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Labor Law: When Should the NLRB Withold Jurisdiction Pending an Arbitration

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CASE NOTE

LABOR LAW: WHEN SