Local 6, ITU (The New York Times Company), 144 NLRB 1555, 1558, 54 LRRM 1281 (1963). *Cf.* IBEW Local 367 (Easton Branch, NECA), 134 NLRB 132, 49 LRRM 1127 (1961).
97 Armored Car Chauffeurs Local 820, IBT (U.S. Trucking Co.), 145 NLRB 225, 229, 54 LRRM 1356 (1963).
98 Houston Typographical Local 87, ITU (Houston Chronicle Publishing Co.), 145 NLRB 1657, 1663, 55 LRRM 1190 (1964).

The content of the duty of fair representation lies within these very general guidelines. The cases construe the statute as granting to the union wide authority to act in the collective bargaining process. This very fact makes it difficult to set forth any easily applicable standard by which to determine when latitude given the union has been exceeded. Whether the duty of fair representation has been breached depends upon analysis of each of a large variety of possible fact situations.[99]

IV. REMEDIES

A. The Board

While concern over the inadequacy of judicial remedies may have been responsible in part for the Board's assertion of jurisdiction,[100] the Board in its first judicial test was met with the Second Circuit's conclusion that "the machinery of the Board and the remedies applied in the enforcement of findings of unfair labor practices . . . are not suited to the task of deciding general questions of private wrongs, unrelated to union activities, suffered by employees as a result of tortious conduct by either employers or labor unions."[101] The adequacy of the remedies which can be provided by the Board and the courts, respectively, may thus be a factor in the ultimate determination of the issue of jurisdiction.

1. Unfair Labor Practice Proceedings. The Board has exercised its remedial powers to order unions to cease and desist from breaches of the duty of fair representation.[102] In appropriate cases the Board has also ordered reinstatement of employees with full seniority and back pay.[103] When, however, the violation involves failure to process a grievance, the Board apparently prefers to order that the grievance be processed fairly rather than to adjudi-

99 *E.g.*, Trotter v. St. Elec. Ry. and Motor Coach Employees of America, 309 F2d 584, 51 LRRM 2424 (CA 6, 1962), *cert. denied*, 372 US 943, 52 LRRM 2673 (1963).
100 "Negroes have gone to court to redress unfair representation on an average of less than once a year since *Steele* was decided." Sovern, *Racial Discrimination and the National Labor Relations Act: the Brave New World of Miranda*, PROCEEDINGS OF NEW YORK UNIVERSITY SIXTEENTH ANNUAL CONFERENCE ON LABOR 3, 5 (1963).
101 NLRB v. Miranda Fuel Co., 326 F2d 172, 180, 54 LRRM 2715 (CA 2, 1963).
102 Cargo Handlers, Inc., 159 NLRB 321, 62 LRRM 1228 (1966); Local 12, United Rubber Workers (Business League of Gadsden), 150 NLRB 312, 57 LRRM 1535 (1964); Local 1367, Int'l Longshoremen's Ass'n (Galveston Maritime Ass'n), 148 NLRB 897, 57 LRRM 1085 (1964); Independent Metal Workers Union (Hughes Tool Co.), 147 NLRB 1573, 56 LRRM 1289 (1964).
103 Miranda Fuel Co., 140 NLRB 181, 51 LRRM 1584 (1962). *See* note 42 *supra*.

cate the claim itself. For example, in *Local 12, United Rubber Workers,*[104] the Board ordered the union to process in good faith grievances concerning back pay and segregation of employee dining, toilet, and recreational facilities. And in *International Union of Electrical Workers, Local 485 (Automotive Plating Corp.),*[105] the Board, finding a Section 8(b)(1)(A) violation by virtue of an arbitrary union refusal to press an employee's grievance, ordered the union to process the grievance and, if necessary, to take it to arbitration. In an effort to comply with the Board's order, the union requested the employer to arbitrate, but the employer refused. Since the Board had no jurisdiction over the employer, the Board, by supplemental order, required the union to pay back pay from the date of the initial refusal to handle the grievance "until such time as union fulfills its duty of fair representation, or discharged employee obtains substantially equivalent employment, whichever is sooner." [106]

2. Representation Proceedings. The Board has declared that it will not permit its contract-bar rules to be utilized to shield contracts containing provisions violative of the duty of fair representation from the challenge of otherwise-appropriate election petitions.[107] In *Pioneer Bus Co.* it held that

> where the bargaining representative of employees in an appropriate unit executes separate contracts, or even a single contract, discriminating between Negro and white employees on racial lines, the Board will not deem such contracts as a bar to an election.[108]

In *Hughes Tool Co.*[109] the Board went a step further and revoked an offending union's certification, reasoning that, having issued the certification, it had the power to police its use and to revoke it in a proper case.[110] This remedy, however, would be effective only in those cases where a certification not only had been issued but also was of some importance to the union. "[E]ven when past violation of the duty of fair representation has made rescission of certification appropriate, the Board has usually not prevented the offending union from immediately participating in a new representation election. . . ." [111]

Although it has been suggested that "the Board should not certify a union likely to represent unfairly," [112] it is doubtful that the Board will adopt this approach in the light of its decision in *Alto Plastics:* [113]

> If the Petitioner herein qualifies as a "Labor organization," then clearly the Board may not refuse to process its petition. For it must be remembered that, initially, the Board merely provides the machinery whereby the desires of the employees may be ascertained, and the employees may select a "good" labor organization, a "bad" labor organization, or no labor organization, it being pre-supposed that employees will intelligently exercise their right to select their bargaining representative.[114]

B. The Courts

The courts will continue to provide a forum for remedying unfair-representation cases.[115]

1. Damages. In enforcing the duty of fair representation, the courts have accorded aggrieved parties the traditional remedies

104 150 NLRB at 322.

105 170 NLRB No. 121, 67 LRRM 1609 (1968), *modified,* 183 NLRB No. 131, 74 LRRM 1396 (1970), note 88 *supra.* The Board contended, on the authority of *NLRB v. C & C Plywood Corp.,* 385 US 421, 64 LRRM 2065 (1967), that it had the authority to construe the provisions of the collective agreement, but declined to do so, deferring, at least initially, to the arbitration process.

106 The supplemental opinion indicated that a §301 action by the union would fulfill that duty. Chairman McCulloch dissented, asserting that *Vaca v. Sipes* precluded the Board from assessing against the union all of the damages arising from the discharge, especially damages flowing from a breach of contract by the employer. (*See infra* at notes 136-139.) He suggested, however, that the Board could order the union to pay reasonable legal fees for a §301 action by the employee against the employer. These remedial difficulties, attributable to limitations on the Board's jurisdiction, were foreseen and commented upon in Morris, *Procedural Reform in Labor Law—A Preliminary Paper,* 35 J. AIR L. & COM. 537, 558, n. 143 (1969). *See also* Port Drum Co. (OCAW Local 4-23), 170 NLRB No. 51, 67 LRRM 1506 (1968), *modified,* 180 NLRB No. 90, 73 LRRM 1068 (1970), where union was ordered to make employee's estate whole for loss of earnings when union failed to take effective steps to comply with Board's order requiring it to arbitrate employee's grievance.

107 Pioneer Bus Co., 140 NLRB 54, 55, 51 LRRM 1546 (1962).

108 *Id.* at 55. *See* Chapter 8 *supra* at note 97.

109 147 NLRB 1573, 56 LRRM 1289 (1964).

110 Pioneer Bus Co., 140 NLRB 54, 51 LRRM 1546 (1962) (dictum); Alto Plastics Mfg. Corp., 136 NLRB 850, 49 LRRM 1867 (1962); A. O. Smith Corp., 119 NLRB 621, 41 LRRM 1153 (1957); Plant City Welding & Tank Co., 118 NLRB 280, 40 LRRM 1168 (1957); Pittsburgh Plate Glass Co., 111 NLRB 1210, 35 LRRM 1658 (1955); Hughes Tool Co., 104 NLRB 318, 32 LRRM 1010, 1232 (1953); Coleman Co., 101 NLRB 120, 31 LRRM 1020 (1952); Larus & Bro. Co., 62 NLRB 1075, 16 LRRM 242 (1945).

111 Sovern, *supra* note 61, at 596, citing Pittsburgh Plate Glass Co., 111 NLRB 1210, 35 LRRM 1658 (1955); Hughes Tool Co., 104 NLRB 318, 32 LRRM 1010, 1232 (1953); Larus & Bro. Co., 62 NLRB 1075, 16 LRRM 242 (1945).

112 Sovern, note 61 at 597-98 *supra.* "Given the considerable power of unions to represent Negroes unfairly without realistic fear of detection, the Board should not certify unions likely to transgress in this way." *Id.* at 599.

113 136 NLRB 850, 49 LRRM 1867 (1962).

114 Id. at 851.

115 Vaca v. Sipes, 386 US 171, 64 LRRM 2369 (1967). Inasmuch as the focus of this book is on NLRB jurisdiction, this section will not treat exhaustively the volume of fair representation litigation in the state and federal courts. Some representative cases and problems will, however, be noted.

of injunctions and/or compensatory damages.[116] Damages in the nature of back pay have been awarded.[117] Such damages are measured by the difference between what the plaintiff actually earned, or with the exercise of due diligence would have earned, and what he would have earned but for the breach.[118] In *Thompson v. Bhd. of Sleeping Car Porters,*[119] the Fourth Circuit affirmed a judgment awarding an employee damages calculated on the basis of future as well as past earnings where the failure of the union to represent the employee fairly with respect to his seniority resulted in the "phase-out" of his job. The court noted that the employer had not been joined in the suit and that under the applicable collective bargaining agreement employees were not required to retire until reaching the age of 70. Under these circumstances the court concluded that the award of future damages was the only effective remedy.

2. Injunctive and Other Equitable Remedies. The anti-injunction provisions of the Norris-LaGuardia Act [120] have not precluded the issuance of judicial decrees enjoining unfair representation.[121] In cases involving contract clauses which on their face are violative of the duty, both the union and the employer have been joined in a suit for an injunction against the enforcement of the discriminatory provisions.[122]

Alleged violations of the duty of fair representation in the administration of the contract raise more difficult questions as to remedy than do the cases involving discriminatory contract clauses.

116 "[T]he statute contemplates resort of the usual judicial remedies of injunction and award of damages when appropriate. . . ." 323 US at 207; Tunstall v. Bhd. of Loco. Firemen, 323 US 210, 15 LRRM 715 (1944); Syres v. Oil Workers Local 23, 223 F2d 739, 36 LRRM 2290 (CA 5, 1955), *reversed per curiam*, 350 US 892, 37 LRRM 2068 (1955); *Cf.* Sipes v. Vaca, 397 SW2d 658, 61 LRRM 2054 (Mo Sup Ct, 1965), *reversed*, 386 US 171, 64 LRRM 2369 (1967).

117 Cent. of Ga. Ry. v. Jones, 229 F2d 648, 37 LRRM 2435 (CA 5, 1956), *cert. denied*, 352 US 848, 38 LRRM 2716 (1956).

118 Thompson v. Bhd. of Sleeping Car Porters, 367 F2d 489, 63 LRRM 2111 (CA 4, 1966), *cert. denied*, 386 US 960, 64 LRRM 2574 (1967).

119 *Ibid.*

120 29 USC §§101-115 (1964).

121 Steele v. Louisville & N.R.R., 323 US 192, 15 LRRM 708 (1944); Tunstall v. Bhd. of Loco. Firemen, 323 US 210, 15 LRRM 715 (1944); Bhd. of R.R. Trainmen v. Howard, 343 US 768, 30 LRRM 2258 (1952); Syres v. Oil Workers Union, 350 US 892, 37 LRRM 2068 (1955); Cent. of Ga. Ry. v. Jones, note 117 *supra*.

122 Bhd. of R.R. Trainmen v. Howard, 343 US 768, 30 LRRM 2258 (1952); Steele v. Louisville & N.R.R., 323 US 192, 15 LRRM 708 (1944); Cent. of Ga. Ry. v. Jones, note 117 *supra*.

Frequently the employer has agreed with the union that grievances are to be processed by the union through an established procedure subject to specific time limitations. Thus, from the employer's viewpoint, the failure of the union to resort to the grievance procedure, regardless of motivation, is urged as a reason for excusing the employer. In addition, the contract usually provides that unresolved disputes concerning application of the contract may be submitted to arbitration and the arbitrator's decision shall be final and binding upon the parties. Hence, in the typical case in which an employee has sued the union and his employer, claiming a wrongful refusal on the part of the union to process his grievance as well as a breach of contract by the employer, the questions of appropriate remedy and against whom the remedy should be applied have been the subject of much judicial as well as scholarly concern.[123]

Several positions have been advanced. One position is that if the employer has not encouraged or participated in the union's breach of duty the employer should not be held liable in a suit by an individual employee for breach of contract. Under this theory the employee is limited to "pursuing any remedy at law which might be available for breach of fiduciary duty owing by the union." [124]

Another view was adopted by the Maryland Court of Appeals in *Jenkins v. Wm. Schluderberg-T. J. Kurdle Co.*[125] Even though the plaintiff had sued only the employer, the court concluded that

> as a general rule grievance procedures provided by a collective bargaining agreement should be a bar to suits by individuals against the Employer based upon alleged violation of the agreement, but . . . such suits are not barred if the Union acted unfairly towards

123 *See* bibliographical note 1 *supra*. This problem closely parallels, and will in large part ultimately depend upon, resolution of the separate and no less perplexing issue of the right of the individual employees to enforce collective bargaining agreements *in the absence* of a claimed breach of duty by the union. *See* Republic Steel Corp. v. Maddox, 379 US 650, 58 LRRM 2193 (1965), note 140 *infra*.

124 Matter of Soto, 180 NYS2d 397 (1958), 165 NE 2d 855 (1960). Prof. Archibald Cox describes this theory as follows:

"Unless a contrary intention is manifest, the employer's obligations under a collective bargaining agreement which contains a grievance procedure controlled by the union shall be deemed to run solely to the union as the bargaining representative, to be administered by the union in accordance with its fiduciary duties to employees in the bargaining unit. The representative can enforce the claim. It can make reasonable, binding compromises. It is liable for breaches of trust in a suit by the employee beneficiaries." Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 600, 619 (1956).

125 217 Md 556, 144 A2d 88, 30 LA 875 (1958).

the employee in refusing to press the employee's claim through to, and including, arbitration under the collective bargaining agreement.[126]

Under this view, if a union has violated the duty by refusing to process an employee's grievance, the employee, at his election, seemingly could bring his action against either the union or the employer or both.

A third position, advanced by a law professor [127] and adopted by the New Jersey Supreme Court in *Donnelly v. United Fruit Co.*,[128] would permit an employee to compel arbitration notwithstanding the union's refusal to process the grievance. In *Donnelly*, a discharged employee sued his union and his employer for damages resulting from loss of employment and improper failure to consider his grievance. Although the court affirmed summary judgment for both defendants, it did so in an elaborate opinion in which it spelled out its view of individual rights under collective agreements and their grievance and arbitration procedures. The court concluded that "an individual employee has a statutorily-vested right [129] to present his grievance to, and to have it determined by, his employer when the union declines to process it in his behalf." [130]

126 217 Md at 574-575, 144 A2d at 99.

127 Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. REV. 362 (1962).

128 40 NJ 61, 190 A2d 825, 53 LRRM 2271 (1963). *See also* Clark v. Hein-Werner Corp., 8 Wis2d 264, 99 NW2d 132, 43 LRRM 2733 (1959), *rehearing denied*, 10 NW2d 317, 45 LRRM 2659 (1960), *cert. denied*, 362 US 962, 45 LRRM 2137 and 46 LRRM 2033 (1960).

129 The Court was relying upon the proviso to §9(a) of the NLRA:
"That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment."

130 190 A2d at 839. Further, the court set forth, in elaborate dicta, the following principles to govern cases of this type:
"[F]or purposes of obtaining reinstatement and back pay or simply back or lost pay where reinstatement is not asked, the individual must pursue or attempt in good faith to pursue the grievance procedure set forth in the collective bargaining contract before seeking a court remedy. . . . If the union refuses to handle the matter for him or if it has a conflicting interest, the employee should request the employer to take up the grievance with him according to the contractually-prescribed mode, but with the employee in control of the procedural steps wherever necessary to achieve a just determination. On refusal, recourse may be had to the courts for specific performance of the agreement to process the dispute through to arbitration or, at the option of the employee, for damages suffered by him because of the employer's conduct (for example, discharge without cause) which gave rise to the grievance.

On the facts of the particular case, the court found that the plaintiff employee had not attempted to process his grievance personally, that the union had not acted unfairly in refusing to proceed to arbitration, and that the employer had at no time refused to entertain the grievance in accordance with the contract. Since the employee had committed his grievance to the union and had failed to prove bad faith, the court declined to upset the resolution of the grievance by union and employer.

The NLRB does not follow the interpretation of the Section 9(a) proviso which the court in *Donnelly* espoused. The Board refuses to permit an individual to process his own grievance to arbitration [131] or to permit a minority union to do so on his behalf.[132] Pursuant to the proviso, the Board requires that the statutory representative be notified and given an opportunity to be present at any grievance adjustment.[133] The Board relies on a pre-Taft-Hartley Fifth Circuit holding that although the grievant may ask "an experienced friend to assist him, he cannot present his grievance through any union except his representative." [134] In a First Circuit case, which has not been followed, Judge Learned Hand disagreed with the Board. He would have permitted a union other than the designated majority union to represent an indi-

"During the argument before us, questions were raised as to where the burden of costs would rest when, in order to obtain relief, an employee finds it necessary to 'present' his grievance personally. If the matter is presented to the final stage of arbitration, decision as to expenses may be left to the arbitrator. Obviously, the union should not be saddled with costs of arbitrating worthless or petty claims of disputatious employees. On the other hand, if the employee is successful and the grievance is one which in the judgment of the arbitrator should have been handled by the union, presumably, costs would follow the course fixed in the collective agreement or usually followed by custom or practice. Further, even if the employee is unsuccessful after arbitration, if his cause is colorable and presented in good faith, and in the judgment of the arbitrator refusal of the union to press was unfair and arbitrary, he should be relieved of costs. But if he fails and has no colorable claim of a substantial nature, he must shoulder the costs." *Id.* at 841-42.

131 Black-Clawson Co. v. Machinists, Lodge 355, 313 F2d 179, 52 LRRM 2038 (CA 2, 1962); Woody v. Sterling Aluminum Products, Inc., 243 F Supp 755, 59 LRRM 2996, *affirmed on other grounds sub nom.*, 365 F2d 448, 63 LRRM 2087 (CA 8, 1966), *cert. denied*, 386 US 957, 64 LRRM 2574 (1967). The United States Supreme Court in *Vaca*, 386 US at 190, n. 13, specifically noted the *Donnelly* decision and declined to follow it. *See* note 20 *supra*.

132 Hughes Tool Co., 56 NLRB 981, 14 LRRM 165 (1944), *enforced*, 147 F2d 69, 15 LRRM 852 (CA 5, 1945); U.S. Automatic Corp., 57 NLRB 124, 14 LRRM 214 (1944); Federal Telephone and Radio Co., 107 NLRB 649, 33 LRRM 1203 (1953).

133 *See also* J. I. Case Co. (Racine Plant), 71 NLRB 1145, 19 LRRM 1100 (1946).

134 147 F2d at 73. *See* Federal Telephone and Radio Co., note 132 *supra*.

vidual or group in the settlement of any grievances that had not been resolved by the collective bargaining contract.[135]

The Court in *Vaca* discussed various remedies which might be available in fair-representation cases. An order compelling arbitration was one remedy suggested. Other equitable relief may also be appropriate. As to damages, the Court made clear that only the employer, and not the union, is liable for the damages flowing from the employer's breach of contract (even though in a case of this type the employer's liability would be contingent upon a breach of the union's duty of fair representation), and that the union is liable only to the extent that the employee's damages were increased "by the union's refusal to process the grievance. . . ." [136] The Court said:

> The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer.[137]

The Court said that joint liability would be appropriate only where "a union has affirmatively caused the employer to commit the . . . breach of contract." [138]

Justice Fortas, with Chief Justice Warren and Justice Harlan, concurred on the basis of an exclusive NLRB jurisdiction to

135 Douds v. Retail Store Union, 173 F2d 764, 23 LRRM 2424 (CA 2, 1949). *Cf.* Olin Industries, 86 NLRB 203, 24 LRRM 1600 (1949), *enforced*, 191 F2d 613, 28 LRRM 2474 (CA 5, 1951), *cert. denied*, 343 US 919, 29 LRRM 2661 (1952); Agar Packing & Provision Corp., 81 NLRB 1262, 23 LRRM 1489 (1949). *See also* Sherman, *The Individual and the Grievance—Whose Grievance Is It?*, 11 PITT. L. REV. 35, 38, 55 (1949); Dunau, *Employee Participation in the Grievance Aspects of Collective Bargaining*, 50 COL. L. REV. 731, 740-44 (1950); *Report of Committee on Improvement of Administration of Union-Management Agreements*, 1954, 50 NW. L. REV. 143, 169-86 (1955); Comment, *Collective Bargaining, Grievance Adjustment, and the Rival Union*, 17 U. CHI. L. REV. 533, 540 (1950). Minority rail unions have been permitted to take employee grievances to adjustment boards in some circumstances. *See:* Locomotive Engineers v. Denver R.R. Co., 411 F2d 1115, 71 LRRM 2690 (CA 10, 1969); McElroy v. Terminal R.R. Ass'n of St. Louis, 392 F2d 966, 67 LRRM 2681 (CA 7, 1968), *cert. denied*, 393 US 813, 70 LRRM 2225 (1969). *Cf.* Elgin, J. & E. Ry. Co. v. Burley, 325 US 711, 16 LRRM 749 (1945), *adhered to on rehearing*, 327 US 661, 17 LRRM 899 (1946).

136 386 US at 198.

137 *Ibid.* "In this case," the Court said, "even if the Union had breached its duty, all or almost all of Owens' damages would still be attributable to his allegedly wrongful discharge by Swift. For these reasons, even if the Union here had properly been found liable for a breach of duty, it is clear that the damage award was improper." *Ibid.*

138 386 US at 197, note 18.

remedy breaches of the duty of fair representation. Therefore, they deemed it unnecessary to resolve the problem, discussed by the Court, of the circumstances under which an employee could sue the *employer* for breach of contract. They did, however, suggest as an alternative to the Court's position that perhaps "all . . . [the employee] would have to show to maintain an action for wrongful discharge against the employer is that he demanded that the union process his claim to exhaustion of available remedies and that it refused to do so." [139]

Justice Black dissented, recalling his disagreement with the Court's decision in *Republic Steel Corp. v. Maddox* [140] to the effect that an individual employee's suit must fail in the absence of the employee's attempt to invoke the grievance procedure. *A fortiori*, he would allow the suit where, as in *Vaca*, the employee had invoked that procedure. And he would not make the employer's liability for a breach of contract depend upon proof of the union's breach of the duty of fair representation. Justice Black pointed out that under the majority's decision the plaintiff "will be no more successful in his pending breach-of-contract action against . . . [the employer] than he is here in his suit against the union." [141]

By not mentioning the proviso to Section 9(a), the Supreme Court impliedly rejected the position of the court in *Donnelly* respecting individual rights to enforce the grievance and arbitration machinery.

3. Statutes of Limitations. An additional factor complicating the remedial problem is the unsettled state of the law of limitations in court cases in contrast to the six-month limitation governing unfair labor practice cases.[142] The limitations problem has been made even more complex by the Supreme Court's decision in *UAW v. Hoosier Cardinal Corp.*[143] This was a suit by a union for damages alleged to result from an employer's denial to his employees of accrued vacation pay. The Court held that "since no federal provision governs, . . . the timeliness of [such] a §301

139 *Id.* at 198-203.

140 379 US 650, 58 LRRM 2193 (1965).

141 386 US at 204.

142 NLRA §10(b), 49 Stat 453 (1935), 29 USC §160(b) (1964); *See* Bryan Mfg. Co. v. NLRB, 362 US 411, 45 LRRM 3212 (1960); *see also* Chapter 30 *infra*.

143 383 US 696, 61 LRRM 2545 (1966).

suit . . . is to be determined as a matter of federal law, by reference to the appropriate state statute of limitations." [144]

The First Circuit Court of Appeals, rejecting a six-month period of limitation, has held that "the logic of Hoosier Corp. dictates the adoption of express state statutes of limitation in the absence of an express federal limitation period." [145] That court could see no reason why such private litigation had to be limited by the same period as that used by the NLRB in unfair labor practice cases. The court predicted that "giving individual employees a period longer than the NLRB's six months [would] encourage initial recourse to the Board without precluding a subsequent civil suit if the Board refused to pursue the matter for the individual employee." [146]

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144 383 US at 702.

145 Figueroa v. Trabajadores Packinghouse, 425 F2d 281, 287 74 LRRM 2028 (CA 1, 1970), *cert. denied, sub nom.* Puerto Rico Telephone Co. v. Figueroa de Arroyo, —— US ——, 75 LRRM 2455 (1970).

146 74 LRRM at 2033. Additionally, the court rejected a theory of a "contractual basis" between the union and its members to support the union's duty of fair representation. The court concluded that "[t]he union's duty seems more akin to, though less rigorous than the duty of due care normally associated with tort actions." *Id.* at 2032.

APPENDIX TO TAB G

Ruzicka v. General Motors Corp.
Steele v. Louisville and Nashville
Railroad Company
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RUZICKA v. GENERAL MOTORS CORP.

U.S. Court of Appeals, Sixth Circuit (Cincinnati)

RUZICKA v. GENERAL MOTORS CORPORATION, INTERNATIONAL UNION, UAW, and LOCAL UNION 166, UAW, Nos. 74-1939, 74-1940, and 74-1941, September 23, 1975

LABOR MANAGEMENT RELATIONS ACT

—Section 301 action—Wrongful discharge — Violation of contract — Fair representation — Failure to process grievance—Breach of duty by international union ▶ 94.22 ▶ 5.10

Discharged employee-member of local union may not maintain action under Section 301 of LMRA against international union, with which local is affiliated, for breach of duty of fair representation, where it is alleged that local union failed to process member's grievance pursuant to contractual grievance-arbitration procedure. (1) Evidence fails to establish that international union, acted arbitrarily, discriminatorily, or in bad faith; and (2) there is no claim that local union was acting for or at direction of international union.

—Section 301 action—Violation of contract — Fair representation — Failure to process grievance ▶ 94.22

Local union acted "arbitrarily" and "perfunctorily" and thus breached its duty of fair representation when, without determination that grievance of its discharged employee-member was meritless, union official negligently allowed grievance to expire so as to preclude submission of grievance to arbitration.

—Section 301 action — Fair representation—Collateral estoppel ▶ 94.22

Discharged employee-member of local union is not collaterally estopped from maintaining action against union under Section 301 of LMRA for breach of union's duty of fair representation, where member is alleging that local union official had acted out of personal hostility in allowing employee's claim to expire, notwithstanding that intra-union forum had ruled that it could not be established "beyond reasonable doubt" that official's failure to process member's grievance was motivated by his personal and political differences with member; decision by intra-union forum did not resolve adversely to member issue of union official's negligence in handling the grievance.

—Section 301 action—Exhaustion of remedies ▶ 94.22

Discharged employee-member of union sufficiently exhausted his intra-union remedies and thus is not barred from maintaining action under Section 301 of LMRA Act against union for breach of its duty of fair representation in failing to process adequately member's grievance, since member's diligent processing of his complaint through 27 months of intra-union proceedings is far more than "at least some opportunity" for local union to resolve its dispute with him.

—Section 301 action—Union liability for conduct of official ▶ 94.22

In action under Section 301 of LMRA alleging that local union breached its duty of fair representation by union official's negligent processing of member's grievance, local union is liable for action of official notwithstanding its contention that his negligent failure to take required action was beyond his authority under union rules, since, as chairman of local union's shop committee, it was his responsibility to take action in question.

—Section 301 action—Union liability ▶ 94.22

Discharged employee-member of union may maintain action against local union, under Section 301 of LMRA, for breach of its duty of fair representation in its handling of employee's grievance brought under contractual grievance procedure, notwithstanding local's contention that even if "unfair representation" claim were proven, employer would solely be liable. Where union has breached its duty of fair representation, employer remains liable for any damages attributable to employer's wrongful discharge of employee, but union is liable for that portion of injury to member resulting in increases, if any, in those damages caused by union's failure to process his grievance properly.

—Section 301 action—Wrongful discharge ▶ 118.801 ▶ 94.22

In action under Section 301 of LMRA by discharged employee-member of union against employer for wrongful discharge in violation of collective bargaining contract, and against union for breach of its duty of fair representation, employer is not entitled to summary judgment, even

though there is no dispute that employee was intoxicated and then abused his foreman on day of discharge. Discharge is permitted under contract as penalty for offense admittedly committed by employee, but this does not foreclose existence of factual question of whether discharge was "harsh, arbitrary, and discriminatory penalty" when applied to employee's situation.

—Section 301 action — Fair representation — Arbitration ▶118.801 ▶94.22 ▶94.751

On remand of action under Section 301 of LMRA by discharged employee-member of union against employer for wrongful discharge, and against local union for breach of its duty of fair representation in processing employee's grievance, federal district court is advised to order arbitration of employee's grievance, but to retain jurisdiction of the case until claims against local union and employer are settled; however, if union's national agreement with employer is interpreted to mean that employer is relieved of its contractual duties because of union's failure to follow grievance procedures, district court should award appropriate relief against local union on the unfair representation claim.

Appeal from the U.S. District Court for the Eastern District of Michigan (86 LRRM 2030). Reversed and remanded.

See also 88 LRRM 2240; 85 LRRM 2419; and 79 LRRM 2327, 336 F.Supp. 842.

Robert J. Dinges (Glotta, Adelman, Dinges, Taylor, Davis & Middleton), Detroit, Mich., for employee.

Jordan Rosen and John A. Fillion, Detroit, Mich., for unions.

J. R. Wheatley, Detroit, Mich., for employer.

Before WEICK, CELEBREZZE, and McCree, Circuit Judges.

Full Text of Opinion

CELEBREZZE, Circuit Judge:—We consider an appeal and two cross-appeals from a District Court's judgment that Appellee Unions did not breach their duty of fair representation towards Appellant, a former employee of Appellee General Motors Corporation (GM). Appellant asks that this conclusion be reversed and that his action against the Unions and GM be reinstated. GM argues that alternative grounds exist for dismissing it from the case. The Unions also assert alternative grounds for dismissal and argue that their cross-claim to send Appellant's grievance to arbitration should have been granted. The arguments raise several significant issues concerning an individual employee's right to fair treatment from his Union, as well as the relationship of arbitration procedures and judicial recourse for aggrieved persons.

On March 31, 1970, Appellant William Ruzicka was discharged for being intoxicated on the job and using threatening and abusive language towards his superiors at GM's Willow Run Plan in Ypsilanti, Michigan. Appellant had worked there for nearly eleven years and had been actively involved in Union activities for much of that time.

Appellant initiated the grievance process under the National Agreement between GM and the United Auto Workers by filing a timely grievance protesting his discharge. He did not dispute the essential facts of intoxication and abusive language, but argued that discharge was an "unduly harsh" penalty which was inconsistent with past decisions of umpires interpreting the National Agreement. The Company completed the second step of the grievance process by filing an answer under Paragraph 77 of the National Agreement. The Union began the third step by filing a "notice of unadjusted grievance." To invoke arbitration, the Union was required by Paragraph 37 to file a "statement of unadjusted grievance" simultaneously with GM. The District Court found that Local 166 never filed such a statement, although it had sought and received two time extensions to do so. After the due date for the statement had passed, GM disclaimed further obligation under the National Agreement.

Appellant immediately pursued his intra-Union remedies under Article 31 of the UAW Constitution. Appellant argued that Charles Panter, a Local 166 official, had willfully failed to perform his duty in failing to file the required statement. A trial before a Local 166 Committee resulted in a finding that Panter had been negligent but not guilty of willful inaction. Appeals to higher levels failed.

Appellant also filed charges with the National Labor Relations Board, which investigated but dismissed them.

Appellant instituted further intra-Union action against Local 166 for wrongful processing of his grievance, but this action was unsuccessful at the Local level. An appeal to higher

levels was stayed pending resolution of a policy grievance that Panter's successor at Local 166 had filed. The policy grievance, which requested GM's consideration of Appellant's grievance despite the procedural problem, was withdrawn by Local 166 on April 24, 1971.

Rather than appeal the adverse decision on Local 166's processing of the grievance to the UAW's International Executive Board, Appellant filed a complaint in federal court on June 3, 1971. He alleged that Panter's personal "hostility" towards him had caused Panter not to file the statement of unadjusted grievance. He asserted that both the Local and International Unions had thus given him unfair representation, and he alleged that GM's discharge was wrongful and that GM had conspired to discharge him because of his Union activities.

The Unions filed a cross-claim against GM, seeking that the dispute be ordered to arbitration. After denying various pretrial motions, the District Court conducted a hearing limited to the question of unfair representation. It concluded that there was no unfair representation because Panter had merely "neglected" to file the required statement. The Court reasoned, "Mere hostility between the plaintiff and the union official is insufficient to show a breach [of the duty of fair representation under 29 U.S.C § 157 (1970)]; the plaintiff must show that the hostility tainted the official's conduct." Since "there was no showing in the case that hostility tainted Panter's processing of the grievance," Appellant's complaint was dismissed, along with the Unions' cross-claim.

We will first consider the question of unfair representation, for if the District Court's conclusion was correct, the action against both the Unions and GM must fail. See Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967). If the District Court erred, there remain for consideration the Unions' and GM's arguments that alternative grounds exist for dismissal. Finally, we must address the Unions' contention that their cross-claim to have Appellant's grievance ordered to arbitration was wrongfully dismissed.

Proof of unfair representation by a Union depends on showing that "a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190, 64 LRRM 2369, 2376 (1967). A review of Appellant's complaint and the facts developed at trial convince us that Appellant did not prove that officials of Appellee International Union had acted arbitrarily, discriminatorily, or in bad faith. In Hines v. Local 377, 506 F.2d 1153, 1157, 87 LRRM 2971, 2973 (6th Cir. 1974), cert. granted and limited to other ground, 43 LW 3571, 88 LRRM 3550 (Apr. 21, 1975), we stated:

> There was no claim that the local union was acting for or at the direction of the International, and appellant Hines, when asked on deposition what steps the International failed to take in investigating the company's charges replied: "I don't know of any steps that they should or should not have taken." Since there was no genuine issue as to a material fact about the conduct of the International Union, the grant of summary judgment was proper.

The Hines reasoning applies here, and we affirm the District Court's finding of no unfair representation by the International Union. We turn now to consideration of the liability, if any, of Local 166.

As discussed above, the District Court concluded that Local 166 had not unfairly represented Appellant because Agent Panter had merely "neglected" to file the required Statement of Unadjusted Grievance and had not acted in bad faith. Appellee Local urges that this conclusion be upheld, asserting that bad faith is an essential element of any claim of unfair representation.

We do not find the duty of fair representation so limited. In Vaca v. Sipes, 386 U.S. 171, 190, 64 LRRM 2369, 2376 (1967), the Supreme Court held that union actions which are "arbitrary, discriminatory, *or* in bad faith" (emphasis added) could establish a breach of the duty of fair representation. As we held in St. Clair v. Local 515, 422 F.2d 128, 130, 73 LRRM 2048 (6th Cir. 1969),

> The phrase "fair representation" is something of a term of art, and the standards by which we are bound have not been set down explicitly in a code. However, the Supreme Court has spoken clearly enough to guide us here. See Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842, 64 LRRM 2369 (1967). The Court there held that the duty of fair representation does not require a union to exhaust every theoretically available procedure simply on the demand of a union member. 386 U.S. at 192. . . . However, the ignoring or the perfunctory processing of a grievance may violate the duty of fair representation. Vaca v. Sipes, 386 U.S. at 194.

We agree with the Fourth Circuit's analysis of the three-pronged standard established in Vaca for determining whether a union has unfairly represented one of its members:

> A union must conform its behavior to each of these three separate standards. First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.

Griffin v. International Union of United Automobile Workers, 469 F.2d 181, 183, 81 LRRM 2485, 2486 (4th Cir. 1974). See also De Arroyo v. Sindicato De Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281, 74 LRRM 2028 (1st Cir.) cert. denied, 400 U.S. 877, 75 LRRM 2455 (1970).[1]

We believe that the District Court misread Vaca when it held that "bad faith" must be read into the separate and independent standards of "arbitrary" or "discriminatory" treatment. Union action which is arbitrary or discriminatory need not be motivated by bad faith to amount to unfair representation.

In the instant case Local 166 officials discussed Appellant's grievance among themselves and with GM personnel, but inexplicably neglected to take Appellant's grievance to the third state of processing by not filing a Statement of Unadjusted Grievance with the appropriate GM official. Having sought and been granted two extensions of time to file the Statement and at no time having decided that Appellant's claim was without merit, the Local allowed the final deadline to pass without filing the Statement or requesting a further extension. At this point the Local did not inform either Appellant or GM that it had decided either to continue or to stop processing Appellant's grievance. Such negligent handling of the grievance, unrelated as it was to the merits of Appellant's case, amounts to unfair representation. It is a clear example of arbitrary and perfunctory handling of a grievance.

The Unions argue that Dill v. Greyhound Corp., 435 F.2d 231, 238, 76 LRRM 2070 (6th Cir. 1970), cert. denied, 402 U.S. 952, 77 LRRM 2120 (1971), stands for the proposition that bad faith is an essential element of any claim of unfair representation. Dill held that bad faith was required to support a claim of unfair representation where the union in question had made a decision that the individual's grievance was without merit. In Dill we held that the interpretation by the company and union of the collective bargaining agreement was reasonable, so that refusing to invoke arbitration of Dill's grievance was a legitimate and proper way for the union to reject his view of the union's contract with the company. We do not deviate from our holding in Dill to conclude that when a union makes no decision as to the merit of an individual's grievance but merely allows it to expire by negligently failing to take a basic and required step towards resolving it, the union has acted arbitrarily and is liable for a breach of its duty of fair representation. As the Vaca Court stated,

> [A] union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion. . . .
>
> In administering the grievance and arbitration machinery as a statutory agent of the employees, a union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances.[2]

The Union made no decision as to the merits of Appellant's grievance, but merely allowed it to expire out of negligent and perfunctory handling. Thus, we must reverse the District Court's conclusion that Local 166 did not unfairly represent Appellant.

Local 166 argues through its cross-appeal that it should have been dismissed from the case for four alternative reasons.

First, it contends that Appellant should be collaterally estopped from pursuing his action because an intra-Union forum had decided his case adversely to him.

A Trial Committee of Local 166, to which Appellant took his *case against Panter under Article 31 of the UAW constitution*, decided that Panter

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1 De Arroyo is parallel to the instant case. There, seven employees were discharged allegedly because of automation but in violation of seniority provisions. Their union failed to press their grievance of an honestly mistaken belief that certain NLRB relief extended to them. The First Circuit found that good-faith mistaken belief was an unacceptable excuse for not pursuing the grievances and amounted to arbitrary and perfunctory processing, which Vaca explicitly stated was one ground for a finding of unfair representation.

2 386 U.S. at 191, 194, 64 LRRM at 2377, 2378.

was not guilty of "consciously and purposely intending to allow a grievance to expire." The International Union's Appeals Committee agreed with this conclusion, stating,

> [T]here is no evidence of any kind to indicate beyond a reasonable doubt that [Panter's] failure to secure management's Statements was motivated by personal and political differences over the years between him and [Appellant].

The UAW's Public Review Board, which sustained the International Executive Board's affirmance of its Appeals Committee, noted that the only issue before Local 166's Trial Committee

> was whether Mr. Panter intentionally let the grievance fail and in so doing was motivated by political considerations; the issue of his negligence or lack thereof was irrelevant.

The District Court held in a pretrial order that the Trial Committee's decision did not collaterally estop Appellant from arguing in federal court that Panter had acted out of personal hostility in not filing a Statement of Unadjusted Grievance, in view of the "beyond a reasonable doubt" standard which prevailed before that forum. We agree with the District Court.

Furthermore, in view of our holding, it is clear that the issue of Panter's negligence was not resolved adversely to Appellant by the Trial Committee, but that its decision supports the District Court's conclusion that Panter "'neglected" to file the required Statement. Local 166's argument in this respect must, therefore, fail.[3]

Second, Local 166 argues that Appellant failed to exhaust his intra-Union remedies and, under Bsharah v. Eltra Corp., 394 F.2d 502, 68 LRRM 2255 (6th Cir. 1968), should be barred from taking his case to court. Specifically, the Local contends that Appellant should have appealed the adverse decision of the Local's rejection of his intra-Union claim that it had wrongfully processed his grievance.

For a period of 27 months, from March 1970 through June 1972, Appellant sought intra-Union relief against Local 166. We agree with the District Court that this was sufficient exhaustion of intra-Union remedies to permit it to hear his case. In Bsharah we affirmed the grant of summary judgment against an employee who had "failed to allege or show any attempt to initiate her intra-Union remedies prescribed by the constitution and by-laws of the International Union." 394 F.2d at 503, 68 LRRM at 2256. The reason for this requirement is that intra-Union remedies are part and parcel of the industrial in-house procedure for settling labor disputes. The primary benefit of requiring initial submission of employee complaints against a union that refuses to help process a grievance against a company is that internal machinery can settle difficulties short of court action. Thus, federal policy requires "staying the hand of 'judicial interference with the internal affairs of a labor organization until it has had at least some opportunity to resolve disputes concerning its own internal affairs.'" Imel v. Zohn Mfg. Co., 481 F.2d 181, 183, 83 LRRM 2797 (10th Cir. 1973), cert. denied, 415 U.S. 915, 85 LRRM 2465 (1974), quoting Brady v. Trans-World Airlines, 401 F.2d 87, 104, 69 LRRM 2048 (3rd Cir. 1968), cert. denied, 393 U.S. 1048, 70 LRRM 2249 (1969).

Appellant's diligent processing of his complaint through 27 months of intra-Union proceedings is far more than "at least some opportunity" for Local 166 to resolve its dispute with him. The requirement of exhaustion of intra-Union remedies is bottomed on the hope that such procedures will quickly resolve disputes without the delay inherent in the judicial process and with the aid of persons experienced at resolving member-union conflicts short of a full-blown judicial proceeding. When that hope has failed, however, the member is not barred from proceeding to federal court with a claim of unfair representation. To conclude otherwise would allow a union to prevent any claim against it from reaching the state of litigation by forcing aggrieved members through endless stages of review.

Third, Local 166 maintains that Panter's inaction in failing to file the required Statement was beyond his authority under Union rules, so that it is not liable for his negligence.

Panter was Chairman of the Shop Committee of Local 166, and it was his responsibility to file Statements of Unadjusted Grievance with GM officials. His action or inaction in that job was clearly attributable to his principal, Local 166. Barefoot v. Team-

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[3] We need not address the problem of when collateral estoppel applies to intra-Union decisions when the adversely affected member alleges in court that the Union acted in breach of its duty of fair representation.

sters Union, 424 F.2d 1001, 1004-05, 73 LRRM 2885 (10th Cir.), cert. denied, 400 U.S. 950, 75 LRRM 2752 (1970).

Finally, Local 166 argues that because no damages could be established even if an unfair representation claim were proven, dismissal is proper. It argues that "GM, if any party, would be solely liable to plaintiff."

Appellant's complaint asserts that GM and the Unions are jointly and severally liable for his injury. This is not true. When a union breaches its duty of fair representation, the employer remains liable for any damages "attributable solely to the employer's breach of contract," i.e., the wrongful discharge. Vaca, 386 U.S. at 197, 64 LRRM at 2379.

When a breach of the duty of fair representation is shown, however, the Union is liable for that portion of Appellant's injury representing "increases if any in those damages [chargeable to the employer] caused by the union's refusal to process the grievance." Vaca, 386 U.S. at 197-98, 64 LRRM at 2380. Thus, upon a finding of unfair representation, "the court must fashion an appropriate remedy," 386 U.S. at 187, 64 LRRM at 2375, compensating Appellant from the Union's pocket for those expenses he incurred because of the Union's failure to process his grievance properly.

Since none of the grounds urged in Local 166's cross-appeal requires dismissal of Appellant's complaint against it, we reverse the District Court's judgment in its favor and remand for a finding of appropriate relief.

Our holding that the Local breached its duty of fair representation requires reversal of the District Court's dismissal of Appellant's claim against GM. When the Union has failed in its duty to fairly represent an employee, the employer may not invoke the Union's failure to follow procedures set forth in the collective bargaining agreement as a defense to the action of the employee. Vaca v. Sipes, 386 U.S. at 185.

GM has filed a cross-appeal which asserts that dismissal of Appellant's claim against it should nonetheless be affirmed on two alternative grounds. First, it argues that the complaint raises no factual issues and that it is entitled to summary judgment on the merits. Second, GM contends that dismissal should have been granted because of Appellant's failure to exhaust his intra-Union remedies. The District Court rejected both arguments in pre-trial orders.

The second ground is quickly rejected. As we stated above, Appellant sufficiently exhausted his intra-Union remedies to give the District Court jurisdiction. See also Scott v. Anchor Motor Freight, Inc., 496 F.2d F.2d at 279, 86 LRRM 2190.

The first ground is that Appellant raised no genuine factual issue concerning his claim that discharge was so excessive a penalty for his offense as to amount to a breach of the collective bargaining agreement between GM and the UAW. There appears to be no dispute that Appellant was intoxicated on the day in question and that he was abusive towards his foreman. Appellant's claim is that discharge was unwarranted in view of past treatment of similar offenses, which allegedly consisted of temporary suspension rather than discharge. His claim as stated in the original complaint was that discharge was "unduly harsh, arbitrary, discriminatory and contrary to past interpretations" of the UAW-GM National Agreement Appellant filed a motion to amend his complaint to clarify the basis of this allegation, but the record filed on appeal contains no copy of the proposed amended complaint and the District Court took no action on Appellant's motion to amend.

Before trial GM filed a motion for summary judgment, asserting that under Rule 56, F. R. Civ. P., it was entitled to judgment as a matter of law. Its supporting brief argued that because discharge was *permitted* under the National Agreement as a penalty for the offense Appellant allegedly committed, Appellant could not establish that discharge amounted to a breach of contract. The District Court denied this motion, stating:

> [T]he question is whether imposition of the discharge sanction in Ruzicka's case constituted a breach of contract by General Motors and this must be decided on the particular facts of this case.[4]

We have reviewed GM's supporting documents which accompanied its motion for summary judgment. The two affidavits and other materials support its claim that discharge is a permissible penalty which was employed once before (and upheld by an arbitrator) in a case somewhat similar to Appellant's. These materials do not, however, foreclose as a factual

[4] Order, 85 LRRM 2419, Civil No. 36598 (E.D. Mich., filed Apr. 25, 1973).

question whether discharge was a harsh, arbitrary, and discriminatory penalty in view of all the circumstances of Appellant's situation. Accordingly, we cannot find that Appellant's allegation concerning the discharge is beyond factual dispute, and we cannot overturn the District Court's refusal to grant summary judgment on the merits.

On remand, the District Court will be free to consider Appellant's motion to amend his complaint, and GM will be able to renew its motion for summary judgment. If a renewed motion is accompanied by materials which indicate that discharge is an ordinary penalty for someone in Appellant's position, considering the facts surrounding the discharge, Appellant's seniority, his past work record, and other matters relevant to the issue, Appellant will be required to demonstrate that there remains a factual issue by alleging specific facts to counteract GM's showing. Rule 56 (e), F.R.Civ.P.; R.E. Cruise, Inc. v. Bruggeman, 508 F.2d 415 (6th Cir. 1975). At this point, however, we may not foreclose Appellant's opportunity to prove his case against GM.

Having reversed the District Court's dismissal of Appellant's claim against Local 166 and GM and having found no alternative basis entitling the Local or GM to dismissal, we are left with a final question. This is raised by the Unions' cross-appeal, which seeks to overturn the District Court's denial of summary judgment concerning their cross-claim against GM and the eventual dismissal thereof.

The cross-claim sought to force GM to process the grievance further or to send it directly to arbitration, despite the Unions' failure to follow procedures mandated by the National Agreement. On May 15, 1973, the District Court ordered the grievance submitted to an Umpire. Included in this Order was the requirement that the Umpire consider the issues of arbitrability and unfair representation, as well as the propriety of Appellant's discharge. Thus, the District Court originally granted the Union's motion for summary judgment on their cross-claim, though on terms different from those requested by the Unions.

On August 31, 1973, the District Court impliedly revoked the May 15 Order by ordering that Appellant's charges of unfair representation be submitted to the Court for trial. Only if the Court found unfair representation would the grievance be submitted to a GM-UAW Umpire.

Based on the finding of no unfair representation, the District Court ordered dismissal of the entire action, including the Union's cross-claim.

The Unions' cross-appeal purports to be an attack on the District Court's denial of all its pre-trial motions. The relief requested is that this Court

> reverse the District Judge's dismissal of the Unions' cross-claim against defendant General Motors and . . . order further processing of plaintiff's contract grievance pursuant to the GM-UAW Agreement or, in the alternative only, modify the Judge's final order to provide that dismissal of said cross-claim was without prejudice.

In view of our reversal of the unfair representation conclusion, we need not decide whether the Unions' cross-claim was well taken had there been no unfair representation. Nor need we decide whether, in that event, further processing of the grievance should be ordered instead of merely providing that dismissal of the cross-claim was without prejudice.

Were we to decide that the District Court should have granted the Unions' motion for summary judgment on their cross-claim, we would affect Appellant's ability to bring his case to a conclusion. The difficulty raised by the Unions' cross-appeal is that if further processing of the grievance within the GM-UAW structure is ordered, Appellant has been deprived of the opportunity to attain judicial resolution of his claim.

Thus, we are compelled to comment on the proper course of action for the District Court to take on remand. Its choice is basically between ordering the grievance submitted to arbitration or deciding itself the merits of Appellant's claim against GM.

This choice embodies two sets of interests. On the one hand, there is the strong interest in settling industrial disputes through arbitration. As discussed in the Steelworkers Trilogy, 363 U.S. 574, 64 LRRM 2416 (1960), arbitration "is the substitute for industrial strife. . . . [A]rbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 578, 64 LRRM 2416 (1960). An individual employee may prefer submitting his grievance to an arbitrator rather than a judge because the arbitrator is not bound to apply only those considerations expressed in the collective bar-

gaining agreement. The parties to such an agreement

expect that [the arbitrator's] judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.[5]

Thus, the Supreme Court held in Steelworkers that

[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.[6]

Furthermore, because of its more informal nature, the arbitration proceeding is "an efficient, inexpensive, and expeditious means for dispute resolution." Alexander v. Gardner-Denver Co., 415 U.S. 36, 58, 7 FEP Cases 81, 89 (1974).

On the other hand, there is the interest in affording an aggrieved employee a final resolution of his claim. Appellant was discharged on March 31, 1970. Five years is far too long for an employee to await a final decision on his demand for reinstatement with back pay. Further delay would seem unconscionable. Having met the heavy burden of showing that his Union unfairly represented him, Appellant is entitled to a judicial decision on his claim against the employer. Vaca, 486 U.S. at 186.

We believe that these interests can both be served if the District Court orders arbitration but retains jurisdiction of the case until the claims against the Local and GM are settled. If the National Agreement is interpreted to mean that GM is relieved of its contractual duties because of the Union's failure to follow grievance procedures, the District Court should proceed to award appropriate relief [7] against Local 166 on the unfair representation claim. To ensure a prompt conclusion to these proceedings, furthermore, the District Court should consider specifying a particular time within which arbitration should be completed. See, e.g., Northwest Airlines, Inc. v. Machinists Workers, 442 F.2d 244, 246, 77 LRRM 2100 (8th Cir. 1970).

Accordingly, we reverse the District Court's dismissal of the Unions' cross-claim and grant the relief specified.

The Judgment of the District Court is reversed, and the cause is remanded for proceedings consistent with this Opinion. The costs of the main appeal will be divided between GM, on the one hand, and Local 166, on the other, in equal amounts. The costs of the cross-appeal of the Unions will be borne by GM, along with the costs of GM's cross-appeal.

Concurring Opinion

McCREE, Circuit Judge (Concurring):—I concur in the holding of the majority opinion that the local union breached the duty of fair representation that it owed appellant. However, I write separately because I do not believe that the local union's handling of the grievance was "arbitrary" or "perfunctory" as the majority opinion determines. The district court determined that the union, through Panter, *neglected* to file a timely statement of unadjusted grievance, and the majority opinion does not overturn this finding. Instead, it characterizes the negligent handling of the grievance as arbitrary and perfunctory.

Arbitrary and *perfunctory* are adjectives characterizing *intentional* conduct that is capricious or superficial. Here there was an *unintentional* failure to act that prevented appellant's grievance from being submitted to arbitration.

Nevertheless, I would hold that when a statutorily established exclusive bargaining representative fails to file a statement that is a prerequisite for submission of an employee's claim to arbitration, not because the union has made a good faith judgment for a lawful reason that it should not file the document, but merely because of its negligent omission, then it has breached its duty of fair representation.

I do not suggest however, that a union should be held liable for all negligence in processing an employee's grievance. Such a rule would put the courts in the position of second-

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[5] Steelworkers v. Warrior & Gulf Co., 363 U.S. at 582, 46 LRRM at 2419.

[6] Id. at 582, 83, 46 LRRM at 2419-20.

[7] The questions of the proper allocation of damages between Local 166 and GM and of the measure of the Local's liability in the event that the grievance is found to be without merit are not before us.

guessing union representatives' decisions. In accordance with the "general congressional policy favoring expert, centralized administration and remedial action" of employee grievances, Motor Coach Employees v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1970), I believe courts should not try to determine whether, in fulfilling its duty of fair representation, a union has adopted the tactic best suited to the needs of an aggrieved employee.

Nevertheless, I believe that a total failure to act, whether negligent or intentional, except for a proper reason, is behavior so egregious that, as in the case of bad faith, hostile discrimination, arbitrariness, or perfunctoriness, the union should be held responsible. We have stated that an action will lie against a union for ". . . such gross mistake or inaction as to imply bad faith." Balowski v. International Union, 372 F.2d 829, 834, 64 LRRM 2397, 2399 (1967). It requires only a slight extension of this principle to require the local to answer to a member if it precludes any consideration of the employee's grievance by its sheer neglect to timely file a paper that the employee is prevented by law from filing for himself.

I believe that the incidence of an injury of this magnitude should be shifted from the innocent employee to the union whose flagrant negligence was responsible for it.

SUPREME COURT OF THE UNITED STATES

STEELE v. LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL., No. 45. Dec. 18, 1944

RAILWAY LABOR ACT

—Injunctions—Requirements of Act—Jurisdiction of federal district court

Negro fireman may apply to federal court to require union which holds agreement with employing railroad to cease discrimination against Negroes in craft which it represents and to enjoin enforcement of allegedly discriminatory agreement between railroad and union since Railway Labor Act (1 LRR Man. 843) requires unions chosen under its authority by majority of members of craft to represent all employees of craft without discrimination as to race and thereby protect equally rights of minority. Labor organization chosen as bargaining representative must represent all members of craft regardless of union affiliations or lack of affiliation since exercise of granted power to act on behalf of others involves duty to act for all.

Negro fireman allegedly discriminated against in collective bargaining agreement between employer and union purporting to represent craft in which fireman is employed may apply to court for remedy since National Railway Adjustment Board established under Railway Labor Act (1 LRR Man. 843) cannot provide relief sought because it does not refer to disputes between employees and their representatives and because of its policy of refusing complaints by individual members of a craft represented by a labor organization. Also, since majority prescribe rules and select members of Board, firemen would be required to appear before group largely composed of those against whom real complaint is made.

—National Adjustment Board—Adjustable disputes under Act—Review jurisdiction of U.S. Supreme Court

Negro railroad fireman alleging racial discrimination in collectivc bargaining agreement between employer and union exclusively representing his craft is right claimed under Constitution and federal statute and therefore reviewable by U. S. Supreme Court under Section 237(b) of Judicial Code since this is not jurisdictional dispute determinable under Labor Act or matter reserved for voluntary settlement or reference to Railroad Adjustment Board as contract interpretation.

On writ of certiorari to the Supreme Court of the State of Alabama. Reversed.

Charles H. Houston (Joseph C. Waddy and Oliver W. Hill on the brief) for petitioner.

James A. Simpson of Birmingham, Ala. (Harold C. Heiss and Russell B. Day, both of Cleveland, Ohio, and John W. Lapsley and Lange, Simpson, Brantley & Robinson, all of Birmingham, Ala., on the brief) for respondent Brotherhood of Locomotive Firemen and Enginemen.

Charles H. Eyster (White E. Gibson on the brief) for respondent Louisville & Nashville R. R. Co.

Charles Fahy, Solicitor General, Robert L. Stern, Alvin J. Rockwell, General Counsel, National Labor Relations Board; Ruth Weyand, Joseph B. Robison, Frank Donner, and Marcel Mallet-Prevost filed brief on behalf of the United States as amicus curiae.

Thurgood Marshall and William H. Hastie filed brief on behalf of National Association for the Advancement of Colored People as amicus curiae.

Edgar Watkins, John D. Miller, Jo Drake Arrington, Shirley Adelson, Arthur Garfield Hays, R. Beverly Herbert, T. Pope Shepherd, Jordan Stokes III, and Howard B. Lee filed brief on behalf of American Civil Liberties Union as amicus curiae.

Full Text of Opinion

Mr. Chief Justice STONE delivered the opinion of the Court.

The question is whether the Railway Labor Act, 48 Stat. 1185, 45 U.S.C. Secs. 151 et seq. [1 LRR Man. 843], imposes on a labor organization, acting by authority of the statute as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all the employees in the craft without discrimination because of their race, and, if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation.

The issue is raised by demurrer to the substituted amended bill of complaint filed by petitioner, a locomotive fireman, in a suit brought in the Alabama Circuit Court against his employer, the Louisville & Nashville Railroad Company, the Brotherhood of Locomotive Firemen and Enginemen, an unincorporated labor organization, and certain individuals representing the Railroad or the Brotherhood. The Circuit Court sustained the demurrer, and the Supreme Court of Alabama affirmed. 245 Ala. 113, 16 So. 2d 416. We granted certiorari, 322 U.S. 722, the question presented being one of importance in the administration of the Railway Labor Act.

The allegations of the bill of complaint, so far as now material, are as follows: Petitioner, a negro, is a locomotive fireman in the employ of respondent railroad, suing on his own behalf and that of his fellow employees who, like petitioner, are negro firemen employed by the Railroad. Respondent Brotherhood, a labor organization, is, as provided under Sec. 2, Fourth of the Railway Labor Act, the exclusive bargaining representative of the craft of firemen employed by the Railroad and is recognized as such by it and the members of the craft. The majority of the firemen employed by the Railroad are white and are members of the Brotherhood, but a substantial minority are negroes who, by the constitution and ritual of the Brotherhood, are excluded from its membership. As the membership of the Brotherhood constitutes a majority of all firemen employed on respondent Railroad, and as under Sec. 2, Fourth the members because they are the majority have the right to choose and have chosen the Brotherhood to represent the craft, petitioner and other negro firemen on the road have been required to accept the Brotherhood as their representative for the purposes of the Act.

On March 28, 1940, the Brotherhood, purporting to act as representative of the entire craft of firemen, without informing the negro firemen or giving them opportunity to be heard, served a notice on respondent Railroad and on twenty other railroads operating principally in the southeastern part of the United States. The notice announced the Brotherhood's desire to amend the existing collective bargaining agreement in such manner as ultimately to exclude all negro firemen from the service. By established practice on the several railroads so notified only white firemen can be promoted to serve as engineers, and the notice proposed that only "promotable", i. e. white, men should be employed as firemen or assigned to new runs or jobs or permanent vacancies in established runs or jobs.

On February 18, 1941, the railroads and the Brotherhood, as representative of the craft, entered into a new agreement which provided that not more than 50% of the firemen in each class of service in each seniority district of a carrier should be negroes; that until such percentage should be reached all new runs and all vacancies should be filled by white men; and that the agreement did not sanction the employment of negroes in any seniority district in which they were not working. The agreement reserved the right of the Brotherhood to negotiate for further restrictions on the employment of negro firemen on the individual railroads. On May 12, 1941, the Brotherhood entered into a supplemental agreement with respondent Railroad further controlling the seniority rights of negro firemen and restricting their employment. The negro firemen were not given notice or opportunity to be heard with respect to either of these agreements, which were put into effect before their existence was disclosed to the negro firemen.

Until April 8, 1941, petitioner was in a "passenger pool", to which one white and five negro firemen were assigned. These jobs were highly desirable in point of wages, hours and other considerations. Petitioner had

performed and was performing his work satisfactorily. Following a reduction in the mileage covered by the pool, all jobs in the pool were, about April 1, 1941, declared vacant. The Brotherhood and the Railroad, acting under the agreement, disqualified all the negro firemen and replaced them with four white men, members of the Brotherhood, all junior in seniority to petitioner and no more competent or worthy. As a consequence petitioner was deprived of employment for sixteen days and then was assigned to more arduous, longer, and less remunerative work in local freight service. In conformity to the agreement, he was later replaced by a Brotherhood member junior to him, and assigned work on a switch engine, which was still harder and less remunerative, until January 3, 1942. On that date, after the bill of complaint in the present suit had been filed, he was reassigned to passenger service.

Protests and appeals of petitioner and his fellow negro firemen, addressed to the Railroad and the Brotherhood, in an effort to secure relief and redress, have been ignored. Respondents have expressed their intention to enforce the agreement of February 18, 1941 and its subsequent modifications. The Brotherhood has acted and asserts the right to act as exclusive bargaining representative of the firemen's craft. It is alleged that in that capacity it is under an obligation and duty imposed by the Act to represent the negro firemen impartially and in good faith; but instead, in its notice to and contracts with the railroads, it has been hostile and disloyal to the negro firemen, has deliberately discriminated against them, and has sought to deprive them of their seniority rights and to drive them out of employment in their craft, all in order to create a monopoly of employment for Brotherhood members.

[RELIEF REQUESTED]

The bill of complaint asks for discovery of the manner in which the agreements have been applied and in other respects; for an injunction against enforcement of the agreements made between the Railroad and the Brotherhood; for an injunction against the Brotherhood and its agents from purporting to act as representative of petitioner and others similarly situated under the Railway Labor Act, so long as the discrimination continues, and so long as it refuses to give them notice and hearing with respect to proposals affecting their interests; for a declaratory judgment as to their rights; and for an award of damages against the Brotherhood for its wrongful conduct.

[RULING OF STATE COURT]

The Supreme Court of Alabama took jurisdiction of the cause but held on the merits that petitioner's complaint stated no cause of action.[1] It pointed out that the Act places a mandatory duty on the Railroad to treat with the Brotherhood as the exclusive representative of the employees in a craft, imposes heavy criminal penalties for willful failure to comply with its command, and provides that the majority of any craft shall have the right to determine who shall be the representative of the class for collective bargaining with the employer, see Virginian Railway Co. v. System Federation, 300 U. S. 515, 545 [1 LRR Man. 743]. It thought that the Brotherhood was empowered by the statute to enter into the agreement of February 18, 1941, and that by virtue of the statute the Brotherhood has power by agreement with the Railroad both to create the seniority rights of petitioner and his fellow negro employees and to destroy them. It construed the statute, not as creating the relationship of principal and agent between the members of the craft and the Brotherhood, but as conferring on the Brotherhood plenary authority to treat with the Railroad and enter into contracts fixing rates of pay and working conditions for the craft as a whole without any legal obligation or duty to protect the rights of minorities from discrimination or unfair treatment, however gross. Consequently it held that neither the Brotherhood nor the Railroad violated any rights of petitioner or his fellow negro employees by negotiating the contracts discriminating against them.

If, as the state court has held, the

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1 The respondents urge that the Circuit Court sustained their demurrers on the ground that the suit could not be maintained against the Brotherhood, an unincorporated association, since by Alabama statute such an association cannot be sued unless the action lies against all its members individually, and on several other state-law grounds. They argue accordingly that the judgment of affirmance of the state Supreme Court may be rested on an adequate non-federal ground. As that court specifically rested its decision on the sole ground that the Railway Labor Act places no duty upon the Brotherhood to protect petitioner and other negro firemen from the alleged discriminatory treatment, the judgment rests wholly on a federal ground, to which we confine our review. Grayson v. Harris, 267 U. S. 352, 358; International Steel Co. v. National Surety Co., 297 U. S. 657, 666; Indiana ex rel. Anderson v. Brand, 303 U. S. 95, 98, 99 and cases cited.

Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights. If the Railway Labor Act purports to impose on petitioner and the other negro members of the craft the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members, we must decide the constitutional questions which petitioner raises in his pleading.

[REQUIREMENTS OF ACT]

But we think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority. Since petitioner and the other negro members of the craft are not members of the Brotherhood or eligible for membership, the authority to act for them is derived not from their action or consent but wholly from the command of the Act. Section 2, Fourth provides: "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act * * *". Under Secs. 2, Sixth and Seventh, when the representative bargains for a change of working conditions, the latter section specifies that they are the working conditions of employees "as a class". Section 1, Sixth of the Act defines "representative" as meaning "Any person or * * * labor union * * * designated either by a carrier or a group of carriers or by its or their employees to act for it or them". The use of the word "representative", as thus defined and in all the contexts in which it is found, plainly implies that the representative is to act on behalf of all the employees which, by virtue of the statute, it undertakes to represent.

By the terms of the Act, Sec. 2, Fourth, the employees are permitted to act "through" their representative, and it represents them "for the purposes of" the Act. Sections 2, Third, Fourth, Ninth. The purposes of the Act declared by Sec. 2 are the avoidance of "any interruption to commerce or to the operation of any carrier engaged therein," and this aim is sought to be achieved by encouraging "the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions." Compare Texas & New Orleans Railroad Co. v. Brotherhood of Railway Clerks, 281 U. S. 548, 569. These purposes would hardly be attained if a substantial minority of the craft were denied the right to have their interests considered at the conference table and if the final result of the bargaining process were to be the sacrifice of the interest of the minority by the action of a representative chosen by the majority. The only recourse of the minority would be to strike, with the attendant interruption of commerce, which the Act seeks to avoid.

Section 2, Second, requiring carriers to bargain with the representative so chosen, operates to exclude any other from representing a craft. Virginian Railway Co. v. System Federation, supra, 545. The minority members of a craft are thus deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining. Order of Railroad Telegraphers v. Railway Express Agency, 321 U. S. 342 [14 LRR 19, 14 LRR Man. 506], and see under the like provisions of the National Labor Relations Act J. I. Case Co. v. Labor Board, 321 U. S. 332 [14 LRR 17, 14 LRR Man. 501], and Medo Photo Supply Corp. v. Labor Board, 321 U. S. 678 [14 LRR 196, 14 LRR Man. 581].

The labor organization chosen to be the representative of the craft or class of employees is thus chosen to represent all of its members, regardless of their union affiliations or want of them. As we have pointed out with respect to the like provision of the National Labor Relations Act in J. I. Case Co. v. Labor Board, supra, 338, "The very purpose of providing by statute for the collective agreement is to supersede the terms of

separate agreements by employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit. * * *" The purpose of providing for a representative is to secure those benefits for those who are represented and not to deprive them or any of them of the benefits of collective bargaining for the advantage of the representative or those members of the craft who selected it.

As the National Mediation Board said In The Matter of Representation of Employees of the St. Paul Union Depot Company, Case No. R-635: "Once a craft or class has designated its representative, such representative is responsible under the law to act for all employees within the craft or class, those who are not members of the represented organization, as well as those who are members."[2]

Unless the labor union representing a craft owes some duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such in the contracts which it makes as their representative, the minority would be left with no means of protecting their interests or, indeed, their right to earn a livelihood by pursuing the occupation in which they are employed. While the majority of the craft chooses the bargaining representative, when chosen it represents, as the Act by its terms makes plain, the craft or class, and not the majority. The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents.[3] It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed.

We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, cf. J. I. Case Co. v. Labor Board, supra, 335, but it has also imposed on the representative a corresponding duty. We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.

[RIGHTS OF UNIONS]

This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a

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2 The Mediation Board's decision in this case was set aside in Brotherhood of Railway & Steamship Clerks v. United Transport Service Employees, 137 F. 2d 817 [12 LRR 873, 12 LRR Man. 861], reversed on jurisdictional grounds 320. U. S. 715 [13 LRR Man. 850]. The Court of Appeals was of the opinion that a representative is not only required to act in behalf of all the employees in a bargaining unit, but that a labor organization which excludes a minority of a craft from its membership has no standing to act as such representative of the minority.

The Act has been similarly interpreted by the Emergency Board referred to in General Committee v. Southern Pacific Co., 320 U. S. 338, 340, 342-343 n. [13 LRR 392, 13 LRR Man. 635]. It declared in 1937: "When a craft or class, through representatives chosen by a majority, negotiates a contract with a carrier all members of the craft or class share in the rights secured by the contract regardless of their affiliation with any organization of employees. * * * The representatives of the majority represent the whole craft or class in the making of an agreement for the benefit of all * * *."

3 Compare the House Committee Report on the N. L. R. A. (H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 20-22) indicating that although the principle of majority rule "written into the statute books by Congress in the Railway Labor Act of 1934" was to be applicable to the bargaining unit under the N. L. R. A., the employer was required to give "equally advantageous terms to nonmembers of the labor organization negotiating the agreement." See also the Senate Committee Report on the N. L. R. A. to the same effect. S. Rep. No. 573, 74th Cong., 1st Sess., p. 13.

craft, all of whose members are not identical in their interest or merit. Cf. Carmichael v. Southern Coal Co., 301 U. S. 495, 509-510, 512 and cases cited; Washington v. Superior Court, 289 U. S. 361, 366; Metropolitan Co. v. Brownell, 294 U. S. 580, 583. Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations. Cf. Yick Wo v. Hopkins, 118 U. S. 356; Yu Cong Eng v. Trinidad, 271 U. S. 500; Missouri ex rel. Gaines v. Canada, 305 U. S. 337; Hill v. Texas, 316 U. S. 400.

The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making. In both cases the right asserted, which is derived from the duty imposed by the statute on the bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct. "The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted." Deitrick v. Greaney, 309 U.S. 190, 200-201; Board of County Commissioners v. United States, 308 U.S. 343; Sola Electric Co. v. Jefferson Co., 317 U.S. 173, 176-7; cf. Clearfield Trust Co. v. United States, 318 U.S. 363.

So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. Wherever necessary to that end, the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing upon its proposed action.

[FEDERAL QUESTION]

Since the right asserted by petitioner "is * * * claimed under the Constitution" and a "statute of the United States," the decision of the Alabama court, adverse to that contention is reviewable here under Sec. 237(b) of the Judicial Code, unless the Railway Labor Act itself has excluded petitioner's claims from judicial consideration. The question here presented is not one of a jurisdictional dispute, determinable under the administrative scheme set up by the Act, cf. Switchmen's Union v. National Mediation Board, 320 U.S. 297 [13 LRR 382, 13 LRR Man. 616]; General Committee v. M.-K.-T. R. Co., 320 U.S. 323 [13 LRR 388, 13 LRR Man. 627]; General Committee v. Southern Pacific Co., 320 U.S. 338 [13 LRR 392, 13 LRR Man. 635]; Brotherhood of Railway & Steamship Clerks v. United Transport Service Employees, 320 U.S. 715, 816 [12 LRR 875, 12 LRR Man. 861], or restricted by the Act to voluntary settlement by recourse to the traditional implements of mediation, conciliation and arbitration. General Committee v. M.-K.-T. R. Co., supra, 332, 337. There is no question here of who is entitled to represent the craft, or who are members of it, issues which have been relegated for settlement to the Mediation Board, Switchmen's Union v. National Mediation Board, supra; General Committee v. M.-K.-T. R. Co., supra. Nor are there differences as to the interpretation of the contract which by the Act are committed to the jurisdiction of the Railroad Adjustment Board.

Section 3, First (i), which provides for reference to the Adjustment Board of "disputes between an employee or group of employees and a carrier or

carriers growing out of grievances or out of the interpretation or application of agreements," makes no reference to disputes between employees and their representative. Even though the dispute between the railroad and the petitioner were to be heard by the Adjustment Board, that Board could not give the entire relief here sought. The Adjustment Board has consistently declined in more than 400 cases to entertain grievance complaints by individual members of a craft represented by a labor organization. "The only way that an individual may prevail is by taking his case to the union and causing the union to carry it through to the Board." Administrative Procedure in Government Agencies, S. Doc. No. 10, 77th Cong., 1st Sess., Pt. 4, p. 7. Whether or not judicial power might be exerted to require the Adjustment Board to consider individual grievances, as to which we express no opinion, we cannot say that there is an administrative remedy available to petitioner or that resort to such proceedings in order to secure a possible administrative remedy, which is withheld or denied, is prerequisite to relief in equity. Further, since Sec. 3, First (c) permits the national labor organizations chosen by the majority of the crafts to "prescribe the rules under which the labor members of the Adjustment Board shall be selected" and to "select such members and designate the division on which each member shall serve," the negro firemen would be required to appear before a group which is in large part chosen by the respondents against whom their real complaint is made. In addition Sec. 3, Second provides that a carrier and a class or craft of employees, "all acting through their representatives, selected in accordance with the provisions of this Act," may agree to the establishment of a regional board of adjustment for the purpose of adjusting disputes of the type which may be brought before the Adjustment Board. In this way the carrier and the representative against whom the negro firemen have complained have power to supersede entirely the Adjustment Board's procedure and to create a tribunal of their own selection to interpret and apply the agreements now complained of to which they are the only parties. We cannot say that a hearing, if available, before either of these tribunals would constitute an adequate administrative remedy. Cf. Tumey v. Ohio, 273 U.S. 510. There is no administrative means by which the negro firemen can secure separate representation for the purposes of collective bargaining. For the Mediation Board "has definitely ruled that a craft or class of employees may not be divided into two or more on the basis of race or color for the purpose of choosing representatives." [4]

[NO ADMINISTRATIVE REMEDY]

In the absence of any available administrative remedy, the right here asserted is of judicial cognizance, to a remedy for breach of the statutory duty of the bargaining representative to represent and act for the members of a craft. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction. Switchmen's Union v. National Mediation Board, supra, 300; Stark v. Wickard, 321 U.S. 288, 306-7. Here, unlike General Committee v. M.-K.-T. R. Co., supra, and General Committee v. Southern Pacific Co., supra, there can be no doubt of the justiciability of these claims. As we noted in General Committee v. M.-K.-T. R. Co., supra, 331, the statutory provisions which are in issue are stated in the form of commands. For the present command there is no mode of enforcement other than resort to the courts, whose jurisdiction and duty to afford a remedy for a breach of statutory duty are left unaffected. The right is analogous to the statutory right of employees to require the employer to bargain with the statutory representative of a craft, a right which this Court has enforced and protected by its injunction in Texas & New Orleans Ry. Co. v. Brotherhood of Railway Clerks, supra, 556-557, 560, and in Virginian Railway v. System Federation, supra, 548, and like it is one for which there is no available administrative remedy.

We conclude that the duty which the statute imposes on a union repre-

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[4] National Mediation Board, The Railway Labor Act and the National Mediation Board, p. 17; see In the Matter of Representation of Employees of the Central of Georgia Ry. Co., Case No. R-234; In the Matter of Representation of Employees of the St. Paul Union Depot Co., Case No. R-635, set aside in Brotherhood of Railway & Steamship Clerks v. United Transport Service Employees, 137 F.2d 817 [12 LRR 875, 12 LRR Man. 861], reversed on jurisdictional grounds, 320 U.S. 715 [13 LRR 481].

sentative of a craft to represent the interests of all its members stands on no different footing and that the statute contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty.

The judgment is accordingly reversed and remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice BLACK concurs in the result.

Concurring Opinion

Mr. Justice MURPHY concurring:—

The economic discrimination against Negroes practiced by the Brotherhood and the railroad under color of Congressional authority raises a grave constitutional issue that should be squarely faced.

The utter disregard for the dignity and the well-being of colored citizens shown by this record is so pronounced as to demand the invocation of constitutional condemnation. To decide the case and to analyze the statute solely upon the basis of legal niceties, while remaining mute and placid as to the obvious and oppressive deprivation of constitutional guarantees, is to make the judicial function something less than it should be.

The constitutional problem inherent in this instance is clear. Congress, through the Railway Labor Act, has conferred upon the union selected by a majority of a craft or class of railway workers the power to represent the entire craft or class in all collective bargaining matters. While such a union is essentially a private organization, its power to represent and bind all members of a class or craft is derived solely from Congress. The Act contains no language which directs the manner in which the bargaining representative shall perform its duties. But it cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the Constitution. Otherwise the Act would bear the stigma of unconstitutionality under the Fifth Amendment in this respect. For that reason I am willing to read the statute as not permitting or allowing any action by the bargaining representative in the exercise of its delegated powers which would in effect violate the constitutional rights of individuals.

If the Court's construction of the statute rests upon this basis, I agree. But I am not sure that such is the basis. Suffice it to say, however, that this constitutional issue cannot be lightly dismissed. The cloak of racism surrounding the actions of the Brotherhood in refusing membership to Negroes and in entering into and enforcing agreements discriminating against them, all under the guise of Congressional authority, still remains. No statutory interpretation can erase this ugly example of economic cruelty against colored citizens of the United States. Nothing can destroy the fact that the accident of birth has been used as the basis to abuse individual rights by an organization purporting to act in conformity with its Congressional mandate. Any attempt to interpret the Act must take that fact into account and must realize that the constitutionality of the statute in this respect depends upon the answer given.

The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color. A sound democracy cannot allow such discrimination to go unchallenged. Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears in the course of statutory interpretation.

SUPREME COURT OF THE UNITED STATES

WALLACE CORPORATION v. NATIONAL LABOR RELATIONS BOARD; RICHWOOD CLOTHESPIN & DISH WORKERS' UNION v. SAME, Nos. 66-67, Dec. 18, 1944

NATIONAL LABOR RELATIONS ACT

—Certification—Consent election—Unfair labor practices—Estoppel of Board

Board's approval of settlement between employer and rival unions and certification of inside union after consent election do not estop Board from considering events occurring before and after settlement and election in subsequent unfair labor practice proceedings in which it found that employer had established and used inside union to halt organization of outside union and signed closed-shop contract with inside union, in accordance with settlement, with knowledge that such contract would be employed to bring about discharge of members of outside union. Board's power to protect employees from unfair labor practices is not limited by general principles governing judicial rules of estoppel.

—Discrimination—Evidence

Finding of Board that employer engaged in unfair labor practice under Section 8(3) of Act by discharging employees because of prior union activities is supported by substantial evidence. Members of outside union were denied membership in inside union, which had won consent election, which had obtained closed-shop contract, in accordance with pre-election settlement requiring employer

to grant such contract to winning union, and had advised employer that it would use contract to deprive such employees of employment. Employer is just as guilty of unfair labor practice of discriminatory discharge of members of outside union in dismissing them in collaboration with inside union through medium of closed-shop contract as if it had dismissed them alone.

There is no merit in the argument of employer that dismissal of members of outside union, because of requirements of closed-shop agreement made with inside union, does not constitute discriminatory discharge within meaning of Act and in argument that employer should not be held responsible for discharges because it was required by law to bargain with inside union and sought unsuccessfully to persuade inside union to admit members of outside union. Employer was not legally required to enter into contract under which it knew that discriminatory discharges of employees were bound to occur and employer could have prevented discharges even after contract was executed.

—Domination—Evidence

Board's finding that employer dominated inside union is sustained even though evidence as to events concerning employer domination antedated settlement made by employer with rival unions and certification of inside union based on consent election made by Board. Act does not deny power of Board to use evidence based on events preceding its own administrative actions and judicial rules governing estoppel do not apply.

—Duty of union—Closed shop contract—Requirements of Act—Unfair labor practice

Duties of bargaining agent selected under terms of Act extend beyond mere representation of own group members; it must represent all employees fairly and impartially. Since Act was designed to remove discrimination in industrial relations, provision in Act authorizing closed-shop contract may not be construed to permit majority of employees, together with employer, to deprive minority group of Act's guarantees and employer who discharges minority employees, members of rival union, because of requirements of closed-shop contract is as guilty of unfair labor practice as if he had discharged them alone.

On writs of certiorari to U. S. Circuit Court of Appeals for the Fourth Circuit (13 LRR 768, 13 LRR Man. 815). Affirmed.

Rehearing denied, Feb. 26, 1945.

R. Walston Chubb (Lyle M. Allen on the brief) for petitioner in No. 66.

M. E. Boiarsky (C. S. Rhyne on the brief) for petitioner in No. 67.

Alvin J. Rockwell, General Counsel (Charles Fahy, Solicitor - General, Robert L. Stern, Ruth Weyand, and Marcel Mallet-Prevost on the brief) for respondent.

Full Text of Opinion

Mr. Justice BLACK delivered the opinion of the Court.

In an attempt to settle a labor dispute at the plant of petitioner company, an agreement approved by the Board was signed by a C.I.O. union, an Independent union, and the company. At a consent election held pursuant to this agreement, Independent won a majority of the votes cast,[1] and was certified by the Board as bargaining representative. The company then signed a union shop contract with Independent, with knowledge—so the Board has found—that Independent intended, by refusing membership to C.I.O. employees, to oust them from their jobs. Independent refused to admit C.I.O. men to membership and the company discharged them.

[FINDINGS OF BOARD]

In a subsequent unfair labor practice proceeding the Board found that (1) Independent had been set up, maintained, and used by the petitioner to frustrate the threatened unionization of its plant by the C.I.O., and (2), the union shop contract was made by the company with knowledge that Independent intended to use the contract as a means of bringing about the discharge of former C.I.O. employees by denying them membership in Independent. The Board held that the conduct of the company in both these instances constituted unfair labor practices. It entered an order requiring petitioner to disestablish Independent, denominated by it a "company union"; to cease and desist from giving effect to the union shop con-

1 Of 207 eligible employees, 98 voted for Independent, 83 for the C.I.O., and 26 did not vote.

tract between it and Independent; and to reinstate with back pay forty-three employees, found to have been discharged because of their affiliation with the C.I.O., and because of their failure to belong to Independent, as required by the union shop contract.[2] The Circuit Court of Appeals ordered enforcement of the Order.[3] We granted certiorari because of the importance to the administration of the Act of the questions involved. 322 U. S. 721.

The Board's findings if valid support the entire order. This is so because Section 8(3) of the Act[4] does not permit such a contract to be made between a company and a labor organization which it has "established, maintained or assisted."[5] The Board therefore is authorized by the Act to order disestablishment of such unions and to order an employer to renounce such contracts.[6] Nor can the company, if the Board's findings are well-grounded, defend its discharge of the C.I.O. employees on the ground that the contract with Independent required it to do so. It is contended that the Board's findings are not supported by substantial evidence. As shown by its analysis, the Board gave careful consideration to the evidence before it relating to the unfair labor practices which occurred both before and after the settlement agreement and the certification. The Circuit Court of Appeals unreservedly affirmed the Board's findings, and we find ample substantiating evidence in the record to justify that affirmance. We need therefore but briefly refer to the circumstances leading to the Board's order.

The findings of the Board establish the fact of an abiding hostility on the part of the company to any recognition of a C.I.O. union. This hostility we must take it extended to any employee who did or who might affiliate himself with the C.I.O. union. The company apparently preferred to close down this one of its two plants rather than to bargain collectively with the C.I.O. It publicly proclaimed through one of its foremen that ". . . the ones that did not sign up with the C.I.O. didn't have anything to worry about . . . the company would see that they was taken care of." The settlement agreement plainly implied that the old employees could retain their jobs with the company simply by becoming members of whichever union would win the election. Nevertheless the company entered into an agreement with Independent which inevitably resulted in bringing about the discharge of a large bloc of C.I.O. men and their president.

[CLOSED-SHOP CONTRACT]

The contract was executed after notice to the company by the business manager of Independent that Independent must have the right to refuse membership to old C.I.O. employees who might jeopardize its majority. The business manager, who had himself originally been recommended to Independent by a company employee, wrote the company, prior to the making of the contract, that Independent insisted upon a closed shop agreement because it wanted a "legal means of disposing of any present employees" who might affect its majority, and "who are unfavorable to our interests." The contract further significantly provided that the company would be released from the clause requiring it to retain in its employ union men only, if Independent should lose its majority and the C.I.O. win it.[7]

Neither the Board nor the court below found that the company engaged in a conspiracy to bring about the discharge of former C.I.O. members. Both of them, however, have found that the contract was signed with knowledge on the part of the company that Independent proposed to refuse to admit them to membership and thus accomplish the very same purpose. By the plan carried out the company has been able to achieve that which the Board found was its object from the beginning, namely, to rid itself of C.I.O. members, categorized by its foreman as "agitators."

[ESTOPPEL RULE INAPPLICABLE]

It is contended that the Board's finding as to company domination has

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[2] 30 N. L. R. B. 138 [12 LRR 644, 12 LRR Man. 209].

[3] 141 F. 2d 87 [13 LRR 768, 13 LRR Man. 815].

[4] Section 8(3) contains a proviso to the effect that nothing in the Act "shall preclude an employer from making an agreement with a labor organization *(not established, maintained, or assisted by any action defined in this Act as an unfair labor practice)* to require as a condition of employment membership therein . . . ." (Italics added.)

[5] Labor Board v. Electric Vacuum Cleaner Co., 315 U. S. 685, 694 [10 LRR Man. 501].

[6] I. A. of M. v. Labor Board, 311 U. S. 72, 81-2 [7 LRR Man. 282]; Labor Board v. Falk Corp., 308 U. S. 453, 461 [5 LRR Man. 677].

[7] The contract reads: "It is mutually agreed by both parties hereto that should the Union at any time become affiliated in any way with any labor organization or federation having membership or local union affiliations in more than one town outside the City of Richwood, West Virginia, this clause (E) of Article I shall immediately become null and void. . . ."

no support in the evidence because the evidence as to company domination antedated the settlement and certification, and hence was improperly admitted. The argument is that the Board cannot go behind the settlement and certification. The petitioner does not argue that any language appearing in the Labor Relations Act denies this power to the Board, but relies upon general principles on which the judicial rule governing estoppel is based. Only recently we had occasion to note that the differences in origin and function between administrative bodies and courts "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts." Federal Communications Commission v. Broadcasting Co., 309 U.S. 134, 143. With reference to the attempted settlement of disputes, as in the peformance of other duties imposed upon it by the Act, the Board has power to fashion its procedure to achieve the Act's purpose to protect employees from unfair labor practices. We cannot, by incorporating the judicial concept of estoppel into its procedure, render the Board powerless to prevent an obvious frustration of the Act's purposes.

To prevent disputes like the one here involved, the Board has from the very beginning encouraged compromises and settlements.[8] The purpose of such attempted settlements has been to end labor disputes, and so far as possible to extinguish all the elements giving rise to them. The attempted settlement here wholly failed to prevent the wholesale discard of employees as a result of their union affiliations. The purpose of the settlement was thereby defeated. Upon this failure, when the Board's further action was properly invoked, it became its duty to take fresh steps to prevent frustration of the Act. To meet such situations the Board has established as a working rule the principle that it ordinarily will respect the terms of a settlement agreement approved by it.[9] It has consistently gone behind such agreements, however, where subsequent events have demonstrated that efforts at adjustment have failed to accomplish their purpose, or where there has been a subsequent unfair labor practice.[10] We think this rule adopted by the Board is appropriate to accomplish the Act's purpose with fairness to all concerned. Consequently, since the Board correctly found that there was a subsequent unfair labor practice, it was justified in considering evidence as to petitioner's conduct, both before and after the settlement and certification.

[UNFAIR PRACTICE FOUND]

The company denies the existence of a subsequent unfair labor practice. It attacks the Board's conclusion that it was an unfair labor practice to execute the union shop contract with knowledge that Independent at that time intended to deny membership to C.I.O. employees because of their former affiliations with the C.I.O. It admits that had there been no union-shop agreement, discharge of employees on account of their membership in the C.I.O. would have been an unlawful discrimination contrary to Section 8(3) of the Act. But the proviso in Section 8(3) permits union shop agreements. It follows therefore, the company argues, that, inasmuch as such agreements contemplate discharge of those who are not members of the contracting union, and inasmuch as the company has no control over admission to union membership, the contract is valid and the company must discharge non-union members, regardless of the union's discriminatory purpose, and the company's knowledge of such purpose. This argument we cannot accept.

[DUTY OF UNION]

The duties of a bargaining agent selected under the terms of the Act

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8 Apparently more than 50% of all cases before it have been adjusted under its supervision. See First Annual Report of the National Labor Relations Board (1936), pp. 30-31; Second Annual Report (1937), pp. 15-17; Third Annual Report (1938), pp. 20-22; Fourth Annual Report (1939), pp. 19-22; Fifth Annual Report (1940), pp. 14, 16-18, 20, 26; Sixth Annual Report (1941), pp. 14-15, 25, 26, 27, 29; Seventh Annual Report (1942), pp. 22-25, 28-30, 80-86; Eighth Annual Report (1943), pp. 20-23, 91, 92.

9 Matter of Corn Products Refining Co., 22 N. L. R. B. 824, 828-829 [6 LRR Man. 242]; Matter of Wickwire Brothers, 16 N. L. R. B. 316, 325-326 [5 LRR Man. 230]; Matter of Godchaux Sugars, Inc., 12 N. L. R. B. 568, 576-579 [4 LRR Man. 165]; Matter of Shenandoah-Dives Mining Co., 11 N. L. R. B. 835, 888 [4 LRR Man. 45]; cf. Matter of the Locomotive Finished Material Company, 52 N. L. R. B. 922, 927 [13 LRR 202, 13 LRR Man. 64].

10 Matter of Locomotive Finished Material Company, supra, 926-928; Matter of Chicago Casket Company, 21 N. L. R. B. 235, 252-256 [6 LRR Man. 83]; Matter of Harry A. Halff, 16 N. L. R. B. 667, 679-682 [5 LRR Man. 256]; cf. Matter of Wickwire Brothers, supra. The courts have approved the Board's practice in this respect. N. L. R. B. v. T. W. Phillips Gas & Oil Co., 141 F.2d 304, 305-6 [14 LRR 21, 14 LRR Man. 509] (C. C. A. 3); N. L. R. B. v. Hawk & Buck Co., 120 F.2d 903, 904-5 [8 LRR Man. 673] (C. C. A. 5); N. L. R. B. v. Thompson Products, Inc., 130 F.2d 363, 366-67 [11 LRR Man. 521] (C. C. A. 6); Canyon Corp. v. N. L.

extend beyond the mere representation of the interest of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. Otherwise, employees who are not members of a selected union at the time it is chosen by the majority would be left without adequate representation. No employee can be deprived of his employment because of his prior affiliation with any particular union. The Labor Relations Act was designed to wipe out such discrimination in industrial relations. Numerous decisions of this Court dealing with the Act have established beyond doubt that workers shall not be discriminatorily discharged because of their affiliation with a union. We do not construe the provision authorizing a closed shop contract as indicating an intention on the part of Congress to authorize a majority of workers and a company, as in the instant case, to penalize minority groups of workers by depriving them of that full freedom of association and self-organization which it was the prime purpose of the Act to protect for all workers. It was as much a deprivation of the rights of these minority employees for the company discriminatorily to discharge them in collaboration with Independent as it would have been had the company done it alone. To permit it to do so by indirection, through the medium of a "union" of its own creation, would be to sanction a readily-contrived mechanism for evasion of the Act.

[NO COMPULSION TO DISCHARGE]

One final argument remains. The company, it is said, bargained with Independent because it was compelled to do so by law. The union shop contract to which the company at first objected, but into which it entered against the advice of counsel, was the result of that bargaining. The company, it is pointed out, persistently though unsuccessfully sought to persuade Independent to admit C.I.O. workers as members of Independent. Hence, we are told, the company did all in its power to prevent the discharges and should not be held responsible for them. Two answers suggest themselves: First, that the company was not compelled by law to enter into a contract under which it knew that discriminatory discharges of its employees were bound to occur; second, the record discloses that there was more the company could and should have done to prevent these discriminatory discharges even after the contract was executed. Immediately after the discharge of this large group of employees, the Labor Board complained to the company. The company appealed in writing to Independent's business manager to admit the men to membership, and thus make possible their reinstatement. This appeal was rejected. The Board then called to the company's attention our decision in National Labor Relations Board v. Electric Vacuum Cleaner Co., 315 U. S. 685 [10 LRR Man. 501], asserting that under its authority the men had been illegally discharged and should be reinstated. In subsequent correspondence, the Board suggested to the company that if it should later be required to reinstate the discharged employees, it would have only itself to blame, since it had voluntarily dispensed with their services. It insisted that the company was taking a needless risk of liability because if the Board should hear charges and dismiss them, the men could then be discharged, but if on the other hand, the Board should sustain the complaint, the discharged employees "would have retained their positions and your client would have no further liability because of their wrongful discharge." The Board's representative at that time wrote the company, "I again beseech you to return them to work pending a decision of the National Labor Relations Board on this question."

It follows from what we have said that we affirm the judgment of the court below approving the order of the Board in its entirety.

Affirmed.

Dissenting Opinion

Mr. Justice JACKSON, dissenting:—

A more complete statement of the facts than is found in the Court's opinion is necessary to disclose the reasons why the Chief Justice, Mr. Justice Roberts, Mr. Justice Frankfurter, and I dissent.

[BACKGROUND FACTS]

The Wallace Manufacturing Company employs about 200 employees and makes clothespins and similar wood products at Richwood, a small community in West Virginia. In July

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R. B., 128 F.2d 953, 955-956 [10 LRR Man. 769] (C. C. A. 8); Sperry Gyroscope Co. v. N. L. R. B., 129 F.2d 922, 931 [10 LRR Man. 811] (C. C. A. 2). See Warehousemen's Union v. N. L. R. B., 121 F.2d 84, 92-94 [8 LRR Man. 949] (App. D. C.) cert. den. 314 U. S. 674 [9 LRR Man. 417].

1941 a union affiliated with the C.I.O., which after the practice of the Court's opinion we will call the C.I.O., began to organize these employees, and the Company engaged in counter measures. Without detailing the evidence or considering the merits of the Company's objections we will assume that the Company during this period was guilty of unfair labor practices.

On September 25, the C.I.O. called a strike. About October 2, the Independent union, one of the petitioners here, came into being. On October 10, 1941, the C.I.O. filed charges with the Labor Board, alleging among other things that the Company had violated the Act by sponsoring the formation of the Independent. Again, without weighing the evidence or the objections of the Company or of the Independent, we will assume that the Company was guilty.

On October 14, the Independent demanded recognition as bargaining representative of the employees, and on October 31, it filed with the Labor Board a petition for investigation and certification of it as the representative of the Company's employees.

[AGREEMENT AND APPROVAL]

The Board, however, did not proceed on either the complaint or the request for certification. Instead, as the Government states, "During the ensuing two and one-half months, representatives of petitioner [the company], the Board, and the two unions engaged in negotiations looking toward settlement of the entire controversy, including disposition of the Union's charge and the Independent's petition." Again, without considering the Company's or the Independent's objection or evidence, we will assume that during this two and a half months the Company engaged in unfair labor practices. The strike was proceeding, however, with much bitterness and some violence. On December 30, the strike then being in its fourth month, the C.I.O. by telegram offered, with the approval of the Labor Board, to enter into a consent election "with you and your Company Union, on the condition that when we prove a majority and become the exclusive bargaining agency for all your employees, that as a condition of employment all eligible employees must become members of Local Union 129, U.C.W.O.C." The closed-shop proposal was thus first brought forward by the C.I.O. On January 13, the C.I.O. and the Independent and the Company signed an agreement that the plant should be opened, that everyone should return to work, that the Company would not in any way influence its employees for or against either union, and that the unions would not exercise any coercion. The Company agreed to recognize as exclusive bargaining agent whichever union was proved by a vote conducted by the Board to represent a majority of its employees and to start negotiations immediately after the result of the election was determined and to grant a union shop. All parties are agreed that they employed "union shop" as the equivalent of "closed shop." There is no finding and no evidence that at the time the company entered into this obligation it had any foreknowledge as to which union would win or what the practice of either as to admission of members would be, nor is there any evidence that either union had decided upon any policy in anticipation of victory. There is no charge, no finding, and no evidence that the Company has not performed its part of this agreement scrupulously.

The parties took this agreement to the office of the Board's regional manager and on January 19 two agreements were drawn: one by which the C.I.O. withdrew the charges of domination and other charges; and the other for a consent election to determine the employees' choice of representative. Both of these agreements, after signature by all the parties, were approved in writing by the Regional Director, acting on behalf of the National Labor Relations Board and with full knowledge of the agreement that the Company would give to the winner a closed shop. [1]

[INDEPENDENT CERTIFIED]

The employees, without distinction as to union affiliation, all returned to work. The election was held January 30, under the auspices of the Board. Of the 186 valid votes cast, the Inde-

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1 The Board has declared its policy with respect to consent elections as follows: "However, the Board does not ordinarily order elections in the presence of unremedied unfair labor practices, whether merely alleged or already found by the Board, unless the labor organization which instituted the charges has agreed in advance that it will not rely upon the unfair labor practices as a basis for objecting to the conduct or results of the election. The Board orders an election only when it is satisfied, after considering all evidence, respecting the employer's compliance with a prior order concerning unfair labor practices that 'an election free from all employer compulsion, restraints and interference, can be held.'" Eighth Annual Report (1943) 49.

pendent received 98, the C.I.O. 83, and 5 votes were cast for neither. The C.I.O. filed no objections, and the Board on February 4 certified the Independent as the exclusive bargaining agent for the employees in the plant.

Thereupon the Company bargained with the certified representative, as it was required by law to do. The evidence is uncontradicted that the Company was reluctant still to enter into a closed-shop agreement. The Independent, however, insisted that the Company perform the contract by which the strike had been settled. It stated its position in a letter in which it said: "The 'Closed Shop' will, therefore, give us some control in preventing the hiring of additional employees who are unfavorable to our interests and who would further jeopardize our majority. It would also provide us with a legal means of disposing of any present employees, including Harvey Dodrill whom our members have declared by unanimous ballot that they will not work with, whose presence in the plant is unfavorable to our interests because those who are so unfavorable will not be permitted to become members of our organization and without such membership they would not be permitted to work in the plant under a closed shop contract which we respectfully insist that we must have."

[EXCLUSION AND DISCHARGES]

This is the first knowledge it is claimed the Company had or should have had of the Independent's adoption of an exclusionary policy toward its rivals. The Company yielded, considering the union's membership policy as something it could not interfere with, and the closed-shop contract was signed. It required that all present and future employees should become members of the Independent within ten days of the date of the contract or from the date of hiring. The contract and notice of the closed-shop arrangement were posted in the plant. On March 18, forty-three employees were dismissed, on demand of the Independent, as not eligible for employment because of non-membership in it. Later it appeared that twelve such dismissed employees never made application for membership in the Independent, and thirty-one members who had applied for membership had been rejected because when their applications came before the meeting in regular course they did not receive the number of ballots necessary under its by-laws to elect to membership. Whether the Company knew that they had applied for membership and had been rejected is disputed, but again we resolve the doubt against the Company and assume that the superintendent knew this fact at the time of discharge.

This is no dispute, however, that when Mr. Wallace, the president of the company, learned of the discharge he attempted to persuade the Independent to allow these employees to be reinstated. On March 20, 1942, he wrote to the business agent of the Independent a letter. The Board has not found that it was not written in good faith. To the contrary, counsel for the Board with commendable candor stated that there is no evidence and that he made no contention that it was other than a good-faith statement of the Company's position. Among other things it says, "When our Mr. Christmas talked to you on March 9th, you will recall that he appealed to you to see that the closed-shop clause, which your Union insisted be included in the working agreement, should not be used in any way to unfairly prevent any person from working who wanted to work. We realize, of course, that the contract does not give the Company the right to tell the Union who to admit as members, and for that reason Mr. Christmas' talk with you and mine over the telephone could only be directed to the sense of fairness which we believe exists in the minds of your members.

"Entirely aside from the fact that having to lay off this large number of experienced people will badly cripple our production which is urgently needed, we feel that it is indeed a sad situation where, on account of some individual differences of opinion, people who have perhaps been friends and neighbors for many years cannot work together. I will appreciate your advising me what can be done."

The Regional Director of the Board was notified of the discharges and, as the Court's opinion states, he did urge the Company to disregard its closed-shop contract and re-employ non-members of the certified union. The Company's counsel reminded him that he had expressed concern about the closed-shop provision to the Regional Director when it was being negotiated, and that the Director had replied that he probably "would have to agree to it as the C. I. O. certainly would have insisted upon it if they had prevailed in the election." The Company insisted that "membership in the

union is beyond the Company's control" and that unless the union relented it would stand by the closed-shop contract. The Company suggested, however, to the Independent that it conduct interviews with those it had rejected and reconsider them individually. The Union by unanimous vote rejected the suggestion. The Regional Director of the Board also wrote to the head of the Independent about the individuals discharged "because they were not members of your union. It develops that your union is unwilling to accept them into membership. I need not remind you of the seriousness of these charges." The Board representatives were unable to persuade the union to accept the rejected members nor the Company to repudiate its agreement.

[NLRB ACTION]

At the opening of the hearing before the examiner July 9, 1942, the Company declared it was "ready to take any steps which are necessary to the end that these people be put back to work, as it has been throughout, since this agreement was entered into." It suggested that the attorney for the Board and the attorney for the Independent work out a settlement. The Board's attorney expressed "to the representative of the Company my thanks for the suggestion." Adjournment was taken and counsel for the union went from Summerville, the place of hearing, to Richwood and convened a meeting of the Independent Union. The Board attorney's objection kept further developments out of the record except that he stated, "I am willing to let the record show that Mr. Ritchie [attorney for the Independent] made me a proposition which I was unable to accept and that I made him one which he was unable to accept." The case therefore proceeded against the Company.

The Board did not find any unfair labor practice on the part of the Company between the date of the settlement agreement and the election. In fact, it refused to accept the recommendation of the trial examiner for such a finding, saying that "such interference, if any, was too trivial," was known to the Union, which made no objection to the certification, and had come to the knowledge of the Regional Director prior to the election. "Nevertheless, he proceeded with the election, found it to be a fair one, and certified the Independent."

[NLRB FINDING OF VIOLATION]

No unfair labor practices at any time after the settlement agreement are found or charged against the employer except the making and performing of the closed-shop agreement. The Board states its position as follows: "The issue remains whether, by entering into the closed-shop contract with the Independent with knowledge that the Independent intended to exclude employees from membership and by discharging employees denied membership in the Independent, as set forth above, the respondent violated the Act. The respondent contends that it was bound to enter into a closed-shop contract by the terms of the election agreement between the respondent, the Union, and the Independent, and urges the Board to regard the discharges as proper since made pursuant to the closed-shop contract.

"We do not agree. An employer may not enter into a closed-shop contract which to his knowledge is designed to operate as an instrument for effecting discrimination against his employees solely because of their prior union activities. The proviso in Section 8(3) of the Act permits an employer to enter into an agreement with the duly designated representative of his employees, requiring membership in that organization as a condition of employment. It is true that under the terms of the election agreement the respondent was bound to execute a union-shop contract with the victorious union. It by no means follows, however, that the respondent was also bound by the election agreement to acquiesce in a scheme to penalize employees whose choice of representatives was not that of a majority; nor can the proviso in Section 8(3) be thought to countenance such a result.

"* * * The facts in the case make it apparent that the respondent [Company] was put on notice that its [Independent's] real purpose was to bar from future employment with the respondent persons who had adhered to the charging Union in the election campaign. While the tripartite agreement of January 13, 1942, may have been valid when made, performance of its terms did not require the respondent knowingly to become a party to the Independent's plan to eliminate from respondent's pay roll employees solely because of their past union activities. On the contrary, when this unlawful scheme became known to it,

the respondent not only had a right to abrogate the tripartite agreement, but also was under an affirmative obligation to do so. * * * Under these circumstances, the closed-shop agreement cannot be deemed a defense, but a discriminatory device to insure perpetuation of the Independent and thus deprive employees of their statutory right to select bargaining representatives."

[DOMINATION AND ORDER]

Holding that execution and performance of the closed-shop agreement after the settlement and certification by the Board were "unfair labor practices," the Board held them effective also to revive the old charges settled by the agreements and election and it went back to those events to find grounds on which to hold that the employer dominates the Independent.

Accordingly it ordered that the Company disestablish and withdraw all recognition from the Independent as representative of any of its employees. It forbade "any continuation, renewal, or modification of the existing contract which would perpetuate the conditions which have deprived employees" of their jobs; it ordered the Company to cease giving effect to any contract between it and the Independent or to any modification or extension thereof. It also ordered that the Company "offer the aforesaid 43 employees immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to make them whole for any loss of pay they may have suffered."

[BASIC ISSUE]

The underlying question is, in the language of the Board's brief, "Whether petitioner by entering into and discharging employees pursuant to the terms of the closed-shop contract with the Independent violated Section 8(3) and (1) of the Act." It is one of importance far beyond this little company and its two hundred employees.

Section 8(3) makes it an unfair labor practice for an employer, by discrimination, to encourage or discourage membership in any labor organization. If it ended there it would of course outlaw any closed shop, for the very essence of the closed shop is that the employer discriminates in employment to require membership in a particular union. To validate discrimination in such circumstances a proviso follows that no law of the United States "shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees. . . ."

At the time this closed shop agreement was made the Board had certified the Independent as representative of the employees. Under Section 8 it would have been an unfair labor practice had the Company refused to bargain with it. The Board made the certification, without objection by the defeated C.I.O. and with full knowledge that the Company was bound in law and in good faith to give the certified union a closed shop contract. We do not say, and it is not necessary now to decide, that the Board has no power to protect minorities at this stage of the proceedings. We do not mean to preclude the power of the Board, when the contract settling the strike, withdrawing charges against the company, and consenting to an election with a closed shop to the winner was brought to the Board, to have refused to dismiss charges and undertake an election unless each union agreed that, if it won a closed shop, it would open the union to membership from the losers on terms the Board deemed fair. Since no one could tell who would win, this would in any event have been an impartial arrangement. Even after the Independent won, the Board before certifying it might perhaps properly have made conditions as to reasonable terms to the defeated. But the Board made no conditions or reservations of the sort. Instead, it takes the position, and the Court is holding, that such conditions must be imposed on the union by the employer. He must see that the union with which he has been ordered to bargain makes proper terms for admission into that certified union of its former enemies and rivals. We think that the decision to that effect is not only unauthorized by Congress, but is utterly at war with the hands-off requirements which the law lays upon the employer, and that this decision is at war with one of the basic purposes of labor in its struggle to obtain this Act and of Congress in enacting it.

[CLOSED-SHOP PRINCIPLE]

Of course the closed shop is well known in labor relations. Its essential

philosophy is that once the employees have chosen their representative union, it is entitled to bargain for the employer's help to maintain its control. Other employer aids to a dominant union, such as the check-off, are also conceded to unions by bargaining on behalf of a majority when they would not be at all permissible for the employer to use in the first place to influence the workmen to choose a particular union because he favored it. But the idea of the closed shop is that, while these acts of influence or pressure on workmen are unfair when exerted by the employer in his own interest, they are fair and lawful when enforced by him as an instrument of the union itself. A closed shop is the ultimate goal of most union endeavor, and not a few employers have found it a stabilizer of labor relations by putting out of their shops men who were antagonistic to the dominant union, thus ending strife for domination. It puts the employment office under a veto of the union, which uses its own membership standards as a basis on which to exclude men from employment.

[NO CONTROL OVER UNION]

Neither the National Labor Relations Act nor any other Act of Congress expressly or by implication gives to the Board any power to supervise union membership or to deal with union practices, however unfair they may be to members, to applicants, to minorities, to other unions, or to employers. This may or may not have been a mistake, but it was no oversight. We suppose that there is no right which organized labor of every shade of opinion in other matters would unite more strongly in demanding than the right of each union to control its own admissions to membership. Each union has insisted on its freedom to fix its own qualifications of applicants, to determine the vote by which individual admissions will be granted, to prescribe the initiation or admission fees, to fix the dues, to prescribe the duties to which members must be faithful and to decide when and why they may be expelled or disciplined. The exclusion of those whose loyalty is to a rival union or hostile organization is one of the most common and most understandable of practices, designed to defend the union against undermining, spying, and discord, and possible capture and delivery over to a rival. Some unions have battled to exclude Communists, some racketeers, and all to exclude those deemed disloyal to their purposes. See Williams v. Quill, 277 N.Y. 1, 7 [1-A LRR Man. 696]; Miller v. Ruehl, 166 Misc. 479, 2 N.Y.S. 2d 394.

There are those who think that the time has come when unions should be denied this control over their own affairs. However this may be, we only know that Congress has included no such principle expressly in the Act. If the Board should attempt to exercise it as we have suggested by way of a condition on its conducting an election or making a certification, a question of its statutory power to do so might arise, on which we express no opinion. It would at least be a forthright exercise of power over the unions by the Board itself acting in the public interest and would not require an employer to engage in interference with union affairs in direct violation of the Act.

But the Court is deciding not only that without authority of Congress the admission practices of a labor organization having a closed shop may be policed, but also, contrary as we think to the Act, that the employer is empowered and required to do the policing. This we think defies both the express terms and the philosophy of the Act. The letter of the Act makes it a forbidden practice for an employer to "interfere with" or "restrain" employees in the "right to self-organization." We assume this employer knew the Independent would exercise its power over admission privileges to some extent to protect itself against infiltration of hostile elements. The Board must have known it, too. And both must have known the C.I.O. would, also, if it won. However, the Independent has not indiscriminately excluded all who were against it in the election. The C.I.O. had 83 votes; all but 43 of these voters seem to have been admitted to the Independent, and 12 of those never applied, making 31 apparently rejected. In view of the bitterness and duration of the strike, involving some shooting, it is not strange that good will did not descend on the victors at once. The Board may have expected more moderation when it conducted the consent election and certified the Independent. There is nothing to show that the Company did not, too. When it was found how harshly the Independent had behaved, the Company did try persuasion to get the union leaders to relent—the Company's own interests were to get back more of its experienced employees. How it could have done more without

breaking both faith and the law, the Court does not point out, and we do not know.

[EMPLOYER NOT RESPONSIBLE]

Of course, if the employer in a closed shop is to be responsible for the discriminations or unfairness of the union, he must have a right to be informed about its admissions. If, in collective bargaining, a union asked a closed shop, the employer would have to demand to know the rules and practices about admission, the fees, the by-laws, the method of electing members. If he should demand this as a condition of collective bargaining, we should expect the Board to hold him guilty of unfair practices, and we have no doubt it would ask this Court to sustain it. Yet here the sole ground of penalizing this employer is that he did not do just that. Should the employer have made the union admit all of its former enemies? If not, by what standard could he allow it to select? Must it also be made to admit even those who would not sign applications or pay initiation fees claimed to be too onerous? The employer is required to reinstate with back pay a dozen who never even asked to join the certified union. But neither the Court nor the Board says what the employer should have required the union to adopt as an admission policy.

The statute expressly permits a closed shop. It can be denied only when the certified union is "established, maintained, or assisted" by unfair labor practices of the employer. But the statute cannot mean that the making and performance of a closed shop contract in itself is an unfair practice which invalidates a closed shop. To so interpret it would be to believe the Congress by this provision was perpetrating a hoax. But if it means that the union can have a closed shop and the employer will supervise its membership, it is a strange contradiction in an Act whose chief purpose was to sterilize the employers and to free workmen of the influence they exerted through control of the right to work.

[BOARD'S POSITION]

We can quite understand, and we do not mean to criticise, the motives which animated the Board. We are dealing here with an industry located in a small community where opportunities for other employment are probably not plentiful. It is not unlikely that denial of the right to work for this company will keep these men from earning a livelihood in a place they long have lived. In so far as the Board has been stirred by concern for individual and minority protection against arbitrary union action, we both understand and sympathize with their concern. The employer is the only one it can lay hands on, and the temptation is great to use him to protect minority rights in the labor movement. This and the other cases before us give ground for belief that the labor movement in the United States is passing into a new phase. The struggle of the unions for recognition and rights to bargain, and of workmen for the right to join without interference, seems to be culminating in a victory for labor forces. We appear now to be entering the phase of struggle to reconcile the rights of individuals and minorities with the power of those who control collective bargaining groups. We have joined in the opinion in Steele v. L. & N. R. Co., decided today [15 LRR Man. 708]. That case arose under the Railway Labor Act, which contains no authorizaion whatever for a closed shop, on the contrary forbids the discrimination underlying the adoption of a closed shop, and deals with an industry and a labor group which never has had or sought a closed shop. But here we deal with a minority which the statute has subjected to closed-shop practices. Whether the closed shop, with or without the closed union, should or should not be permitted without supervision is in the domain of policy-making, which it is not for this Court to undertake. Neither do we find any authority in the National Labor Relations Board to undertake it.

It happens to be an independent that won here. But counsel for the Board assured us on argument that this is not a one-way policy to require independent unions to admit their enemies. It would, as we understand it, have been applied in the same manner if the C. I. O. had won and had excluded some independent members—on suspicion, perhaps, that they were company spies. The obstacle that this decision will interpose to all future bargaining for closed shops is likely to be felt by C. I. O. and A. F. of L. unions many times as often as by independents.

Of course it is the employer who is penalized here, and on shallow and superficial examination it may seem like another victory for labor. The

employer must pay many thousands of dollars for hours unworked, because it performed reluctantly but in good faith its closed-shop agreement made under authority of Congress and with knowledge and encouragement of the Board, and with the approval and instigation of the C. I. O. union whose members now gain back pay by its repudiation. We think this cannot be justified as an unfair labor practice outlawed by Congress. That resistance to closed-shop unions will likely be stiffened if employers must underwrite the fairness of closed-shop unions to applicants and members, and that a good deal labor has fought for may be jeopardized if the price of obtaining it is to have the union policed by the employer, are considerations beyond our concern. We can only view this as a very unfair construction of the statute to the employer and one not warranted by anything Congress has directed or authorized.

FORD MOTOR CO. v. HUFFMAN

Supreme Court of the United States

FORD MOTOR COMPANY v. HUFFMAN, etc.; INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO v. Same, Nos. 193 and 194, April 6, 1953

NATIONAL LABOR RELATIONS ACT

—Seniority contract—Discrimination between groups—Validity ▶54.215 ▶60.20 ▶105.28

Seniority provisions in collective bargaining contracts giving seniority credit for military service rendered by veterans before their employment by contracting employer are valid as within authority of contracting union under National Labor Relations Act, even though such seniority provisions prejudice the seniority rights of veterans who rendered military service after their employment by contracting employer.

—Authority of bargaining agent ▶60.06

National Labor Relations Act does not compel a bargaining representative to limit seniority contracts solely to the relative lengths of employment of the respective employees.

National Labor Relations Act does not so limit the vision and action of a bargaining representative that it must disregard public policy and national security.

Wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject to complete good faith and honesty of purpose in the exercise of its discretion.

On writs of certiorari to the U. S. Court of Appeals for the Sixth Circuit (29 LRRM 2531, 195 F.2d 170). Reversed and remanded.

William T. Gossett (L. Homer Surbeck, Richard W. Hogue, Jr., and Malcolm L. Denise, with him on the brief), for petitioner in No. 193.

Harold A. Cranefield, General Counsel, UAW-CIO (Lowell Goerlich, Sol Goodman, and Kurt L. Hanslowe, Assistant General Counsel, with him on the brief), for petitioner in No. 194.

Herbert H. Monsky (Samuel M. Rosenstein, Benjamin F. Shobe, William G. Colson, and Herman G. Handmaker, with him on the brief), for respondents.

James P. Falvey, Louis S. Lebo, and Henry W. Goranson filed brief for Electric Auto-Lite Co. as amicus curiae.

Nicholas Kelley, Francis S. Bensel, T. R. Iserman, and Hancock Griffin, Jr., filed brief for Chrysler Corp. as amicus curiae.

Walter J. Cummings, Jr., Solicitor General, George J. Bott, General Counsel, National Labor Relations Board, David P. Findling, Associate General Counsel, Duane Beeson, and Sonja Goldstein filed brief for National Labor Relations Board as amicus curiae.

Arthur J. Goldberg, General Counsel, Congress of Industrial Organizations, and David E. Feller, Assistant General Counsel, filed brief for Congress of Industrial Organizations as amicus curiae.

George Morris Fay, Peter J. Monaghan, and David M. McCrone filed brief for Briggs Mfg. Co. as amicus curiae.

Full Text of Opinion

MR. JUSTICE BURTON delivered the opinion of the Court.

In these cases we sustain the validity of collective-bargaining agreements whereby an employer, in determining relative seniority of employment among its employees, gives them credit for pre-employment military service as well as the credit required by statute for post-employment military service.[1]

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1 Where the context permits, "military service" in this opinion includes service in the land or naval forces or Merchant Marine of the United States or its allies.

[THEORY OF ACTION]

These proceedings were begun in the United States District Court for the Western District of Kentucky by respondent Huffman, acting individually and on behalf of a class of about 275 fellow employees of the Ford Motor Company, petitioner in Case No. 193 (here called Ford). His complaint is that his position, and that of each member of his class, has been lowered on the seniority roster at Ford's Louisville works, because of certain provisions in collective-bargaining agreements between Ford and the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, petitioner in Case No. 194 (here called International). He contends that those provisions have violated his rights, and those of each member of his class, under the Selective Training and Service Act of 1940, as amended.[2] He contends also that International's acceptance of those provisions exceeded its authority as a collective-bargaining representative under the National Labor Relations Act, as amended.[3] He asks, accordingly, that the provisions be declared invalid insofar as they prejudice the seniority rights of members of his class, and that appropriate injunctive relief be granted against Ford and International. After answer, both sides asked for summary judgment.[4]

The District Court dismissed the action without opinion but said in its order that it was "of the opinion that the collective bargaining agreement expresses an honest desire for the protection of the interests of all members of the union and is not a device of hostility to veterans. The Court finds that said collective bargaining agreement sets up a seniority system which the Court deems not to be arbitrary, discriminatory or in any respect unlawful." The Court of Appeals for the Sixth Circuit reversed, one judge dissenting. 195 F.2d 170 [29 LRRM 2531]. Ford and International filed separate petitions for certiorari seeking to review the same decision of the Court of Appeals. We granted both because of the widespread use of contractual provisions comparable to those before us, and because of the general importance of the issue in relation to collective bargaining. 344 U.S. 814.

The pleadings state that Huffman entered the employ of Ford September 23, 1943, was inducted into military service November 18, 1944, was discharged July 1, 1946, and, within 30 days, was reemployed by Ford with seniority dating from September 23, 1943, as provided by statute.[5] It does not appear whether the other members of his class are veterans but, like him, all have seniority computed from their respective dates of employment by Ford.

[SENIORITY CONTRACTS]

The pleadings allege further that Huffman and the members of his class all have been laid off or furloughed from their respective employments at times and for periods when they would not have been so laid off or furloughed except for the provisions complained of in the collective-bargaining agreements. Those provisions state, in substance, that after July 30, 1946 in determining the order of retention of employees all veterans in the employ of Ford "shall receive sen-

2 54 Stat. 890, 56 Stat. 724, 58 Stat. 798, 60 Stat. 341, 50 U. S. C. App. § 308.

3 49 Stat. 452, 61 Stat. 140, 65 Stat. 601, 29 U.S.C. (Supp. V) §§ 157-159.

4 In No. 194, International also questions the jurisdiction of the District Court. International recognizes that one issue in the case is whether it engaged in an unfair labor practice when it agreed to the allowance of credit for pre-employment military service in computations of employment seniority. It then argues that the National Labor Relations Act, as amended, 61 Stat. 146, 29 U. S. C. (Supp. V) § 160 (a), vests the initial jurisdiction over such an issue exclusively in the National Labor Relations Board. This question was not argued in the Court of Appeals nor mentioned in its opinion and, in view of our position on the merits, it is not discussed here. Our decision interprets the statutory authority of a collective-bargaining representative to have such breadth that it removes all ground for a substantial charge that International, by exceeding its authority, committed an unfair labor practice. As to a somewhat comparable question considered in connection with the Railway Labor Act, see Tunstall v. Brotherhood of Locomotive Firemen, 323 U. S. 210 [15 LRR Man. 715]; Steele v. Louisville & N. R. Co., 323 U. S. 192, 204-207 [15 LRR Man. 708].

5 "SEC. 8. * * *

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate [of satisfactory completion of his period of training and service], (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service * * *

* * * * *

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; * * *" 54 Stat. 890, 58 Stat. 798, 50 U.S.C. App. § 308(b)(B).

iority credit for their period of service, subsequent to June 21, 1941 in the land or naval forces or Merchant Marine of the United States or its allies upon completion of their probationary period" of six months.[6]

The effect of these provisions is that whereas Huffman's seniority, and that of the members of his class, is computed from their respective dates of employment by Ford and they have been credited with their subsequent military service, if any, yet in some instances they are now surpassed in seniority by employees who entered the employ of Ford after they did but who are credited with certain military service which they rendered before their employment by Ford.[7]

Respondent contended in the Court of Appeals that allowance of credit for pre-employment military service was invalid because it went beyond the credit prescribed by the Selective Training and Service Act of 1940. That argument was rejected unanimously. 195 F.2d 170, 173 [29 LRRM 2531]. It has not been pressed here. There is nothing in that statute which prohibits allowing such a credit if the employer and employees agree to do so. The statutory rights of returning veterans are subject to changes in the conditions of their employment which have occurred in regular course during their absence in military service, where the changes are not hostile devices discriminating against veterans. Aeronautical Lodge v. Campbell, 337 U.S. 521 [24 LRRM 2173]; and see Trailmobile Co. v. Whirls, 331 U.S. 40 [19 LRRM 2531]; Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 [18 LRRM 2075]. See also, Oakley v. Louisville & N. R. Co., 338 U.S. 278 [25 LRRM 2038], as to a veteran's seniority status more than one year after his reemployment.

[AUTHORITY OF UNION]

On the other hand, the second objection raised by respondent was sustained by a majority of the members of the Court of Appeals. This objection was that the authority of International, as a certified bargaining representative, was limited by statute and was exceeded when International

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6 Article VIII of a supplementary agreement between Ford and International, dated July 30, 1946, contained the following:

"Section 13— * * *

"(c) *Any veteran of World War II who was not employed by any person or company at the time of his entry into the service of the land or naval forces or the Merchant Marine* and who is a citizen of the United States and served with the allies and who has been honorably discharged from such training and service and *who is hired by the company after he is relieved from training and service* in the land or naval forces or after completion of service in the Merchant Marine *shall, upon having been employed for six (6) months and not before, receive seniority credit for the period of such service subsequent to June 21, 1941*, provided:

"(1) Such veteran must apply for employment within ninety (90) days from the time he is relieved from such training or service in the land or naval forces or the time of his completion of such service in the Merchant Marine, and must obtain such employment within twelve (12) months from the time he is relieved from such training and service in the land or naval forces or the time of his completion of such service in the Merchant Marine.

"(2) Such veteran shall not have previously exercised his right in any plant of this or any other company.

"(3) A veteran so employed shall submit his service discharge papers to the company at the end of aforesaid probationary period of employment and the company shall place thereon in permanent form a statement showing that the veteran has exercised this right, such statement to be signed by representatives of the company and the Union, and a copy thereof placed in the employee's record and a copy furnished to the Union.

"(d) It is further understood and agreed that, regardless of any of the foregoing, *all veterans in the [employ] of the company at the time the Contract is thus amended shall receive seniority credit for their period of service, subsequent to June 21, 1941 in the land or naval forces or Merchant Marine of the United States or its allies, upon completion of their probationary period.*" (Emphasis supplied.)

The above provisions were continued in effect, in substantially identical form, in an agreement of August 21, 1947. An agreement of September 28, 1949, provided:

"Section 12. * * *

* * * * *

"(c) Any employee who, prior to the effective date of this Agreement, has received the seniority credit provided for in Article VIII, Section 13(c) or (d) of the Agreement between the Company and the Union dated August 21, 1947, or the comparable provision in the Supplementary Agreement between the Company and the Union dated July 30, 1946, shall continue to receive such seniority credit."

* * * * *

7 On Huffman's return to Ford in July, 1946, his employment seniority, including his military service, dated from September 23, 1943. It totaled about 33 months, including about 14 months of pre-service company employment and 19 of post-employment military service. An example of a veteran who, due to the agreements before us, outranks Huffman in employment seniority is one who entered military service July 1, 1943, without any prior employment, served honorably until discharged March 1, 1945, and, thereafter, has been employed continuously by Ford, including six months of satisfactory probationary employment. His seniority dates from July 1, 1943. By July 1, 1946, it totaled 36 months, including 20 months of pre-employment military service, and 16 of post-service company employment. However, except for the collective-bargaining agreements, Huffman would then have outranked such a veteran by about 17 months, although Huffman's military service totaled one month less, his employment by Ford two months less and his combined military service and company employment three months less than that of such a veteran.

agreed to the provisions that are before us.

The authority of every bargaining representative under the National Labor Relations Act, as amended, is stated in broad terms:

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of *collective bargaining or other mutual aid or protection* * * *

* * * * * *

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of *collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:* * * *" (Emphasis supplied.) 61 Stat. 140, 143, 29 U.S.C. (Supp. V) §§ 157, 159 (a).

In the absence of limiting factors, the above purposes, including "mutual aid or protection" and "other conditions of employment," are broad enough to cover terms of seniority. The National Labor Relations Act, as passed in 1935 and as amended in 1947, exemplifies the faith of Congress in free collective bargaining between employers and their employees when conducted by freely and fairly chosen representatives of appropriate units of employees. That the authority of bargaining representatives, however, is not absolute is recognized in Steele v. Louisville & N. R. Co., 323 U.S. 192, 198-199 [15 LRR Man. 708], in connection with comparable provisions of the Railway Labor Act. Their statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all of those members, without hostility to any. Id., at 198, 202-204; Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 211 [15 LRR Man. 715]; Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 [30 LRRM 2258].

Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals. A bargaining representative, under the National Labor Relations Act, as amended, often is a labor organization but it is not essential that it be such. The employees represented often are members of the labor organization which represents them at the bargaining table, but it is not essential that they be such. The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents. In the instant controversy, International represented, with certain exceptions not material here, all employees at the Louisville works, including both the veterans with, and those without, prior employment by Ford, as well as the employees having no military service. Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Compromises on a temporary basis, with a view to long range advantages, are natural incidents of negotiation. Differences in wages, hours and conditions of employment reflect countless variables. Seniority rules governing promotions, transfers, layoffs and similar matters may, in the first instance, revolve around length of competent service. Variations acceptable in the discretion of bargaining representatives, however, may well include differences based upon such matters as the unit within which seniority is to be computed, the privileges to which it shall relate, the nature of the work, the time at which it is done, the fitness, ability or age of the employees, their family responsibilities, injuries received in course of service, and time or labor devoted to related public service, whether civil or military, voluntary or involuntary. See e.g., Hartley v. Brotherhood of Clerks, 283 Mich. 201, 277 N.W. 885 [2 LRR Man. 872]; and see also, Williamson & Harris, Trends in Collective Bargaining (1945), 100-103.

The National Labor Relations Act, as amended, gives a bargaining representative not only wide responsibility but authority to meet that responsi-

bility. We have held that a collective-bargaining representative is within its authority when, in the general interest of those it represents, it agrees to allow union chairmen certain advantages in the retention of their employment, even to the prejudice of veterans otherwise entitled to greater seniority. Aeronautical Lodge v. Campbell, supra, at 526-529.

[PUBLIC POLICY]

The public policy and fairness inherent in crediting employees with time spent in military service in time of war or national emergency is so clear that Congress, in the Selective Training and Service Act of 1940, required some credit to be given for it in computing seniority both in governmental and in private employment. See note 5, supra. Congress there prescribed that employees who left their private civilian employment to enter military service should receive seniority credit for such military service, provided their prior civilian employment, however brief, was bona fide and not on a temporary basis. There is little that justifies giving such a substantial benefit to a veteran with brief prior civilian employment that does not equally justify giving it to a veteran who was inducted into military service before having a chance to enter any civilian employment, or to a veteran who never worked for the particular employer who hired him after his return from military service. The respective values of all such veterans, as employees, are substantially the same. From the point of view of public policy and industrial stability, there is much to be said, especially in time of war or emergency, for allowing credit for all military service. Any other course adopts the doubtful policy of favoring those who stay out of military service over those who enter it.

The above considerations took concrete form in the Veterans' Preference Act of 1944 which added the requirement that credit for military service be given by every civilian federal agency, whether the military service preceded or followed civilian employment.[8] Apparently recognizing the countless variations in conditions affecting private employment, Congress, however, did not make credit for such pre-employment military service compulsory in private civilian employment. A little later, the Administrator of the Retraining and Reemployment Administration of the United States Department of Labor assembled a representative committee to recommend principles to serve as guides to private employers in their employment of veterans and others.[9] Among 15 principles developed by that committee, and "wholeheartedly" endorsed by the Secretary of Labor, in 1946, were the following:

"8. All veterans having reemployment rights under Federal statutes should be accorded these statutory rights *as a minimum.*

* * * * *

"13. Newly hired veterans who have served a probationary period and qualified for employment should be allowed seniority credit, at least for purposes of job retention, equal to time spent in the armed services plus time spent in recuperation from service-connected injuries or disabilities either through hospitalization or vocational training." [10]

The provisions before us reflect such a policy.[11] It is not necessary to

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8 "SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: * * *" 58 Stat. 390, 5 U.S.C. § 861.

9 This "Committee of Nine" consisted of representatives from the Business Advisory Council to the Secretary of Commerce, National Association of Manufacturers, U. S. Chamber of Commerce, American Federation of Labor, Congress of Industrial Organizations, Railway Labor Executives' Association, American Legion, Disabled American Veterans and Veterans of Foreign Wars.

10 Reemployment of Veterans Under Collective Bargaining, United States Department of Labor, Bureau of Labor Statistics, October, 1947, Statement of Employment Principles dated October 7, 1946, App. D, pp. 46-48; and see Bulletin of Retraining and Reemployment Administration, United States Department of Labor, October 10, 1946, p. 5; Harbison, Seniority Problems During Demobilization and Reconversion, Industrial Relations Section, Department of Economics and Social Institutions, Princeton University (1944) 12-14.

11 Collective Bargaining Provisions—Seniority, Bull. No. 908-11, United States Department of Labor, Bureau of Labor Statistics (1949), quotes many seniority clauses as examples of those then in use and including many factors other than length of employment. Among those quoted is the following:

"61. *Veteran Not Previously Employed Given Seniority Credit for Time Spent in Armed Forces*

"Any veteran of World War II who has been discharged, other than dishonorably, from the armed forces of the United States and who immediately prior to his acceptance in the armed forces was not previously employed by [name of company] and who is employed by [name of company] within twelve (12) months after his discharge, provided it is his first place of employment after his discharge, shall take

define here the limits to which a collective-bargaining representative may go in accepting proposals to promote the long range social or economic welfare of those it represents. Nothing in the National Labor Relations Act, as amended, so limits the vision and action of a bargaining representative that it must disregard public policy and national security. Nor does anything in that Act compel a bargaining representative to limit seniority clauses solely to the relative lengths of employment of the respective employees. Aeronautical Lodge v. Campbell, supra, at 526, and 528-529, n. 5. For examples of negotiated provisions protecting veterans from loss of seniority upon their return to private civilian employment, recognized by the National War Labor Board as coming within the proper scope of collective bargaining, in 1945, see, In re American Can Co., 27 War Lab. Rep. 634, 28 War Lab. Rep. 764, and In re Firestone Tire & Rubber Co., 24 War Lab. Rep. 322, 28 War Lab. Rep. 483. See also, Bureau of National Affairs, Inc., Collective Bargaining Contracts (1941), 369 et seq.

[VALIDITY OF CONTRACTS]

The provisions before us are within reasonable bounds of relevancy. They extended but slightly, during a period of war and emergency, the acceptance of credits for military service under circumstances where comparable credit already was required, by statute, in favor of all who had been regularly employed by Ford before entering military service. These provisions conform to the recommendation of responsible Government officials and round out a statutory requirement which, unless so rounded out, produces discriminations of its own. A failure to adopt these provisions might have resulted in more friction among employees represented by International than did their adoption.

The several briefs of *amici curiae*, filed here by consent of all parties, demonstrate the widespread acceptance and relevance of the type of provisions before us.

We hold that International, as a collective-bargaining representative, had authority to accept these provisions. Accordingly, we find no ground sufficient to establish the invalidity of the provisions before us or to sustain an injunction against either petitioner. In accord: Haynes v. United Chemical Workers, 190 Tenn. 165, 228 S.W.2d 101 [25 LRRM 2456].

The judgment of the Court of Appeals which reversed that of the District Court therefore is reversed. The judgment of the District Court is affirmed and the cause is remanded to it.

Reversed and remanded.

his place on the seniority list after completing the sixty (60) day trial period. His seniority shall be computed from the day of his acceptance into the armed forces. However, no veteran covered by this section shall have seniority prior to December 7, 1941." P. 13.

VACA v. SIPES

Supreme Court of the United States

VACA et al. v. SIPES, etc., No. 114, February 27, 1967

DISCHARGE OF EMPLOYEES

—Wrongful discharge — Action against union — Taft-Hartley Act — State court jurisdiction ▶45.346 ▶45.338

Missouri state court had jurisdiction of damage action brought against union by discharged employee who alleged that he had been discharged in violation of collective bargaining contract and that the union had arbitrarily and without just cause refused to take his grievance to arbitration under the contract, as against the union's contention that the state court lacked jurisdiction because the gravamen of the action was arguably and basically an unfair labor practice within exclusive jurisdiction of National Labor Relations Board under Section 8(b) of Federal Labor Management Relations Act.

—Action against union—Duty of fair representation—Evidence of wrongful discharge ▶94.22 ▶118.309

In damage action brought against union by discharged employee who alleged that he had been discharged in violation of collectiye bargaining contract and that the union had arbitrarily and without just cause refused to take his grievance to arbitration under the contract, Missouri Supreme Court erred in upholding the verdict in favor of the discharged employee solely on ground that the evidence supported his claim that he had been wrongfully discharged.

—Action against union—Duty of fair representation — Evidence of breach of duty ▶94.22

In damage action brought against union by discharged employee who alleged that he had been discharged in violation of collective bargaining contract and that the union had arbitrarily and without just cause refused to take his grievance to arbitration under the contract, the evidence as a matter of federal law does not support a verdict that the union breached its duty of fair representation.

—Action against union—Duty of fair representation—Damages ▶94.22

In damage action brought against union by discharged employee who alleged that he had been discharged in violation of collective bargaining contract and that the union had arbitrarily and without just cause refused to take his grievance to arbitration under the contract, a damage award against the union may not include damages attributable solely to employer's breach of contract.

—Action against union—Duty of fair representation—Arbitration ▶94.-22

Union does not breach its duty of fair representation, and thereby open up a suit by discharged employee for breach of contract, merely because the union settled the employee's grievance short of arbitration.

Discharged employee has no absolute right to have his grievance arbitrated under collective bargaining contract, and a breach of union's duty of fair representation is not established merely by proof that the employee's grievance was meritorious.

On writ of certiorari to the Missouri Supreme Court (61 LRRM 2054, 397 S.W.2d 658). Reversed.

David E. Feller, Washington, D.C. (Henry A. Panethiere, Russell D. Jacobson, and Jerry D. Anker, with him on the brief), for petitioners.

Allan R. Browne, Kansas City, Mo. (Ennis, Browne, and Martin, with him on the brief), for respondent.

Thurgood Marshall, Solicitor General, Robert S. Rifkind, Assistant to the Solicitor General, Arnold Ordman, NLRB General Counsel, Dominick L. Manoli, Associate General Counsel, Norton J. Come, Assistant General Counsel, and Malcolm D. Schultz filed brief for the United States, as amicus curiae, seeking reversal.

Robert L. Hecker, William H. Curtis, George V. Gallaher, Donald H. Bussman, Earl G. Spiker, and P. Gordon Stafford filed brief for Swift & Company, as amicus curiae, seeking reversal.

J. Albert Woll, Robert C. Mayer, Laurence Gold, and Thomas E. Harris filed brief for American Federation of Labor and Congress of Industrial Organizations, as amicus curiae, seeking reversal.

Full Text of Opinion

Mr. Justice WHITE delivered the opinion of the Court.

On February 13, 1962, Benjamin Owens filed this class action against petitioners, as officers and representatives of the National Brotherhood of Packinghouse Workers[1] and of its Kansas City Local No. 12 (the Union), in the Circuit Court of Jackson County, Missouri. Owens, a Union member, alleged that he had been discharged from his employment at Swift & Company's (Swift) Kansas City Meat Packing Plant in violation of the collective bargaining agreement then in force between Swift and the Union, and that the Union had "arbitrarily, capriciously and without just or reasonable reason or cause" refused to take his grievance with Swift to arbitration under the fifth step of the bargaining agreement's grievance procedures.

Petitioners' answer included the defense that the Missouri courts lacked jurisdiction because the gravamen of Owens' suit was "arguably and basically" an unfair labor practice under § 8(b) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b), within the exclusive jurisdiction of the National Labor Relations Board (NLRB). After a jury trial, a verdict was returned awarding Owens $7,000 compensatory and $3,300 punitive damages. The trial judge set aside the verdict and entered judgment for petitioners on the ground that the NLRB had exclusive jurisdiction over this controversy, and the Kansas City Court of Appeals affirmed. The Supreme Court of Missouri reversed and directed reinstatement of the jury's verdict,[2] relying on this Court's decisions in International Assn. of Machinists v. Gonzales, 356 U.S. 617, 42 LRRM 2135, and in Automobile Workers v. Russell, 356 U.S. 634, 42 LRRM 2142. 397 S.W.2d 658, 61 LRRM 2054. During the appeal, Owens died and respondent, the administrator of Owens' estate, was substituted. We granted certiorari to consider whether exclusive jurisdiction lies with the NLRB and, if not, whether the finding of Union liability and the relief afforded Owens are consistent with governing principles of federal labor law. 384 U.S. 969. The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), Swift, and the United States have filed *amicus* briefs supporting petitioners. Although we conclude that state courts have jurisdiction in this type of case, we hold that federal law governs, that the governing federal standards were not applied here, and that the judgment of the Supreme Court of Missouri must accordingly be reversed.

[FACTS OF CASE]

I. In mid-1959, Owens, a long-time high blood pressure patient, became sick and entered a hospital on sick leave from his employment with Swift. After a long rest during which his weight and blood pressure were reduced, Owens was certified by his family physician as fit to resume his heavy work in the packing plant. However, Swift's company doctor examined Owens upon his return and concluded that his blood pressure was too high to permit reinstatement. After securing a second authorization from another outside doctor, Owens returned to the plant, and a nurse permitted him to resume work on January 6, 1960. However, on January 8, when the doctor discovered Owens' return, he was permanently discharged on the ground of poor health.

Armed with his medical evidence of fitness, Owens then sought the Unions' help in securing reinstatement and a grievance was filed with Swift on his behalf. By mid-November 1960, the grievance had been processed through the third and into the fourth step of the grievance procedure established by the collective bargaining agreement.[3] Swift adhered to its position that Owens' poor health justified his discharge, rejecting numerous medical reports of reduced blood pressure proffered by Owens and by the Union. Swift claimed that these reports were not based upon sufficiently thorough medical tests.

On February 6, 1961, the Union sent Owens to a new doctor at Union expense "to see if we could get some better medical evidence so that we could go to arbitration with his case."

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1 Now known as the National Brotherhood of Packinghouse & Dairy Workers.

2 Punitive damages were reduced to $3,000, the amount claimed by Owens in his complaint.

3 The agreement created a five-step procedure for the handling of grievences. In steps one and two, either the aggrieved employee or the Union's representative presents the grievance first to Swift's department foreman and then in writing to the division superintendent. In step three, grievance committees of the Union and management meet, and the company must state its position in writing to the Union. Step four is a meeting between Swift's general superintendent and representatives of the National Union. If the grievance is not settled in the fourth step, the National Union is given power to refer the grievance to a specified arbitrator.

R., at 182. This examination did not support Owens' position. When the Union received the report, its executive board voted not to take the Owens grievance to arbitration because of insufficient medical evidence. Union officers suggested to Owens that he accept Swift's offer of referral to a rehabilitation center, and the grievance was suspended for that purpose. Owens rejected this alternative and demanded that the Union take his grievance to arbitration, but the Union refused. With his contractual remedies thus stalled at the fourth step, Owens brought this suit. The grievance was finally dismissed by the Union and Swift shortly before trial began in June 1964.[4]

In his charge to the jury, the trial judge instructed that petitioners would be liable if Swift had wrongfully discharged Owens and if the Union had "arbitrarily . . . and without just cause or excuse . . . refused" to press Owens' grievance to arbitration. Punitive damages could also be awarded, the trial judge charged, if the Union's conduct was "willful, wanton and malicious." However, the jury must return a verdict for the defendants, the judge instructed, "if you find and believe from the evidence that the union and its representatives acted reasonably and in good faith in the handling and processing of the grievance of the plaintiff." R., at 259-261. The jury then returned the general verdict for Owens which eventually was reinstated by the Missouri Supreme Court.

[JURISDICTION OF STATE COURT]

II. Petitioners challenge the jurisdiction of the Missouri courts on the ground that the alleged conduct of the Union was arguably an unfair labor practice and within the exclusive jurisdiction of the NLRB. Petitioners rely on Miranda Fuel Co., 140 NLRB 181, 51 LRRM 1584 (1962), enforcement denied, 326 F.2d 172, 54 LRRM 2715 (C. A. 2d Cir. 1963), where a sharply divided Board held for the first time that a union's breach of its statutory duty of fair representation violates N.L.R.A. § 8(b), as amended. With the NLRB's adoption of Miranda Fuel, petitioners argue, the broad preemption doctrine defined in San Diego Building Trades Council v. Garmon, 359 U.S. 236, 43 LRRM 2838, becomes applicable. For the reasons which follow, we reject this argument.

It is now well established that, as the exclusive bargaining representative of the employees in Owens' bargaining unit, the Union had a statutory duty fairly to represent all of those employees, both in its collective bargaining with Swift, see Ford Motor Co. v. Huffman, 345 U.S. 330, 31 LRRM 2548; Syres v. Oil Workers International Union, 350 U.S. 892, 37 LRRM 2068, and in its enforcement of the resulting collective bargaining agreement, see Humphrey v. Moore, 375 U.S. 335, 55 LRRM 2031. The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act, see Steele v. Louisville & N.R.R., 323 U.S. 192, 15 LRRM 708; Tunstall v. Brotherhood of Locomotive Firemen, 323 U. S. 210, 15 LRRM 715, and was soon extended to unions certified under the N. L. R. A., see Ford Motor Co. v. Huffman, supra. Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. Humphrey v. Moore, 375 U.S., at 342, 55 LRRM 2031. It is obvious that Owens' complaint alleged a breach by the Union of a duty grounded in federal statutes, and that federal law therefore governs his cause of action. E. g., Ford Motor Co. v. Huffman, supra.

Although N.L.R.A. § 8(b) was enacted in 1947, the NLRB did not until Miranda Fuel interpret a breach of a union's duty of fair representation as an unfair labor practice. In Miranda Fuel, the Board's majority held that N.L.R.A. § 7 gives employees "the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment," and "that Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair." 140 NLRB, at 185, 51 LRRM 1584. The Board also held that an employer who "participates" in such arbitrary union conduct violates § 8(a)(1), and that the employer and the union may violate §§ 8(a)(3) and 8(b)(2), respectively, "when, for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee." [5] Id. at 186.

The Board's Miranda Fuel decision was denied enforcement by a divided Second Circuit, 326 F.2d 172, 54 LRRM 2715 (1963). However, in Local 12, United Rubber Workers v. NLRB, No. 22239, 63 LRRM 2395 (Nov. 9, 1966), the Fifth Circuit upheld the Board's Miranda Fuel doctrine in an opinion suggesting that the Board's approach will pre-empt judicial cognizance of some fair representation duty suits. In light of these developments, petitioners argue that Owens' state court action was based upon Union conduct that is arguably proscribed by N.L.R.A. § 8(b), was potentially enforceable by the NLRB and was therefore preempted under the Garmon line of decisions.

A. In Garmon, this Court recognized that the broad powers conferred by Congress upon the National Labor Relations Board to interpret and to enforce the complex Labor Management Relations Act necessarily imply that potentially conflicting "rules of law, of remedy, and of administration" cannot be permitted to operate. 359 U.S., at 242, 43 LRRM 2838. In enacting the National Labor Relations Act and later the Labor Management Relations Act,

"Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal. . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." Garner v. Teamsters Union, 346 U.S. 485, 490-491, 33 LRRM 2218.

Consequently, as a general rule, neither state nor federal courts have jurisdiction over suits directly involving "activity [which] is arguably subject to § 7 or § 8 of the Act." San Diego Building Trades Council v. Garmon, 359 U.S., at 245, 43 LRRM 2838.

This pre-emption doctrine, however, has never been rigidly applied to cases where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB. Congress itself has carved out exceptions to the Board's exclusive jurisdiction: Section 303 of the Labor Management Relations Act, 29 U. S. C. § 187, expressly permits anyone injured by a violation of N.L.R.A. § 8(b)(4) to recover damages in a federal court even though such unfair labor practices are also remediable by the Board; § 301 of that Act, 29 U.S.C. § 185, permits suits for breach of a collective bargaining agreement regardless of whether the particular breach is also an unfair labor practice within the jurisdiction of the Board, see Smith v. Evening News Assn., 371, U.S. 195, 51 LRRM 2646; and N.L.R.A. § 14, as amended by Title VII, § 701 (a) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 541, 29 U.S.C. § 164(c), permits state agencies and courts to assume jurisdiction "over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction." Compare Guss v. Utah Labor Relations Board, 353 U.S. 1, 39 LRRM 2567.

In addition to these congressional exceptions, this Court has refused to hold state remedies pre-empted "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress has deprived the States of the power to act." San Diego Building Trades Council v. Garmon, 359 U.S., at 243-244, 43 LRRM 2838. See, e.g., Linn v. United Plant Guard Workers, 383 U.S. 53, 61 LRRM 2345 (libel); United Automobile Workers v. Russell, 356 U.S. 634, 42 LRRM 2142 (violence); International Assn. of Machinists v. Gonzales, 356 U.S. 617, 42 LRRM 2135 (wrongful expulsion from union membership); Electrical Workers v. Wisconsin Em-

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[4] No notice of the dismissal was given to Owens, who by that time had filed a second suit against Swift for breach of contract. The suit against Swift is still pending in a pretrial stage.

[5] See also Cargo Handlers, Inc., 159 NLRB No. 17, 62 LRRM 1228; Local 12, United Rubber Workers, 150 NLRB 312, 57 LRRM 1535, enforced, No. 22239 (C.A. 5th Cir. Nov. 9, 1966, 63 LRRM 2395); Maremont Corp., 149 NLRB, 482, 57 LRRM 1298; Galveston Maritime Assn., Inc., 148 NLRB 897, 57 LRRM 1083; Hughes Tool Co., 147 NLRB 1573, 56 LRRM 1289.

We think that another situation when the employee may seek judicial enforcement of his contractual rights arises if, as is true here, the union has sole power under the contract to invoke the higher stages of the grievance procedure, *and* if, as is alleged here, the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's *wrongful* refusal to process the grievance. It is true that the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement. But the employer has committed a wrongful discharge in breach of that agreement, a breach which could be remedied through the grievance process to the employee-plaintiff's benefit were it not for the union's breach of its statutory duty of fair representation to the employee. To leave the employee remediless in such circumstances would, in our opinion, be a great injustice. We cannot believe that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract. Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements. Cf. Richardson v. Texas & N.O.R.R., 242 F.2d 230, 235-236, 39 LRRM 2593 (C.A. 5th Cir.).

For these reasons, we think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance.[11] We may assume for present purposes that such a breach of duty by the union is an unfair labor practice, as the NLRB and the Fifth Circuit have held. The employee's suit against the employer, however, remains a § 301 suit, and the jurisdiction of the courts is no more destroyed by the fact that the employee, as part and parcel of his § 301 action, finds it necessary to prove an unfair labor practice by the union, than it is by the fact that the suit may involve an unfair labor practice by the employer himself. The court is free to determine whether the employee is barred by the actions of his union representative, and, if not, to proceed with the case. And if, to facilitate his case, the employee joins the union as a defendant, the situation is not substantially changed. The action is still a § 301 suit, and the jurisdiction of the courts is not pre-empted under the Garmon principle. This, at the very least, is the holding of Humphrey v. Moore with respect to pre-emption, as petitioners recognize in their brief. And, insofar as adjudication of the union's breach of duty is concerned, the result should be no different if the employee, as Owens did here, sues the employer and the union in separate actions. There would be very little to commend a rule which would permit the Missouri courts to adjudicate the Union's conduct in an action against Swift but not in an action against the Union itself.

For the above reasons, it is obvious that the courts will be compelled to pass upon whether there has been a breach of the duty of fair representation in the context of many § 301 breach-of-contract actions. If a breach of duty by the union and a breach of contract by the employer are proven, the court must fashion an appropriate remedy. Presumably, in at least some cases, the union's breach of duty will have enhanced or contributed to the employee's injury. What possible sense could there be in a rule which would permit a court that has litigated the fault of employer and union to fashion a remedy only with respect to the employer? Under such a rule, either the employer would be compelled by the court to pay for the union's wrong—slight deterrence, indeed, to future union misconduct—or the injured employee would be forced to go to two tribunals to repair a single injury. Moreover, the Board would be compelled in many cases either to remedy injuries arising out of a breach of contract, a task which Congress has not assigned to it, or to leave the individual employee without remedy for the union's wrong.[12] Given the strong reasons for not pre-empting duty of fair representation suits in general, and the fact that the courts in many § 301 suits must adjudicate whether the union has breached its duty, we conclude that the courts may also fashion remedies for such a breach of duty.

It follows from the above that the Missouri courts had jurisdiction in this case. Of course, it is quite another problem to determine what remedies may be available against the Union if a breach of duty is proven. See Part IV, *infra*. But the unique role played by the duty of fair representation doctrine in the scheme of federal labor laws, and its important relationship to the judicial enforcement of collective bargaining agreements in the context presented here, render the Garmon pre-emption doctrine inapplicable.

[FAIR REPRESENTATION]

III. Petitioners contend, as they did in their motion for judgment notwithstanding the jury's verdict, that Owens failed to prove that the Union breached its duty of fair representation in its handling of Owens' grievance. Petitioners also argue that the Supreme Court of Missouri, in rejecting this contention, applied a standard that is inconsistent with governing principles of federal law with respect to the Union's duty to an individual employee in its processing of grievances under the collective bargaining agreement with Swift. We agree with both contentions.

A. In holding that the evidence at trial supported the jury's verdict in favor of Owens, the Missouri Supreme Court stated:

"The essential issue submitted to the jury was whether the union . . . arbitrarily . . . refused to carry said grievance . . . through the fifth step.

. . .

"We have concluded that there was sufficient substantial evidence from which the jury reasonably could have found the foregoing issue in favor of plaintiff. It is notable that no physician actually testified in the case. Both sides were content to rely upon written statements. Three physicians certified that plaintiff was able to perform his regular work. Three other physicians certified that they had taken plaintiff's blood pressure and that the readings were approximately 160 over 100. It may be inferred that such a reading does not indicate that his blood pressure was dangerously high. Moreover, plaintiff's evidence showed that he had actually done hard physical labor periodically during the four years following his discharge. We accordingly rule this point adversely to defendants." 397 S.W.2d, at 665, 61 LRRM 2054.

Quite obviously, the question which the Missouri Supreme Court thought dispositive of the issue of liability was whether the evidence supported Owens' assertion that he had been wrongfully discharged by Swift, regardless of the Union's good faith in reaching a contrary conclusion. This was also the major concern of the plaintiff at trial: the bulk of Owens' evidence was directed at whether he was medically fit at the time of discharge and whether he had performed heavy work after that discharge.

A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. See Humphrey v. Moore, supra; Ford Motor Co. v. Huffman, supra. There has been considerable debate over the extent of this duty in the context of a union's enforcement of the grievance and arbitration procedures in a collective bargaining agreement. See generally Blumrosen, The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship, 61 Mich. L. Rev. 1435, 1482-1501 (1963); Comment, Federal Protection of Individual Rights under Labor Contracts, 73 Yale L. J. 1215 (1964). Some have suggested that every individual employee should have the right to have his grievance taken to

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11 Accord, Hiller v. Liquor Salesmen's Union, 338 F.2d 778, 57 LRRM 2629 (C.A. 2d Cir.); Hardcastle v. Western Greyhound Lines, 303 F.2d 182, 50 LRRM 2239 (C.A. 9th Cir.), cert. denied, 371 U.S. 920, 51 LRRM 2616; Fiore v. Associated Transport, Inc., 253 F.Supp. 596, 62 LRRM 2517; Bieski v. Eastern Automobile Forwarding Co., 231 F.Supp. 710, 56 LRRM 2775, aff'd, 354 F.2d 414, 61 LRRM 2078 (C.A. 3d Cir.); Ostrofsky v. United Steelworkers, 171 F.Supp. 782, 43 LRRM 2744 aff'd per curiam, 273 F.2d 614, 45 LRRM 2486 (C.A. 4th Cir.), cert. denied, 363 U.S. 849; Jenkins v. Wm. Schluderberg-T. J. Kurdle Co., 217 Md. 556, 144 A.2d 88, 30 LA 875.

12 Assuming for the moment that Swift breached the collective bargaining agreement in discharging Owens and that the Union breached its duty in handling Owens' grievance, this case illustrates the difficulties that would result from a rule pre-empting the courts from remedying the Union's breach of duty. If Swift did not "participate" in the Union's unfair labor practice, the Board would have no jurisdiction to remedy Swift's breach of contract. Yet a court might be equally unable to give Owens full relief in a § 301 suit against Swift. Should the court award damages against Swift for Owens' full loss, even if it concludes that part of that loss was caused by the Union's breach of duty? Or should it award Owens only partial recovery hoping that the Board will make him whole? These remedy problems are difficult enough when one tribunal has all parties before it; they are impossible if two independent tribunals, with different procedures, time limitations, and remedial powers must participate.

ployment Relations Board, 315 U.S. 740, 10 LRRM 520 (mass picketing). See also Hanna Mining Co. v. Marine Engineers Beneficial Assn., 382 U.S. 181, 60 LRRM 2473. While these exceptions in no way undermine the vitality of the pre-emption rule where applicable, they demonstrate that the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies.

A primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union duty of fair representation. The doctrine was judicially developed in Steele and its progeny, and suits alleging breach of the duty remained judicially cognizable long after the NLRB was given unfair labor practice jurisdiction over union activities by the L.M.R.A.[6] Moreover, when the Board declared in Miranda Fuel that a union's breach of its duty of fair representation would henceforth be treated as an unfair labor practice, the Board adopted and applied the doctrine as it had been developed by the federal courts. See 140 NLRB at 184-186, 51 LRRM 1584. Finally, as the dissenting Board members in Miranda Fuel have pointed out, fair representation duty suits often require review of the substantive positions taken and policies pursued by a union in its negotiation of a collective bargaining agreement and in its handling of the grievance machinery; as these matters are not normally within the Board's unfair labor practice jurisdiction, it can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts, which have been engaged in this type of review since the Steele decision.[7]

In addition to the above considerations, the unique interests served by the duty of fair representation doctrine have a profound effect, in our opinion, on the applicability of the pre-emption rule to this class of cases. The federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining. See N.L.R.A. § 1, as amended, 29 U.S.C. § 151. The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit. See, e.g., J. I. Case Co. v. N.L.R.B., 321 U.S. 332, 14 LRRM 501. This Court recognized in Steele that the congressional grant of power to a union to act as exclusive collective bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination. 323 U.S., at 198-199, 15 LRRM 708. Since that landmark decision, the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law. Were we to hold, as petitioners and the government urge, that the courts are pre-empted by the NLRB's Miranda Fuel decision of this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint. See United Electrical Contractors Assn. v. Ordman, No. 298, C. A. 2d Cir., Sept. 23, 1966, 33 LRRM 2223, cert. denied, 35 U.S. L. Week 3243, 64 LRRM 2158 (Jan. 17, 1967).[8]

The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a unions breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine. For these reasons, we cannot assume from the NLRB's tardy assumption of jurisdiction in these cases that Congress, when it enacted N.L.R.A. § 8(b) in 1947, intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative.

B. There are also some intensely practical considerations which foreclose pre-emption of judicial cognizance of fair representation duty suits, considerations which emerge from the intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts. For the fact is that the question of whether a union has breached its duty of fair representation will in many cases be a critical issue in a suit under L.M.R.A. § 301 charging an employer with a breach of contract. To illustrate, let us assume a collective bargaining agreement that limits discharges to those for good cause and that contains no grievance, arbitration or other provisions purporting to restrict access to the courts. If an employee is discharged without cause, either the union or the employee may sue the employer under L.M.R.A. § 301. Under this section, courts have jurisdiction over suits to enforce collective bargaining agreements even though the conduct of the employer which is challenged as a breach of contract is also arguably an unfair labor practice within the jurisdiction of the NLRB. Garmon and like cases have no application to § 301 suits. Smith v. Evening News Assn., 371 U.S. 195, 51 LRRM 2646.

The rule is the same with regard to pre-emption where the bargaining agreement contains grievance and arbitration provisions which are intended to provide the exclusive remedy for breach of contract claims.[9] If an employee is discharged without cause in violation of such an agreement, that the employer's conduct may be an unfair labor practice does not preclude a suit by the union against the employer to compel arbitration of the employee's grievance; the adjudication of the claim by the arbitrator; or a suit to enforce the resulting arbitration award. See, e.g., Steelworkers v. American Mfg. Co., 363 U.S. 564, 46 LRRM 2414.

However, if the wrongfully discharged employee himself resorts to the courts before the grievance procedures have been fully exhausted, the employer may well defend on the ground that the exclusive remedies provided by such a contract have not been exhausted. Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. Republic Steel Corp. v. Maddox, 379 U.S. 650, 58 LRRM 2193. However, because these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures.

An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the contract occurs when the conduct of the employer amounts to a repudiation of those contractual procedures. Cf. Drake Bakeries Inc. v. Bakery Workers, 370 U.S. 254, 260-263, 50 LRRM 2440. See generally 6A Corbin, Contracts § 1443 (1962). In such a situation (and there may of course be others), the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action.

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[6] See Ford Motor Co. v. Huffman, 345 U.S. 330, 332, n. 4, 31 LRRM 2548. In Huffman, the NLRB submitted an *amicus* brief stating that it had not assumed pre-emptive jurisdiction over fair representation duty issues. Mem. for the NLRB, Nos. 193 and 194, Oct. Term, 1952. In Syres v. Oil Workers International Union, 350 U.S. 892, 37 LRRM 2068, the Court reversed the dismissal of a suit which claimed breach of the duty of fair representation despite express reliance by one respondent on exclusive NLRB jurisdiction. Brief for Resp. Gulf Oil Corp., No. 390, Oct. Term, 1955.

[7] See Hughes Tool Co., 147 NLRB 1573, 1589-1590, 56 LRRM 1289 (Chairman McCulloch and Member Fanning, dissenting in part).

[8] The public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies. See N.L.R.A. § 10(c), as amended, 29 U.S.C. § 160(c); Phelps Dodge Corp. v. N. L. R. B., 313 U.S. 177, 8 LRRM 439. Thus, the General Counsel will refuse to bring complaints on behalf of injured employees where the injury complained of is "insubstantial." See Administrative Decision of the General Counsel, Case No. K-610, Aug. 13, 1956, in CCH N. L. R. B. Decisions, 1956-1957, at ¶ 54,059, 38 LRRM 1297.

[9] If a grievance and arbitration procedure is included in the contract, but the parties do not intend it to be an exclusive remedy, then a suit for breach of contract will normally be heard even though such procedures have not been exhausted. See Republic Steel Corp. v. Maddox, 379 U.S. 650, 657-658, 58 LRRM 2193; 6A Corbin Contracts § 1436 (1962).

[10] Occasionally, the bargaining agreement will give the aggrieved employee, rather than his union, the right to invoke arbitration. See Retail Clerks v. Lion Dry Goods, Inc., 369 F.2d 715, 58 LRRM 2611; cert. denied, 382 U.S. 839, 60 LRRM 2234.

arbitration.[13] Others have urged that the Union be given substantial discretion (if the collective bargaining agreement so provides) to decide whether a grievance should be taken to arbitration, subject only to the duty to refrain from patently wrongful conduct such as racial discrimination or personal hostility.[14]

Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. In L.M.R.A. § 203(d), 29 U.S.C. § 173(d), Congress declared that "Final adjustment by a method agreed upon by the parties themselves is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement. See Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956).

If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration.[15] This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully. See NLRB v. Acme Ind. Co., —— U.S. ——, ——, 64 LRRM 2069; Ross, Distressed Grievance Procedures and Their Rehabilitation, in Labor Arbitration and Industrial Change, Proceedings of the 16th Annual Meeting, National Academy of Arbitrators 104 (1963). It can well be doubted whether the parties to collective bargaining agreements would long continue to provide for detailed grievance and arbitration procedure of the kind encouraged by L.M.R.A. § 203(d), supra, if their power to settle the majority of grievances short of the costlier and more time-consuming steps was limited by a rule permitting the grievant unilaterally to invoke arbitration. Nor do we see substantial danger to the interests of the individual employee if his statutory agent is given the contractual power honestly and in good faith to settle grievances short of arbitration. For these reasons, we conclude that a union does not breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract, merely because it settled the grievance short of arbitration.

For these same reasons, the standard applied here by the Missouri Supreme Court cannot be sustained. For if a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial. Since the union's statutory duty of fair representation protects the individual employee from arbitratory abuses of the settlement device by providing him with recourse against both employer (in a § 301 suit) and union, this severe limitation on the power to settle grievances is neither necessary nor desirable. Therefore, we conclude that the Supreme Court of Missouri erred in upholding the verdict in this case solely on the ground that the evidence supported Owens' claim that he had been wrongfully discharged.

B. Applying the proper standard of union liability to the facts of this case, we cannot uphold the jury's award, for we conclude that as a matter of federal law the evidence does not support a verdict that the Union breached its duty of fair representation. As we have stated, Owens could not have established a breach of that duty merely by convincing the jury that he was in fact fit for work in 1960; he must also have proved arbitrary or bad-faith conduct on the part of the Union in processing his grievance. The evidence revealed that the Union diligently supervised the grievance into the fourth step of the bargaining agreement's procedure, with the Union's business representative serving as Owens' advocate throughout these steps. When Swift refused to reinstate Owens on the basis of his medical reports indicating reduced blood pressure, the Union sent him to another doctor of his own choice, at Union expense, in an attempt to amass persuasive medical evidence of Owens' fitness for work. When this examination proved unfavorable, the Union concluded that it could not establish a wrongful discharge. It then encouraged Swift to find light work for Owens at the plant. When this effort failed, the Union determined that arbitration would be fruitless and suggested to Owens that he accept Swifts' offer to send him to a heart association for rehabilitation. At this point, Owens' grievance was suspended in the fourth step in the hope that he might be rehabilitated.

In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances See Humphrey v. Moore, 375 U.S. 335, 349-350, 55 LRRM 2031: Ford Motor Co. v. Huffman, 345 U.S. 330, 337-339, 31 LRRM 2548. In a case such as this, when Owens supplied the Union with medical evidence supporting his position, the Union might well have breached its duty had it ignored Owens' complaint or had it processed the grievance in a perfunctory manner. See Cox, Rights under a Labor Agreement, 69 Harv. L. Rev., at 632-634. But here the Union processed the grievance into the fourth step, attempted to gather sufficient evidence to prove Owens' case, attempted to secure for Owens less vigorous work at the plant, and joined in the employer's efforts to have Owens rehabilitated. Only when these efforts all proved unsuccessful did the Union conclude both that arbitration would be fruitless and that the grievance should be dismissed. There was no evidence that any Union officer was personally hostile to Owens or that the Union acted at any time other than in good faith.[16] Having concluded that the individual employee has no absolute right to have his grievance arbitrated under the collective bargaining agreement at issue, and that a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious, we must conclude that that duty was not breached here.

[THE DAMAGES]

IV. In our opinion, there is another important reason why the judgment of the Missouri Supreme Court cannot stand. Owens' suit against the Union was grounded on his claim that Swift had discharged him in violation of the applicable collective bargaining agreement. In his complaint Owens alleged "that, as a direct result of said wrongful breach of said

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[13] See Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825, 53 LRRM 2271; 1954 Report of Committee on Improvement of Administration of Union-Management Agreements, Individual Grievances, 50 Nw. U. L. Rev. 143 (1955); Murphy, The Duty of Fair Representation under Taft-Hartley, 30 Mo. L. Rev. 373, 389 (1965); Summers, Individual Rights in Collective Agreements and Arbitration, 37 N. Y. U. L. Rev. 362 (1962).

[14] See Sheremet v. Chrysler Corp., 372 Mich. 658, 127 N.W.2d 313, 56 LRRM 2102; Wyle, Labor Arbitration and the Concept of Exclusive Representation, 7 B. C. Ind. & Com. L. Rev. 783 (1966).

[15] Under current grievance practices, an attempt is usually made to keep the number of arbitrated grievances to a minimum. An officer of the National Union testified in this case that only one of 967 grievances filed at all of Swift's plants between September 1961 and October 1963 was taken to arbitration. And the AFL-CIO's *amicus* brief reveals similar performances at General Motors Company and United States Steel Corporation, two of the Nation's largest unionized employers: less than .05% of all written grievances filed during a recent period at General Motors required arbitration, while only 5.6% of the grievances processed beyond the first step at United States Steel were decided by an arbitrator.

[16] Owen's did allege and testify that petitioner Vaca, President of the Kansas City local, demanded $300 in expenses before the Union would take the grievance to arbitration, a charge which all the petitioners vigorously denied at trial. Under the collective bargaining agreement, the local union had no power to invoke arbitration. See Note 3, supra. Moreover, the Union's decision to send Owens to another doctor at Union expense occurred after Vaca's alleged demand, and the ultimate decision not to invoke arbitration came later still. Thus, even if the jury believed Owens' controverted testimony, we do not think that this incident would establish a breach of duty by the Union.

contract, by employer. . . . Plaintiff was damaged in the sum of Six Thousand, Five Hundred ($6,500.00) Dollars per year, continuing until the date of trial." For the Union's role in "preventing Plaintiff from completely exhausting administrative remedies," Owens requested, and the jury awarded, compensatory damages for the above-described breach of contract plus punitive damages of $3,000. R., at 6. We hold that such damages are not recoverable from the Union in the circumstances of this case.

The appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach. In this case, the employee's complaint was that the Union wrongfully failed to afford him the arbitration remedy against his employer established by the collective bargaining agreement. But the damages sought by Owens were primarily those suffered because of the employer's alleged breach of contract. Assuming for the moment that Owens had been wrongfully discharged, Swift's only defense to a direct action for breach of contract would have been the Union's failure to resort to arbitration, compare Republic Steel Corp. v. Maddox, 379 U.S. 650, 58 LRRM 2193, with Smith v. Evening News Assn., 371 U.S. 195, 51 LRRM 2646, and if that failure was itself a violation of the Union's statutory duty to the employee, there is no reason to exempt the employer from contractual damages which he would otherwise have had to pay. See pp. 13-14, supra. The difficulty lies in fashioning an appropriate scheme of remedies.

Petitioners urge that an employee be restricted in such circumstances to a decree compelling the employer and the union to arbitrate the underlying grievance.[17] It is true that the employee's action is based on the employer's alleged breach of contract plus the union's alleged wrongful failure to afford him his contractual remedy of arbitration. For this reason, an order compelling arbitration should be viewed as one of the available remedies when a breach of the union's duty is proved. But we see no reason inflexibly to require arbitration in all cases. In some cases, for example, at least part of the employee's damages may be attributable to the union's breach of duty, and an arbitrator may have no power under the bargaining agreement to award such damages against the union. In other cases, the arbitrable issues may be substantially resolved in the course of trying the fair representation controversy. In such situations, the court should be free to decide the contractual claim and to award the employee appropriate damages or equitable relief.

A more difficult question is, what portion of the employee's damages may be charged to the union: in particular, may an award against a union include, as it did here, damages attributable solely to the employer's breach of contract? We think not. Though the union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract which triggered the controversy and which caused this portion of the employee's damages. The employee should have no difficulty recovering these damages from the employer, who cannot, as we have explained, hide behind the union's wrongful failure to act; in fact, the employer may be (and probably should be) joined as a defendant in the fair representation suit, as in Humphrey v. Moore, supra. It could be a real hardship on the union to pay these damages, even if the union were given a right of indemnification against the employer. With the employee assured of direct recovery from the employer, we see no merit in requiring the union to pay the employer's share of the damages.[18]

The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer. In this case, even if the Union had breached its duty, all or almost all of Owens' damages would still be attributable to his allegedly wrongful discharge by Swift. For these reasons, even if the Union here had properly been found liable for a breach of duty, it is clear that the damage award was improper.

Reversed.

Concurring Opinion

Mr. Justice FORTAS, with whom The Chief Justice and Mr. Justice HARLAN join, concurring in the result.

1. In my view, a complaint by an employee that the union has breached its duty of fair representation is subject to the exclusive jurisdiction of the NLRB. It is a charge of unfair labor practice. See Miranda Fuel Co., 140 NLRB 181, 51 LRRM 1584 (1962);[1] Local 12, United Rubber Workers, 150 NLRB 312, 57 LRRM 1535, enforced, No. 22239 (C.A. 5th Cir., Nov. 9, 1966, 63 LRRM 2395)[2] As is the case with most other unfair labor practices, the Board's jurisdiction is preemptive. Garner v. Teamsters Union, 346 U.S. 485, 33 LRRM 2218 (1953); Guss v. Utah Labor Board, 353 U.S. 1, 39 LRRM 2567 (1957); San Diego Building Trades Council v. Garmon, 359 U.S. 236, 43 LRRM 2838 (1959); Local 438, Constr. Laborers v. Curry, 371 U.S. 542, 52 LRRM 2188 (1963); Plumbers' Union v. Borden, 373 U.S. 690, 53 LRRM 2322 (1963); Iron Workers v. Perko, 373 U.S. 701, 53 LRRM 2327 (1963); Liner v. Jafco, Inc., 375 U.S. 301, 55 LRRM 2048 (1964). Cf. Woody v. Sterling Alum. Prods. Inc., No. 18,083, 63 LRRM 2087 (C.A. 8th Cir., Sept. 2, 1966, petition for certiorari pending, No. 946, O. T. 1966). There is no basis for failure to apply the pre-emption principles in the present case, and, as I shall discuss, strong reason for its application. The relationship between the union and the individual employee with respect to the processing of claims to employment rights under the collective bargaining agreement is fundamental to the design and operation of federal labor law. It is not "merely peripheral," as the Court's opinion states. It "presents difficult problems of definition of status, problems which we have held are precisely 'of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole.'" Iron Workers v. Perko, supra, 373 U.S., at 706, 53 LRRM 2327. Accordingly, the judgment of the Supreme Court of Missouri should be reversed and the complaint dismissed for this reason and on this basis. I agree, however, that if it were assumed that jurisdiction of the subject matter exists, the judgment would still have to be reversed because of the use by the Missouri court of an improper standard for measuring the union's duty, and the absence of evidence to establish that the union refused further to process Owens' grievance because of bad faith or arbitrarily.

[MAJORITY OPINION]

2. I regret the elaborate discussion in the Court's opinion of problems which are irrelevant. This not an action by the employee against the employer, and the discussion of the requisites of such an action is, in my judgment, unnecessary. The Court argues that the employee could sue the employer under NLRB § 301: and that to maintain such an action the employee would have to show that he has exhausted his remedies under the collective bargaining agreement, or alternatively that he was prevented from doing so because the union breached its duty to him by failure completely to process his claim. That may be; or maybe all he would have to show to maintain an action against the employer for wrongful discharge is that he demanded that

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17 Obviously, arbitration is an appropriate remedy only when the parties have created such a procedure in the collective bargaining agreement.

18 We are not dealing here with situations where a union has affirmatively caused the employer to commit the alleged breach of contract. In cases of that sort where the union's conduct is found to be an unfair labor practice, the NLRB has found an unfair labor practice by the employer, too, and has held the union and the employer jointly and severally liable for any back pay found owing to the particular employee who was the subject of their joint discrimination. E.g., Imparato Stevedoring Corp., 113 NLRB 883, 36 LRRM 1401 (1953); Squirt Distrib. Co., 92 NLRB 1667, 27 LRRM 1303 (1951); H. M. Newman, 85 NLRB 725, 24 LRRM 1463 (1949). Even if this approach would be appropriate for analogous § 301 and breach-of-duty suits, it is not applicable here. Since the Union played no part in Swift's alleged breach of contract and since Swift took no part in the Union's alleged breach of duty, joint liability for either wrong would be unwarranted.

1 This decision of the NLRB was denied enforcement by the Court of Appeals for the Second Circuit but on a basis which did not decide the point relevant here. NLRB v. Miranda Fuel Co., 326 F.2d 172, 54 LRRM 2715 (C.A. 2d Cir. 1963). Only one judge, Judge Medina, took the position that the NLRB had incorrectly held violation of the duty of fair representation to be an unfair labor practice. As an alternative ground for decision, he held that the NLRB had not had sufficient evidence to support its finding of breach of duty. Judge Lumbard agreed with this latter holding, and explicitly did not reach the question whether breach of the duty is an unfair labor practice. Judge Friendly dissented. He would have affirmed the NLRB both on the sufficiency of the evidence and on the holding that breach of the duty of fair representation is an unfair labor practice as to which the NLRB can give relief.

2 The opinion by Judge Thornberry for the Fifth Circuit supports the views expressed herein. See also Cox, The Duty of Fair Representation, 2 Villanova L. Rev. 151, 172-173 (1957); Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L. J. 1327 (1958).

the union process his claim to exhaustion of available remedies, and that it refused to do so.[3] I see no need for the Court to pass upon that question, which is not presented here, and which, with all respect, lends no support to the Court's argument. The Court seems to use its discussion of the employee-employer litigation as somehow analogous to or supportive of its conclusion that the employee may maintain a court action against the union. But I do not believe that this follows. I agree that the NLRB's unfair labor practice jurisdiction does not preclude an action under § 301 against the employer for wrongful discharge from employment. Smith v. Evening News Assn., 371 U.S. 195, 51 LRRM 2646 (1962). Therefore, Owens might maintain an action against his employer in the present case. This would be an action to enforce the collective bargaining agreement, and Congress has authorized the courts to entertain actions of this type. But his claim against the union is quite different in character, as the Court itself recognizes. The Court holds—and I think correctly if the issue is to be reached—that the union could not be required to pay damages measured by the breach of the employment contract, because it was not the union but the employer that breached the contract. I agree; but I suggest that this reveals the point for which I contend: that the employee's claim against the union is not a claim under the collective bargaining agreement, but a claim that the union has breached its statutory duty of fair representation. This claim, I submit, is a claim of unfair labor practice and it is within the exclusive jurisdiction of the NLRB. The Court agrees that "one of the available remedies [obtainable, the Court says, by court action] when a breach of the Union's duty is proved" is "an order compelling arbitration." This is precisely and uniquely the kind of order which within the province of the Board. Beyond this, the Court is exceedingly vague as to remedy: "appropriate damages or other equitable relief" are suggested as possible remedies, apparently when arbitration is not available. Damages against the union, the Court admonishes, should be gauged "according to the damage caused by its fault"—i.e., the failure to exhaust remedies for the grievance. The Court's difficulty, it seems to me, reflects the basic awkwardness of its position: It is attempting to force into the posture of a contract violation an alleged default of the union which is not a violation of the collective bargaining agreement but a breach of its separate and basic duty fairly to represent all employees in the unit. This is an unfair labor practice, and should be treated as such.[4]

[COURT JURISDICTION]

3. If we look beyond logic and precedent to the policy of the labor relations design which Congress has provided, court jurisdiction of this type of action seems anomalous and ill-advised. We are not dealing here with the interpretation of a contract or with an alleged breach of an employment agreement. As the Court in effect acknowledges, we are concerned with the subtleties of a union's statutory duty faithfully to represent employees in the unit, including those who may not be members of the union. The Court—regrettably, in my opinion—ventures to state judgments as to the metes and bounds of the reciprocal duties involved in the relationship between the union and the employee. In my opinion, this is precisely and especially the kind of judgment that Congress intended to entrust to the Board and which is well within the pre-emption doctrine that this Court has prudently stated.[5] See cases cited, supra, especially the Perko and Borden cases, the facts of which strongly parallel the situation in this case. See also Linn v. Plant Guard Workers, 383 U.S. 53, 72, 61 LRRM 2345 (1966) (dissenting opinion). The nuances of union-employee and union-employer relationship are infinite and consequential, particularly when the issue is as amorphous as whether the union acted "in bad faith or arbitrarily" which the Court states as the standard applicable here. In all reason and in all good judgment, this jurisdiction should be left with the Board and not be placed in the courts, especially with the complex and necessarily confusing guidebook that the Court now publishes.

Accordingly, I join the judgment of reversal, but on the basis stated.

Dissenting Opinion

Mr. Justice BLACK, dissenting.

The Court today opens slightly the courthouse door to an employee's incidental claim against his union for breach of its duty of fair representation, only to shut it in his face when he seeks direct judicial relief for his underlying and more valuable breach-of-contract claim against his employer. This result follows from the Court's announcement in this case, involving an employee's suit against his union, of a new rule to govern an employee's suit against his employer. The rule is that before an employee can sue his employer under § 301 of the L.M.R.A. for a simple breach of his employment contract, the employee must prove not only that he attempted to exhaust his contractual remedies, but that his attempt to exhaust them was frustrated by "arbitrary, discriminatory or . . . bad faith" conduct on the part of his union. With this new rule and its result, I cannot agree.

The Court recognizes, as it must, that the jury in this case found at least that Benjamin Owens was fit for work, that his grievance against Swift was meritorious, and that Swift breached the collective bargaining agreement when it wrongfully discharged him. The Court also notes in passing that Owens has a separate action for breach of contract pending against Swift in the state courts. And in Part IV of its opinion, the Court vigorously insists that "there is no reason to exempt the employer from contractual damages which he would otherwise have had to pay," that the "employee should have no difficulty recovering these damages from the employer" for his "unrelated breach of contract," and that "the employee [is] assured of direct recovery from the employer." But this reassurance in part IV gives no comfort to Owens, for Part IV is based on the assumption that the union breached its duty to Owens, an assumption which, in Part III of its opinion, the Court finds unsupported by the facts of this case. What this all means, though the Court does not expressly say it, is that Owens will be no more successful in his pending breach-of-contract action against Swift than he is here in his suit against the union. For the Court makes it clear "that the question of whether a union has breached its duty of fair representation will . . . be a critical issue in a suit under L. M. R. A. § 301," that "the wrongfully discharged employee may bring an action against his employer" only if he "can prove that the union . . . breached its duty of fair representation in its handling of the employee's grievance," and "that the employee, as part and parcel of his § 301 action, finds it necessary to prove an unfair labor practice by the union." Thus, when Owens attempts to proceed with his pending breach-of-contract action against Swift, Swift will undoubtedly secure its prompt dismissal by pointing to the Court's conclusion here that the union has not breached its duty of fair representation. Thus, Owens, who now has obtained a judicial determination that he was wrongfully discharged, is left remediless, and Swift having breached its contract, is allowed to hide behind, and is shielded by, the union's conduct. I simply fail to see how it should make one iota of difference as far as the "unrelated breach-of-contract" by Swift is concerned whether the union's conduct is wrongful or rightful. Neither precedent nor

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[3] Cf. my Brother Black's dissenting opinion in this case. Cf. also Brown v. Sterling Alum. Products, Inc., 385 F.2d 651, 656-657, 63 LRRM 2177 (C.A. 8th Cir. 1966, petition for certiorari pending, No. 946, O. T. 1966). Republic Steel Corp. v. Maddox, 379 U.S. 650, 58 LRRM 2193 (1965), does not pass upon the issue. The Court states that "To leave the employee remedyless" when the union wrongfully refuses to process his grievance, "would . . . be a great injustice." I do not believe the Court relieves this injustice to any great extent by requiring the employee to prove an unfair labor practice as a prerequisite to judicial relief for the employer's breach of contract. Nor do I understand how giving the employee a cause of action against the union is an appropriate way to remedy the injustice which would exist if the union were allowed to foreclose relief against the employer.

[4] The Court argues that since the employee suing the employer for breach of the employment contract would have to show exhaustion of remedies under the contract, and since he would for this purpose have to show his demand on the union and, according to the Court, its wrongful failure to prosecute his grievance, the union could be joined as a party defendant; and since the union could be joined in such a suit, it may be sued independently of the employer. But this is a *non sequitur*. As the Court itself insists, the suit against the union is not for breach of the employment contract, but for violation of the duty fairly to represent the employee. This is an entirely different matter. It is a breach of statutory duty—all unfair labor practice—and not a breach of the employment contract.

[5] In a variety of contexts the NLRB concerns itself with the substantive bargaining behavior of the parties. For example: (a) the duty to bargain in good faith, see, e.g., Fibreboard Corp. v. Labor Board, 379 U.S. 203, 57 LRRM 2609 (1964); (b) jurisdictional disputes, see, e.g., Labor Board v. Radio Engineers, 364 U.S. 573, 47 LRRM 2332 (1961); (c) secondary boycotts and hot cargo clauses, see, e.g., Orange Belt District Council of Painters No. 48 v. NLRB, 328 F.2d 534, 55 LRRM 2293 (C.A.D.C. Cir. 1964).

logic support the Court's new announcement that it does.

[MADDOX CASE]

Certainly, nothing in Republic Steel Corp. v. Maddox, 379 U.S. 650, 58 LRRM 2193, supports this new rule. That was a case where the aggrieved employee attempted to "completely sidestep available grievance procedures in favor of a lawsuit." Id., at 653. Noting that "it cannot be said . . . that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so," ibid., the Court there held that the employee "must *attempt* use of the contract grievance procedure," id., at 652, and "must afford the union the opportunity to act on his behalf," id., at 653. I dissented on the firm belief that an employee should be free to litigate his own lawsuit with his own lawyer in a court before a jury, rather than being forced to entrust his claim to a union which, even if it did agree to press it, would be required to submit it to arbitration. And even if, as the Court implied, "the worker would be allowed to sue after he had presented his claim to the union and after he had suffered the inevitable discouragement and delay which necessarily accompanies the union's refusal to press his claim," id., at 669, I could find no threat to peaceful labor relations or to the union's prestige in allowing an employee to bypass completely contractual remedies in favor of a traditional breach-of-contract lawsuit for backpay or wage substitutes. Here, of course, Benjamin Owens did not "completely sidestep available grievance procedures in favor of a lawsuit." With complete respect for the union's authority and deference to the contract grievance procedures, he not only gave the union a chance to act on his behalf, but in every way possible tried to convince it that his claim was meritorious and should be carried through the fifth step to arbitration. In short, he did everything the Court's opinion in Maddox said he should do, and yet now the Court says so much is not enough.

In Maddox, I noted that the "cases really in point are those which involved agreements governed by the Railway Labor Act and which expressly refused to hold that a discharged worker must pursue collective bargaining grievance procedures before suing in a court for wrongful discharge. Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653, 32 LRRM 2157; Moore v. Illinois Central R. Co., 312 U.S. 630, 8 LRRM 455." 379 U.S., at 666, 58 LRRM 2193. I also observed that the Court's decision in Maddox "raised the overruling axe so high [over those cases] that its falling is just about as certain as the changing of the seasons." Id., at 667. In the latter observation I was mistaken. The Court has this Term, in Walker v. Southern R. Co., —— U.S. ——, 63 LRRM 2491, refused to overrule in light of Maddox such cases as Moore and Koppal. Noting the long delays attendant upon exhausting administrative remedies under the railway Labor Act, the Court based this refusal on "the contrast between the administrative remedy" available to Maddox and that available to Walker. If, as the Court suggested, the availability of an administrative remedy determines whether an employee can sue without first exhausting it, can there be any doubt that Owens who had no administrative remedy should be as free to sue as Walker who had a slow one? Unlike Maddox, Owens attempted to implement the contract grievance procedures and found them inadequate. Today's decision, following in the wake of Walker v. Southern R. Co., merely perpetuates an unfortunate anomaly created by Maddox in the law of labor relations.

[ARBITRATION]

The rule announced in Maddox, I thought, was a "brainchild" of the Court's recent preference for arbitration. But I am unable to subscribe any such genesis to today's rule, for arbitration is precisely what Owens sought and preferred. Today the Court holds that an employee with a meritorious claim has no absolute right to have it either litigated or arbitrated. Fearing that arbitrators would be overworked, the Court allows unions unilaterally to determine not to take a grievance to arbitration —the first step in the contract grievance procedure at which the claim would be presented to an impartial third party—as long as the union decisions are neither "arbitrary" nor "in bad faith." The Court derives this standard of conduct from a long line of cases holding that "a breach of the statutory duty of fair representation occurs only when the union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." What the Court overlooks is that those cases laid down this standard in the context of situations where the employee's sole or fundamental complaint was against the union. There was not the slightest hint in those cases that the same standard would apply where the employee's primary complaint was against his employer for breach of contract and where he only incidentally contended that the union's conduct prevented the adjudication, by either court or arbitrator, of the underlying grievance. If the Court here were satisfied with merely holding that in this situation the employee cannot recover damages from the union unless the union breached its duty of fair representation, then it would be one thing to say that the union did not do so in making a good-faith decision not to take the employee's grievance to arbitration. But if, as the Court goes on to hold, the employee cannot sue his employer for breach of contract unless his failure to exhaust contractual remedies is due to the union's breach of its duty of fair representation, then I am quite unwilling to say that the union's refusal to exhaust such remedies—however nonarbitrary—does not amount to a breach of its duty. Either the employee should be able to sue his employer for breach of contract after having attempted to exhaust his contractual remedies, or the union should have an absolute duty to exhaust contractual remedies on his behalf. The merits of an employee's grievance would thus be determined by either a jury or an arbitrator. Under today's decision it will never be determined by either.

And it should be clear that the Court's opinion goes much further than simply holding that an employee has no absolute right to have the union take his grievance to arbitration. Here, of course, the union supervised the grievance through the fourth step of the contract machinery and dropped it just prior to arbitration on its belief that the outcome of arbitration would be unfavorable. But limited only by the standard of arbitrariness, there was clearly no need for the union to go that far. Suppose, for instance, the union had a rule that it would not prosecute a grievance even to the first step unless the grievance were filed by the employee within 24 hours after it arose. Pursuant to this rule, the union might completely refuse to prosecute a grievance filed several days late. Thus, the employee, no matter how meritorious his grievance, would get absolutely nowhere. And unless he could prove that the union's rule was arbitrary (a standard which no one can define), the employee would get absolutely no consideration of the merits of his grievance—not by a jury, nor by an arbitrator, nor by the employer, nor by the union. The Court suggests three reasons for giving the union this almost unlimited discretion to deprive injured employees of all remedies for breach of contract. The first is that "frivolous grievances" will be ended prior to time-consuming and costly arbitration. But here no one, not even the union, suggests that Benjamin Owens' grievance was frivolous. The union decided not to take it to arbitration simply because the union doubted the chance of success. Even if this was a good-faith doubt, I think the union had the duty to present this contested, but serious claim to the arbitrator whose very function is to decide such claims on the basis of what he believes to be right. Second, the Court says that allowing the union to settle grievances prior to arbitration will assure consistent treatment of "major problem areas in interpretation of collective bargaining contract." But can it be argued that whether Owens was "fit to work" presents a major problem in the interpretation of the collective bargaining agreement? The problem here was one of interpreting medical reports, not a collective bargaining agreement, and of evaluating other evidence of Owens' physical condition. I doubt whether consistency is either possible or desirable in determining whether a particular employee is able to perform a particular job. Finally, the Court suggests that its decision "furthers the interests of the union as statutory agent." I think this is the real reason for today's decision which entirely overlooks the interests of the injured employee, the only one who has anything to lose. Of course, anything which gives the union life and death power over those whom it is supposed to represent furthers its "interests." I simply fail to see how the union's legitimate role as statutory agent is undermined by requiring it to prosecute all serious grievances to a conclusion or by allowing the injured employee to sue his employer after he

has given the union a chance to act on his behalf.

[BURDEN OF PROOF]

Henceforth, in almost every § 301 breach-of-contract suit by an employee against an employer, the employee will have the additional burden of proving that the union acted "arbitrarily or in bad faith." The Court never explains what is meant by this vague phrase or how trial judges are intelligently to translate it to a jury. Must the employee prove that the union in fact acted arbitrarily or will it be sufficient to show that the employee's grievance was so meritorious that a reasonable union would not have refused to carry it to arbitration? Must the employee join the union in his § 301 suit against the employer, or must he join the employer in his unfair representation suit against the union? However these questions are answered, today's decision, requiring the individual employee to take on both the employer and the union in every suit against the employer and to prove not only that the employer breached its contract, but that the union acted arbitrarily, converts what would otherwise be a simple breach-of-contract action into a three-ring donnybrook. It puts an intolerable burden on employees with meritorious grievances and means they will frequently be left with no remedy. Today's decision, while giving the worker an ephemeral right to sue his union for breach of its duty of fair representation, creates insurmountable obstacles to block his far more valuable right to sue his employer for breach of the collective bargaining agreement.

HUMPHREY v. MOORE

Supreme Court of the United States

HUMPHREY, etc., et al. v. MOORE, etc., et al., Nos. 17 and 18, January 6, 1964

LABOR MANAGEMENT RELATIONS ACT

—Merger of seniority lists—Challenge by union member—Federal law of contract enforcement ▶24.902 ▶94.7033 ▶117.203

Action by union member challenging decision of joint employer-union committee to dovetail seniority lists of two companies when one absorbed business of other is covered by Section 301 of LMRA and therefore is controlled by federal law, even though brought in state court, since member alleges that his discharge pursuant to such decision would breach collective bargaining agreement and was brought about by breach of union's duty of fair representation.

—Merger of seniority lists—Union's duty of fair representation—Jurisdiction of courts ▶45.03 ▶45.346 ▶117.203

Federal and state courts have concurrent jurisdiction under Section 301 of LMRA of action by union member alleging breach of collective bargaining contract by joint employer-union committee in deciding to dovetail seniority lists of two companies when one absorbed business of other, even though member also alleges breach by union of its duty of fair representation which arguably may be unfair labor practice within jurisdiction of NLRB.

SENIORITY

—Merger of seniority lists—Authority under contract ▶94.161 ▶94.557 ▶117.232 ▶122.40 ▶93.70

Decision of joint employer-union committee to dovetail seniority lists

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as to actually have resulted in an infringement of members' rights, but where the election has not yet become an accomplished fact. See Beckman v. Local 46, International Ass'n of Bridge Workers, supra; Young v. Hayes, 195 F.Supp. 911, 48 LRRM 2625 (D.D.C. 1961). Of course, in situations where a union has enacted provisions into its constitution or by-laws which are barred by the LMRDA, a pre-election suit may be brought to enjoin the conduct of an election to be held pursuant to such provisions. See Harvey v. Calhoon, supra. Finally, the right to bring a pre-election suit to compel compliance with a union's constitution and by-laws is explicitly preserved by § 403 of the LMRDA.

of two companies when one absorbed business of other was within power of committee to make under provision in collective bargaining agreement of absorbing company which provided for such decisions to determine seniority of employees "absorbed or affected thereby."

—Merger of seniority lists—Employer-union decision—Union's duty of fair representation ▶ 94.22 ▶ 117.232

Union did not violate its duty of fair representation by obtaining decision of joint employer-union committee to dovetail seniority lists of two companies when one absorbed business of other. (1) Evidence does not show dishonesty or intentional misleading by union; (2) although union's action favored one group of members over another, it was based upon wholly relevant considerations, not upon capricious or arbitrary factors; and (3) disadvantaged group was given opportunity to state its position before joint committee and did not request time to obtain further representation.

On writs of certiorari to the Court of Appeals of Kentucky (356 S.W.2d 241, 49 LRRM 2677). Reversed and remanded.

David Previant, Milwaukee, Wis. (Herbert S. Thatcher, David S. Barr, and Ralph R. Logan on the brief) and Mozart Ratner, Washington, D.C. (H. Solomon Horen and William S. Zeman on the brief) for petitioners.

John Y. Brown, Lexington, Ky. (Brown, Sledd & McCann, on the brief) and Newell N. Fowler, Memphis, Tenn. (Fowler & Fortas on the brief) for respondents.

Full Text of Opinion

Mr. Justice WHITE delivered the opinion of the Court.

The issue here is whether the Kentucky Court of Appeals properly enjoined implementation of the decision of a joint employer-employee committee purporting to settle certain grievances in accordance with the terms of a collective bargaining contract. The decision of the committee determined the relative seniority rights of the employees of two companies, Dealers Transport Company of Memphis, Tennessee, and E & L Transport Company of Detroit, Michigan. We are of the opinion that the Kentucky court erred and we reverse its judgment.

[BACKGROUND FACTS]

Part of the business of each of these companies was the transportation of new automobiles from the assembly plant of the Ford Motor Company in Louisville, Kentucky. In the face of declining business resulting from several factors, the two companies were informed by Ford that there was room for only one of them in the Louisville operation. After considering the matter for some time, the two companies made these arrangements: E & L would sell to Dealers its "secondary" authority out of Louisville, the purchase price to be a nominal sum roughly equal to the cost of effecting the transfer of authority; E & L would also sell to Dealers its authority to serve certain points in Mississippi and Louisiana; and Dealers would sell to E & L its initial authority out of Lorain, Ohio, along with certain equipment and terminal facilities. The purpose of these arrangements was to concentrate the transportation activities of E & L in the more northerly area and those of Dealers in the southern zone. The transfers were subject to the approval of regulatory agencies.

The employees of both Dealers and E & L were represented by the same union, General Drivers, Warehousemen and Helpers, Local Union No. 89. Its president, Paul Priddy, as the result of inquiry from E & L by his assistant, understood that the transaction between the companies involved no trades, sales, or exchanges of properties but only a withdrawal by E & L at the direction of the Ford Motor Company. He consequently advised the E & L employees that their situation was precarious. When layoffs at E & L began three E & L employees filed grievances claiming that the seniority lists of Dealers and E & L should be "sandwiched" and the E & L employees be taken on at Dealers with the seniority they had enjoyed at E & L. The grievances were placed before the local joint committee, Priddy or his assistant meanwhile advising Dealers employees that they had "nothing to worry about" since E & L employees had no contract right to transfer under these circumstances.

[CONTRACT PROVISIONS]

The collective bargaining contract

involved covered a multi-employer, multi-local union unit negotiated on behalf of the employees by Automobile Transporters Labor Division and on behalf of the unions by National Truckaway and Driveaway Conference. Almost identical contracts were executed by each company in the unit and by the appropriate local union. According to Art. 4, § 1 of the contract "seniority rights for employees shall prevail" and "any controversy over the employees' standing on such lists shall be submitted to the joint grievance procedure. . . ." Section 5 of the same article, of central significance here, was as follows:

"In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure."

Article 7 called for grievances to be first taken up between the employer and the local union and, if not settled, to be submitted to the local joint committee where the union and the employer were to have equal votes. Failing settlement by majority vote of the members of the local committee, the matter could be taken to the Automobile Transporters Joint Conference Committee upon which the employers and the unions in the over-all bargaining unit had an equal number of representatives. Decisions of the Joint Conference Committee were to be "final and conclusive and binding upon the employer and the union, and the employees involved." However, if the Joint Conference Committee was unable to reach a decision the matter was to be submitted to arbitration as provided in the contract.

Article 7 also provided that:

(d) "It is agreed that all matters pertaining to the interpretation of any provision of this Agreement, whether requested by the Employer or the Union, must be submitted to the full Committee of the Automobile Transporters Joint Conference Committee, which Committee, after listening to testimony of both sides, shall make a decision."

Other provisions of the contract stated that it was "the intention of the parties to resolve all questions of interpretation by mutual agreement" and that the employer agreed "to be bound by all of the terms and provisions of this Agreement, and also agrees to be bound by the interpretations and enforcement of the Agreement."

[GRIEVANCES SUBMITTED]

The grievances of the E & L employees were submitted directly to the local joint committee and endorsed "Deadlocked to Detroit for interpretation" over the signatures of the local union president and the Dealers representative on the committee. Later, however, the local union, having been more fully advised as to the nature of the transaction between the two companies, decided to recommend to the Joint Conference Committee that the seniority lists of the two companies be dovetailed and the E & L employees be employed at Dealers with seniority rights based upon that which they had enjoyed at E & L. The three shop stewards who represented the Dealers employees before the Joint Conference Committee meeting in Detroit were so advised by the union immediately prior to the opening of the hearing. After hearing from the company, the union and from the stewards representing Dealers employees, the Joint Conference Committee thereupon determined that "in accordance with Article 4 and particularly sub-sections 4 and 5" of the agreement the employees of E & L and of Dealers should "be sandwiched in on master seniority boards using the presently constituted seniority lists and the dates contained therein. . . ."

Since E & L was an older company and most of its employees had more seniority than the Dealers employees, the decision entailed the layoff of a large number of Dealers employees to provide openings for the E & L drivers.

Respondent Moore, on behalf of himself and other Dealers employees, then brought this class action in a Kentucky state court praying for an injunction against the union and the company to prevent the decision of the Joint Conference Committee from being carried out. Damages were asked in an alternative count and certain E & L employees were added as defendants by amendment to the complaint.[1] The complaint alleged that Dealers employees had relied upon the union to represent them, that the president of Local 89, Paul Priddy, assured Dealers employees that they had nothing to worry about and that precedent in the industry provided that when a new business is taken over, its employees do not displace the original employees of the acquiring company;

[1] The International union was also named as a party but service was quashed and the action dismissed as against it.

it further alleged that Priddy had deliberately "deadlocked" the local joint committee and that the Dealers employees learned for the first time before the Joint Conference Committee in Detroit, that Priddy favored dovetailing the seniority lists. Priddy's actions, the complaint went on, "in deceiving these plaintiffs as to his position left them without representation before the Joint Conference Committee." The decision, according to the complaint, was "contrived, planned and brought about by Paul Priddy" who "has deceived and failed completely to represent said employees" and whose "false and deceitful action" and "connivance . . . with the employees of E & L" threatened the jobs of Dealers employees. The International union is said to have "conspired with and assisted the defendant, Local No. 89, and its president, Paul Priddy, in bringing about this result . . . ." The decision of the Joint Conference Committee was charged to be arbitrary and capricious, contrary to the existing practice in the industry and violative of the collective bargaining contract.

After hearing, the trial court denied a temporary and permanent injunction.[2] The Court of Appeals of the Commonwealth of Kentucky reversed and granted a permanent injunction, two judges dissenting. 356 S.W.2d 241, 49 LRRM 2677. In the view of that court, Art. 4, § 5 could have no application to the circumstances of this case since it came into play only if the absorbing company agreed to hire the employees of the absorbed company. The clause was said to deal with seniority, not with initial employment. Therefore, it was said, the decision of the Joint Conference Committee was not binding because the question of employing E & L drivers was not "arbitrable" at all under this section. The Court of Appeals, however, went on to hold that even if it were otherwise, the decision could not stand since the situation involved antagonistic interests of two sets of employees represented by the same union advocate. The result was inadequate representation of the Dealers employees in a context where Dealers itself was essentially neutral. Against such a backdrop, the erroneous decision of the board became "arbitrary and violative of natural justice." Kentucky cases were cited and relied upon. We granted both the petition filed by the E & L employees in No. 17 and the petition in No. 18, filed by the local union. 371 U.S. 966-967.

[2] The denial of a temporary injunction by the trial court was set aside and temporary injunction ordered by the Court of Appeals. Thereafter the trial court dismissed the complaint, but the Court of Appeals reversed and made the temporary injunction permanent.

[NATURE OF ACTION]

I. Since issues concerning the jurisdiction of the courts and the governing law are involved, it is well at the outset to elaborate upon the statement of the Kentucky court that this is an action to enforce a collective bargaining contract, an accurate observation as far as we are concerned.

First, Moore challenges the power of the parties and of the Joint Conference Committee to dovetail seniority lists of the two companies because there was no absorption here within the meaning of § 5 of Art. 4 and because, as the court below held, that section granted no authority to deal with jobs as well as seniority. His position is that neither the parties nor the committee has any power beyond that delegated to them by the precise terms of § 5. Since in his view the Joint Committee exceeded its power in making the decision it did, the settlement is said to be a nullity and his impending discharge a breach of contract.

Second, Moore claims the decision of the Committee was obtained by dishonest union conduct in breach of its duty of fair representation and that a decision so obtained cannot be relied upon as a valid excuse for his discharge under the contract. The undoubted broad authority of the union as exclusive bargaining agent in the negotiation and administration of a collective bargaining contract is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation. Syres v. Oil Workers Union, 350 U.S. 892, 37 LRRM 2068, reversing 223 F.2d 739, 36 LRRM 2290; Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 30 LRRM 2258; Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210, 15 LRRM 715; Steele v. Louisville & N.R. Co., 323 U.S. 192, 15 LRRM 708. "By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially." Wallace v. Labor Board, 323 U.S. 248, 255, 15 LRRM 697. The exclusive agent's

obligation "to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all of those members, without hostility to any . . ." and its powers are "subject always to complete good faith and honesty of purpose in the exercise of its discretion." Ford Motor Co. v. Huffman, 345 U.S. 330, 337-338, 31 LRRM 2548.

In the complaint which Moore filed here, the union is said to have deceived the Dealers employees concerning their job and seniority rights, deceitfully connived with the E & L drivers and with the international union to deprive Moore and others of their employment rights and prevented the latter from having a fair hearing before the Joint Committee by espousing the cause of the rival group of drivers after having indicated the interests of the men at Dealers would be protected by the union. These allegations are sufficient to charge a breach of duty by the union in the process of settling the grievances at issue under the collective bargaining agreement.

Both the local and international unions are charged with dishonesty, and one-half of the votes on the Joint Committee were cast by representatives of unions affiliated with the international. No fraud is charged against the employer; but except for the improper action of the union, which is said to have dominated and brought about the decision, it is alleged that Dealers would have agreed to retain its own employees. The fair inference from the complaint is that the employer considered the dispute a matter for the union to decide. Moreover, the award had not been implemented at the time of the filing of the complaint, which put Dealers on notice that the union was charged with dishonesty and a breach of duty in procuring the decision of the Joint Committee. In these circumstances, the allegations of the complaint, if proved, would effectively undermine the decision of the Joint Committee as a valid basis for Moore's discharge.[3]

[SECTION 301 OF LMRA]

For these reasons this action is one arising under § 301 of the Labor Management Relations Act[4] and is a case controlled by federal law, Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 40 LRRM 2113, 2120, even though brought in the state court. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 49 LRRM 2717; Smith v. Evening News Assn., 371 U.S. 195, 51 LRRM 2646. Although there are differing views on whether a violation of the duty of fair representation is an unfair labor practice under the Labor Management Relations Act,[5] it is not necessary for us to resolve that difference here. Even if it is, or arguably may be, an unfair labor practice, the complaint here alleged that Moore's discharge would violate the contract and was therefore within the cognizance of federal and state courts, Smith v. Evening News Assn., supra, subject of course, to the applicable federal law.[6]

3 In its brief filed here Dealers does not support the decision of the Joint Committee. It suggests, rather, that the matter be finally settled by arbitration under the terms of the contract.

4 § 301(a) of the L.M.R.A. is as follows: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. § 185(a).

5 Compare, for example, Labor Board v. Local 294, International Bro. of Teamsters, etc., 317 F.2d 746, 53 LRRM 2248 (C.A. 2d Cir.), with Miranda Fuel Co., 140 NLRB 181, 51 LRRM 1584 (1962), 1962 CCH NLRB Decs. ¶ 11,848. See also Cox, The Duty of Fair Representation, 2 Villanova L. Rev. 151, 172-175.

6 The union contended in the state courts that the jurisdiction of the state courts had been preempted by the federal statutes. The Kentucky Court of Appeals ruled otherwise and the union appears to have abandoned the view here, since it says, relying upon Ford Motor Co. v. Huffman, 345 U.S. 330, 31 LRRM 2548, that individual employees "may undoubtedly maintain suits against their representative when the latter hostilely discriminates against them."

We note that in Syres v. Oil Workers International Union, 350 U.S. 892, 37 LRRM 2068, individual employees sued the exclusive agent and the company to enjoin and declare void a collective bargaining agreement alleged to violate the duty of fair representation. Dismissal in the trial court was affirmed in the Court of Appeals. This Court reversed and ordered further proceedings in the trial court in the face of contentions made both in this Court and the lower courts that the employees should have brought their proceedings before the National Labor Relations Board. Cf. Cosmark v. Struthers Wells Corp., 54 LRRM 2333 (Pa. Oct. 17, 1963).

The E & L employees, petitioners in No. 17, urge that even if the federal courts may entertain suits such as this, the state courts may not. Since in our view the complaint here charged a breach of contract, we find no merit in this position. It is clear that suits for violation of contracts between an employer and a labor organization may be brought in either state or federal courts. Dowd Box Co. v. Courtney, 368 U.S. 502, 49 LRRM 2619.

We now come to the merits of this case.

[AUTHORITY OF COMMITTEE]

II. If we assume with Moore and the courts below that the Joint Conference Committee's power was circumscribed by § 5 [7] and that its interpretation of the section is open to court review, Moore's cause is not measurably advanced. For in our opinion the section reasonably meant what the Joint Committee said or assumed it meant. There was an absorption here within the meaning of the section and that section did deal with jobs as well as with seniority.[8]

Prior to this transaction both E & L and Dealers were transporting new cars out of Louisville for the Ford Motor Company. Afterwards, only one company enjoyed this business, and clearly this was no unilateral withdrawal by E & L. There was an agreement between the companies, preceded by long negotiation. E & L's authority to engage in the transportation of new cars out of Louisville was sold to Dealers. The business which E & L had done in that city was henceforth to be done by Dealers. While there was no sale of tangible assets at that location, the Joint Conference Committee reasonably concluded that there was an absorption by Dealers of the E & L business within the meaning of § 5 of the contract.

It was also permissible to conclude that § 5 dealt with employment as well as seniority. Mergers, sales of assets and absorptions are commonplace events. It is not unusual for collective bargaining agreements to deal with them, especially in the transportation industry where the same unions may represent the employees of both parties to the transaction.[9] Following such an event, the business of the one company will probably include the former business of the other; and the recurring question is whether it is the employees of the absorbed company or those of the acquiring company who are to have first call upon the available work at the latter concern. Jobs, as well as seniority, are at stake; and it was to solve just such problems that § 5 was designed. Its interpretation should be commensurate with its purposes.

Seniority has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job. Here § 5 provided for resolving the seniority of not only those employees who are "absorbed," but all who were "affected" by the absorption. Certainly the transaction "affected" the E & L employees; and the seniority of these drivers, which the parties or the Joint Conference Committee could determine, was clearly seniority at Dealers, the company which had absorbed the E & L business. The parties very probably, therefore, intended the seniority granted an E & L employee at Dealers to carry the job with it, just as seniority usually would. If it did not and if Dealers unilaterally could determine whether to hire any E & L employee, it might decide to hire none, excluding E & L employees from any of the work which they had formerly done. Or if it did hire E & L employees to fill any additional jobs resulting from the absorption of the E & L business, it might select E & L employees for jobs without regard to length of service at E & L or it might insist on an agreement from the union to grant only such seniority as might suit the company. Section 5 would be effectively emasculated.

[DECISION JUSTIFIED]

The power of the Joint Conference Committee over seniority gave it power over jobs. It was entitled under § 5 to integrate the seniority lists

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7 We need not consider the problem posed if § 5 had been omitted from the contract or if the parties had acted to amend the provision. The fact is that they purported to proceed under the section. They deadlocked at the local level and it was pursuant to § 5 that the matter was taken to the Joint Conference Committee which, under Art. 7, was to make a decision "after listening to testimony on both sides." The committee expressly recited that its decision was in accordance with § 5 of the contract. Even in the absence of § 5, however, it would be necessary to deal with the alleged breach of the union's duty of fair representation.

8 We also put aside the union's contention that Art. 7, § (d)—providing that all matters of interpretation of the agreement be submitted to the Joint Conference Committee—makes it inescapably clear that the committee had the power to decide that the transfer of operating authority was an absorption within the scope of § 5. But it is by no means clear that this provision in Art. 7 was intended to apply to interpretations of § 5, for the latter section by its own terms appears to limit the authority of the committee to disputes over seniority in the event of an absorption. Reconciliation of these two provisions, going to the power of the committee under the contract, itself presented an issue ultimately for the court, not the committee, to decide. Our view of the scope and applicability of § 5, infra, renders an accommodation of these two sections unnecessary.

9 See cases cited in footnote 10, infra.

upon some rational basis, and its decision to integrate lists upon the basis of length of service at either company was neither unique nor arbitrary. On the contrary, it is a familiar and frequently equitable solution to the inevitably conflicting interests which arise in the wake of a merger or an absorption such as occurred here.[10] The Joint Conference Committee's decision to dovetail seniority lists was a decision which § 5 empowered the committee to make.

Neither do we find adequate support in this record for the complaint's attack upon the integrity of the union and of the procedures which led to the decision. Although the union at first advised the Dealers drivers that they had nothing to worry about but later supported the E & L employees before the Joint Conference Committee, there is no substantial evidence of fraud, deceitful action or dishonest conduct. Priddy's early assurances to Dealers employees were not well founded, it is true; but Priddy was acting upon information then available to him, information received from the company which led him to think there was no trade or exchange involved, no "absorption" which might bring § 5 into play. Other sections of the contract, he thought, would protect the jobs of Moore, and his fellow drivers.[11] Consistent with this view, he also advised E & L employees that the situation appeared unfavorable for them. However, when he learned of the pending acquisition by Dealers of E & L operating authority in Louisville and of the involvement of other locations in the transaction, he considered the matter to be one for the Joint Committee. Ultimately he took the view that an absorption was involved, that § 5 did apply and that dovetailing seniority lists was the most equitable solution for all concerned. We find in this evidence insufficient proof of dishonesty or intentional misleading on the part of the union. And we do not understand the court below to have found otherwise.

[UNION REPRESENTATION]

The Kentucky court, however, made much of the antagonistic interests of the E & L and Dealers drivers, both groups being represented by the same union, whose president supported one group and opposed the other at the hearing before the Joint Conference Committee. But we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another. In Ford Motor Co. v. Huffman, 345 U.S. 330, 31 LRRM 2548, the Court found no breach of duty by the union in agreeing to an amendment of an existing collective bargaining contract, granting enhanced seniority to a particular group of employees and resulting in layoffs which otherwise would not have occurred. "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." Id., at 338. Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would

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10 See for example, Kent v. Civil Aeronautics Board, 204 F.2d 263, 32 LRRM 2144 (C.A. 2d Cir. 1953); Keller v. Teamsters Local 249, 36 LA 1286, 43 CCH Labor Cases ¶ 17,119 (D.C. W.D. Pa. 1961); Pratt v. Wilson Trucking Co., 214 Ga. 385, 104 S.E.2d 915, 42 LRRM 2703 (1958); Walker v. Penn-Reading Seashore Lines, 142 N.J. Eq. 588, 61 A.2d 453, 22 LRRM 2553 (1948); In re Western Union Telegraph Co. and American Communications Association (Decisions of War Labor Board 1944) 14 LRRM 1623. Cf. Colbert v. Brotherhood of Railroad Trainmen, 206 F.2d 9, 32 LRRM 2459 (C.A. 9th Cir. 1953); Labor Board v. Wheland Co., 271 F.2d 122, 45 LRRM 2061 (C.A. 6th Cir. 1959); Hardcastle v. Western Greyhound Lines, 303 F.2d 182 (C.A. 9th Cir. 1962); Fagan v. Pennsylvania R. Co., 173 F.Supp. 465, 44 LRRM 2117 (D.C. M.D. Pa. 1959). "Integration of seniority lists should ordinarily be accomplished on the basis of each employee's length of service with his original employer . . . ." Kahn, Seniority Problems in Business Mergers, 8 Industrial and Labor Relations Review 361, 378.

11 The Dealers employees rely upon a rider to the Dealers contract protecting the seniority of the employees at a terminal when another terminal of that company is closed down. The court below did not believe the rider dispositive, and we agree.

surely weaken the collective bargaining and grievance processes.

As far as this record shows, the union took its position honestly, in good faith and without hostility or arbitrary discrimination. After Dealers absorbed the Louisville business of E & L, there were fewer jobs at Dealers than there were Dealers and E & L drivers. One group or the other was going to suffer. If any E & L drivers were to be hired at Dealers either they or the Dealers drivers would not have the seniority which they had previously enjoyed. Inevitably the absorption would hurt someone. By choosing to integrate seniority lists based upon length of service at either company, the union acted upon wholly relevant considerations, not upon capricious or arbitrary factors. The evidence shows no breach by the union of its duty of fair representation.

There is a remaining contention. Even though the union acted in good faith and was entitled to take the position it did, were the Dealers employees, if the union was going to oppose them, deprived of a fair hearing by having inadequate representation at the hearing? Dealers employees had notice of the hearing, they were obviously aware that they were locked in a struggle for jobs and seniority with the E & L drivers, and three stewards representing them went to the hearing at union expense and were given every opportunity to state their position. Thus the issue is in reality a narrow one. There was no substantial dispute about the facts concerning the nature of the transaction between the two companies. It was for the Joint Conference Committee initially to decide whether there was an "absorption" within the meaning of § 5 and, if so, whether seniority lists were to be integrated and the older employees of E & L given jobs at Dealers. The Dealers employees made no request to continue the hearing until they could secure further representation and have not yet suggested what they could have added to the hearing by way of facts or theory if they had been differently represented. The trial court found it "idle speculation to assume that the result would have been different had the matter been differently presented." We agree.

Moore has not, therefore, proved his case. Neither the parties nor the Joint Committee exceeded their power under the contract and there was no fraud or breach of duty by the exclusive bargaining agent. The decision of the committee, reached after proceedings adequate under the agreement, is final and binding upon the parties, just as the contract says it is. Drivers Union v. Riss & Co., 372 U.S. 517, 52 LRRM 2623.

The decision below is reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Concurring Opinion

Mr. Justice GOLDBERG, with whom Mr. Justice BRENNAN joins, concurring in the result.

I concur in the judgment and in the holding of the Court that since "Moore has not . . . proved his case . . . ," the decision below must be reversed. Ante, at 16. I do not, however, agree that Moore stated a cause of action arising under § 301(a) of the Labor Management Relations Act, 61 Stat. 156, 29 U.S.C. § 185(a). It is my view rather that Moore's claim must be treated as an individual employee's action for a union's breach of its duty of fair representation—a duty derived not from the collective bargaining contract but from the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. § 141 et seq. See Syres v. Oil Workers Int'l Union, 350 U.S. 892, 37 LRRM 2068, reversing 223 F.2d 739, 36 LRRM 2290; Brotherood of Railroad Trainmen v. Howard, 343 U.S. 768, 30 LRRM 2253; Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210, 15 LRRM 715; Steele v. Louisville & N.R. Co., 323 U.S. 192, 15 LRRM 708. Cf. International Association of Machinists AFL-CIO et al. v. Central Airlines, Inc., 372 U.S. 682, 52 LRRM 2803.

The complaint does not expressly refer either to § 301(a) of the Labor Management Relations Act or to the National Labor Relations Act as the source of the action. Since substance and not form must govern, however, we look to the allegations of the complaint and to the federal labor statutes to determine the nature of the claim.

The opinion of the Court correctly describes Moore's complaint as alleging that the decision of the Joint Conference Committee dovetailing the seniority lists of the two companies violated Moore's rights because: (1) the Joint Committee exceeded its powers under the existing collective

bargaining contract in making its decision dovetailing seniority lists, and (2) the decision of the Committee was brought about by dishonest union conduct in breach of its duty of fair representation.

Neither ground, it seems to me, sustains an action under § 301(a) of the L.M.R.A. A mutually acceptable grievance settlement between an employer and a union, which is what the decision of the Joint Committee was, cannot be challenged by an individual dissenting employee under § 301(a) on the ground that the parties exceeded their contractual powers in making the settlement. It is true that this Court, in a series of decisions dealing with labor arbitrations, has recognized that the powers of an arbitrator arise from and are defined by the collective bargaining agreement.[1] "For arbitration," as the Court said in United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 46 LRRM 2414, "is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Thus the existing labor contract is the touchstone of an arbitrator's powers. But the power of the union and the employer jointly to settle a grievance dispute is not so limited. The parties are free by joint action to modify, amend, and supplement their original collective bargaining agreement. They are equally free, since "[t]he grievance procedure is . . . a part of the continuous collective bargaining process," to settle grievances not falling within the scope of the contract. Id., at 581. In this case, for example, had the dispute gone to arbitration, the arbitrator would have been bound to apply the existing agreement and to determine whether the merger-absorption clause applied. However, even in the absence of such a clause, the contracting parties—the multiemployer unit[2] and the union—were free to resolve the dispute by amending the contract to dovetail seniority lists or to achieve the same result by entering into a grievance settlement. The presence of the merger-absorption clause did not restrict the right of the parties to resolve their dispute by joint agreement applying, interpreting, or amending the contract.[3] There are too many unforeseeable contingencies in a collective bargaining relationship to justify making the words of the contract the exclusive source of rights and duties.

These principles were applied in Ford Motor Co. v. Huffman, 345 U.S. 330, 31 LRRM 2548. There the union and the employer during a collective bargaining agreement entered into a "supplementary agreement" providing seniority credit for the pre-employment military service of veterans, a type of seniority credit not granted in the original agreement. Id., at 334, n. 6. Huffman, on behalf of himself and other union members whose seniority was adversely affected, brought suit to have the supplementary provisions declared invalid and to obtain appropriate injunctive relief against the employer and the union. There was no doubt that Huffman and members of his class were injured as a result of the "supplementary agreement"; they were subjected to layoffs that would not have affected them if the seniority rankings had not been altered. Despite the change in rights under the prior agreement, this Court held that the existing labor agreement did not limit the power of the

1 E.g., United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 46 LRRM 2414; United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 46 LRRM 2416; United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 46 LRRM 2423.

2 The Court states that "In its brief filed here Dealers does not support the decision of the Joint Committee." See ante, at 8, n. 3. The Court overlooks, however, that Dealers throughout the litigation has acknowledged that it is a part of the multiemployer unit, which is the employer party to the collective bargaining agreement and that the employer representatives on the Joint Conference Committee acted honestly and properly on behalf of the employer members including Dealers. See infra, at 7.

3 The contract in this case specifically envisioned such a result. Section 5 of Article 4 provided that:

"In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure. . . ."

Section 2 of Article 7 also provided that:

"(d) It is agreed that all matters pertaining to the interpretation of any provision of this Agreement, whether requested by the Employer or the Union, must be submitted to the full Committee of the Automobile Transporters Joint Conference Committee, which Committee, after listening to testimony on both sides, shall make a decision."

Moreover, as the Court itself points out, other provisions stated that it was "the intention of the parties to resolve all questions of interpretation by mutual agreement" and that the employer agreed "to be bound by all of the terms and provisions of this agreement and also agrees to be bound by the interpretations and enforcement of the agreement." Ante, at 4.

parties jointly, in the process of bargaining collectively, to make new and different contractual arrangements affecting seniority rights.

It necessarily follows from Huffman that a settlement of a seniority dispute, deemed by the parties to be an interpretation of their agreement, not requiring an amendment, is plainly within their joint authority. Just as under the Huffman decision an amendment is not to be tested by whether it is within the existing contract, so a grievance settlement should not be tested by whether a court could agree with the parties' interpretation. If collective bargaining is to remain a flexible process, the power to amend by agreement and the power to interpret by agreement must be coequal.

It is wholly inconsistent with this Court's recognition that "[t]he grievance procedure is . . . a part of the continuous collective bargaining process," United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S., at 581, 46 LRRM 2416, to limit the parties' power to settle grievances to the confines of the existing labor agreement, or to assert, as the Court now does, that an individual employee can claim that the collective bargaining contract is violated because the parties have made a grievance settlement going beyond the strict terms of the existing contract.

I turn now to the second basis of the complaint, viz., that the decision of the Joint Conference Committee was brought about by dishonest union conduct in breach of its duty of fair representation. In my view, such a claim of breach of the union's duty of fair representation cannot properly by treated as a claim of breach of the collective bargaining contract supporting an action under § 301(a). This is particularly apparent where, as here, "[n]o fraud is charged against the employer. . . ." Ante, at 8.

This does not mean that an individual employee is without a remedy for a union's breach of its duty of fair representation. I read the decisions of this Court to hold that an individual employee has a right to a remedy against a union breaching its duty of fair representation—a duty derived not from the collective bargaining contract but implied from the union's rights and responsibilities conferred by federal labor statutes. See Syres v. Oil Workers Int'l Union, supra (National Labor Relations Act); Brotherhood of Railroad Trainmen v. Howard, supra, (Railway Labor Act); Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, supra (Railway Labor Act); Steele v. Louisville & N. R. Co., supra (Railway Labor Act). Cf. International Association of Machinists AFL-CIO et al. v. Central Airlines, Inc., supra (Railway Labor Act). There is nothing to the contrary in Smith v. Evening News Assn., 371 U.S. 195, 51 LRRM 2646. In that case the gravamen of the individual employee's § 301 (a) action was the employer's discharge of employees in violation of the express terms of the collective bargaining agreement. No breach of the union's duty of fair representation was charged. To the contrary, the union supported the employee's suit which was brought as an individual suit out of obeisance to what the union deemed to be the requirements of Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U.S. 437, 35 LRRM 2643.

The remedy in a suit based upon a breach of the union's duty of fair representation may be extended to the employer under appropriate circumstances. This was recognized in Steele v. Louisville & N. R. Co., supra, where the Court extended the remedy against the union to include injunctive relief against a contract between the employer and the union. There the employer willfully participated in the union's breach of its duty of fair representation and that breach arose from discrimination based on race, a classification that was held "irrelevant" to a union's statutory bargaining powers. The Court observed:

> "[I]t is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on . . . relevant differences." Id., at 203.

The Court distinguished classifications and differences which are "relevant to the authorized purposes of the contract . . . such as differences in seniority, the type of work performed, [and] the competence and skill with which it is performed, . . ." Ibid. Where the alleged breach of a union's duty involves a differentiation based on a relevant classification—in this case seniority rankings following an amalgamation of employer units—and where the employer has not willfully participated in the alleged

breach of the union's duty, the collective bargaining agreement should not be open to the collateral attack of an individual employee merely because the union alone has failed in its duty of fair representation. We should not and, indeed, we need not strain, therefore, as the Court does, to convert a breach of the union's duty to individual employees into a breach of the collective bargaining agreement between the employer and the union.

I do not agree with the Court that employer willfulness was claimed in this case by "[t]he fair inference from the complaint" that Dealers "considered the dispute a matter for the union to decide." Ante, at 8. Nor can I agree that willfulness could be predicated on the rationale that since "the award had not been implemented at the time of the filing of the complaint," Dealers was "put . . . on notice that the union was charged with dishonesty and a breach of duty in procuring the decision of the Joint Committee." Ibid. Dealers may indeed have been neutral when the case was presented to the Joint Conference Committee but the Court overlooks that the employer-party to the collective bargaining contract was the multiemployer unit whose representatives—acting on behalf of both Dealers and E & L—fully participated in the Joint Committee's decision resolving the dispute.[4] Furthermore, an employer not willfully participating in union misconduct should not be restrained from putting a grievance settlement into effect merely by being "put . . . on notice" that an individual employee has charged the union with dishonesty. Such a rule would penalize the honest employer and encourage groundless charges frustrating joint grievance settlements. Finally, it is difficult to conceive how mere notice to an employer of union dishonesty can transform the union's breach of its duty of fair representation into a contractual violation by the employer.

In summary, then, for the reasons stated, I would treat Moore's claim as a Syres-Steele type cause of action rather than as a § 301(a) contract action. So considering it, I nevertheless conclude, as the Court does, that since "there was no fraud or breach of duty by the exclusive bargaining agent," ante, at 16, Moore is not entitled to the relief sought.

I have written at some length on what may seem a narrow point. I have done so because of my conviction that in this Court's fashioning of a federal law of collective bargaining, it is of the utmost importance that the law reflect the realities of industrial life and the nature of the collective bargaining process. We should not assume that doctrines evolved in other contexts will be equally well adapted to the collective bargaining process. Of course, we must protect the rights of the individual. It must not be forgotten, however, that many individual rights, such as the seniority rights involved in this case, in fact arise from the concerted exercise of the right to bargain collectively. Consequently, the understandable desire to protect the individual should not emasculate the right to bargain by placing undue restraints upon the contracting parties. Similarly, in safeguarding the individual against the misconduct of the bargaining agent, we must recognize that the employer's interests are inevitably involved whenever the labor contract is set aside in order to vindicate the individual's right against the union. The employer's interest should not be lightly denied where there are other remedies available to insure that a union will respect the rights of its constituents. Nor should trial-type hearing standards or conceptions of vested contractual rights be applied so as to hinder the employer and the union in their joint endeavor to adapt the collective bargaining relationship to the exigencies of economic life. I have deemed it necessary to state my views separately because I believe that the Court's analysis in part runs contrary to these principles.

Concurring and Dissenting Opinion

Mr. Justice HARLAN, concurring in part and dissenting in part.

I agree with the Court's opinion and judgment insofar as it relates to the claim that the Joint Conference Committee exceeded its authority under the collective bargaining agreement. Although it is undoubtedly true as a general proposition that bargaining representatives have power to alter the terms of a contract with an employer, the challenge here is not to a purported exercise of such power but to the validity of a grievance settlement reached under proceedings allegedly not authorized by the terms of the collective agreement. Moreover, a committee with authority to settle

[4] See note 2, supra.

grievances whose composition is different from that in the multiunion-multiemployer bargaining unit cannot be deemed to possess power to effect changes in the bargaining agreement. When it is alleged that the union itself has engaged or acquiesced in such a departure from the collective bargaining agreement, I can see no reason why an individual affected employee may not step into the shoes of the union and maintain a § 301 suit himself.

But insofar as petitioners' claim rests upon alleged unfair union representation in the grievance proceeding, I agree with the views expressed in the concurring opinion of my Brother Goldberg (ante, 5—8) (except that I would expressly reserve the question of whether a suit of this nature would be maintainable under § 301 where it is alleged or proved that the employer was a party to the asserted unfair union representation). However, the conclusion that unilateral unfair union representation gives rise only to a cause of action for violation of a duty implicit in the National Labor Relations Act brings one face to face with a further question: Does such a federal cause of action come within the play of the preemption doctrine, San Diego Trades Council v. Garmon, 359 U.S. 236, 43 LRRM 2838, 2843, contrary to what would be the case were such a suit to lie under § 301, Smith v. Evening News, 371 U.S. 195, 51 LRRM 2646? Short of deciding that question, I do not think it would be appropriate to dispose of this case simply by saying that no unfair union representation was shown in this instance. For if there be preemption in this situation, Garmon would not only preclude state court jurisdiction but would also require this Court initially to defer to the primary jurisdiction of the Labor Board.

The preemption issue is a difficult and important one, carrying ramifications extending far beyond this particular case. It should not be decided without our having the benefit of the views of those charged with the administration of the labor laws. To that end I would reverse the judgment of the state court to the extent that it rests upon a holding that the Joint Conference Committee acted beyond the scope of its authority, set the case for reargument on the unfair representation issue, and invite the National Labor Relations Board to present its views by brief and oral argument on the preemption question. Cf. Retail Clerks International Assn. v. Schermerhorn, 373 U.S. 746, 757, 53 LRRM 2318; 375 U.S. 96, 54 LRRM 2612.

Concurring and Dissenting Opinion

Mr. Justice DOUGLAS

I agree for the reasons stated by my Brother Goldberg that this litigation was properly brought in the state court but on the merits I believe that no cause of action has been made out for the reasons stated by the Court.

H

TAB H

PREPARING TO ADMINISTER A PUBLIC SECTOR COLLECTIVE BARGAINING AGREEMENT

Once adopted by the legislative body and ratified by the employee organization, the collective bargaining agreement is a binding contract. It amends, supplements, and/or replaces agency regulations and is the law of the workplace. Contract administration is the process of insuring that this "law" is respected and enforced.

To develop a consistent approach to administering the contract, labor organizations and management most often find it necessary as well as helpful to have a centralized authority (e.g., business agent or employee relations officer) to resolve differences in contract interpretation and direct implementation. This is expecially important during a "first" contract, when stewards and line supervisors may lack sufficient familiarity with the agreement. Nevertheless, the day-to-day administration of the contract will begin with those in the workplace. It is critical, therefore, that the training of supervisors and union stewards receive the highest priority. Other basic steps should also be taken.

Setting the Proper Mood

To set the appropriate mood for proper contract administration, it is suggested that union and management officials have joint formal ceremonies in which the contract is signed and presented to the public.

The parties should stress the contract's importance to the agency and to the union's membership. Both sides should pledge mutual aid and support throughout the contract's duration to insure that it achieves its objectives.

Printing and Distributing the Agreement

If the contract is to be administered effectively, all those covered by it must have access to it; the contract should be printed and distributed to all involved. Frequently, provisions for printing and distributing arrangements are included in the contract. In the absence of such provisions, printing and distribution details should be worked out by the parties as soon as possible. The agreement should be printed rather than mimeographed, to underscore its importance.

Printing and distributing the contract is important for both management and union officials as part of their formal obligation to workers. For example, management is obliged to communicate work rules and other pertinent matters to employees regarding their on-the-job performance. Failure to do so when the contract is the only source containing a rule or regulation may well be viewed by arbitrators as excusing conduct otherwise subject to punishment in disciplinary hearings and/or grievance arbitrations. Similarly--since unions are liable under fair representation suits--the failure of the union to effect the distribution of contracts could well be viewed as a willful failure to inform members and non-members of their rights.

Preparing Written Interpretation

The contract, as an agreement drawn up by two parties contains many parts on which there is mutual agreement. However, just as the parties had different interests while negotiating the contract, so will they have different interests in administering it. In short, both parties will interpret the contract in ways most favorable to themselves.

Management and the labor organization should independently prepare a clause-by-clause interpretation of the agreement, which can be used to clarify their view of the agreement and as a teaching aid in training programs. Adequate margins should be provided to allow note-taking or corrections if the agreement is later modified. This "annotated" contract should be distributed at least to all chief shop stewards, union officers, and key first-line supervisors. It should also be accompanied by any "side letters" or other correspondence pertinent to its interpretation.

Training and Orienting the Bargaining Parties

Stewards and line supervisors should be aware of the contract's bargaining history, <u>including</u> issues raised but not covered in the agreement and oral commitments regarding the contract's administration.

Both sides should hold training programs to inform their stewards and line supervisors of these points. Members of the negotiating team should attend these training sessions; they can best describe the issues and implications of the agreement; they can also point out how the other side is likely to interpret and administer the contract.

The following topics should also be included in training programs:

Past Practices

Shop stewards and line managers should independently review all past practices in light of the new contract. They must be prepared to handle any problems that may arise due to a past practice being abolished or modified by the agreement. Problems should be anticipated and solutions sought before the contract actually goes into effect. Questions or problems in this regard should be referred to the leadership of their respective organizations.

Problem Handling

Even after initial orientation, questions will still arise involving the contract. Shop stewards and line managers must understand the proper procedure to handle such questions. They should know how to review the contract each time a

question is raised. There should also be a "fail-safe" system within the management and union organizations to provide quick advice to stewards and supervisors for immediate problems.

The line managers and shop stewards should keep accurate records of questions, problems, and grievances raised regarding the contract. These records are vital for grievance hearings and serve as useful data in renegotiating the contract.

Channels of Responsibility

Stewards and line supervisors must understand the lines of authority within their respective organization and the responsibilities assigned to them individually in the contract administration process. They must know the extent and limits of their own authority and the authority of others in relevant situations.

Coordination

Contract administration is a cooperative effort. All parties involved must know when and how to coordinate their efforts to best administer the contract. Thus it may be helpful to have stewards and line supervisors attend an orientation meeting jointly sponsored by management and the labor organization. It is extremely important to hold at least

one such meeting with regard to the respective roles of the stewards and supervisors in grievance handling, as their first official face-to-face meeting should not be in a confrontation over a grievance if this can be avoided. Both sides must, however, have thorough knowledge of the grievance procedure.

The Ongoing Process

Contract administration is an ongoing process and training for this task should also be seen as a continuing effort. Steward councils or first-line supervisor meetings should be held regularly to review the contract administration process. Educational programs relating to all aspects of collective bargaining should be established.[1/] Separate labor and management meetings should be held on important arbitration cases and disputes to disseminate information quickly and correctly.

A contract is only as good as the way it is administered.

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[1]The bibliography included in this section suggests possible reading materials for such programs.

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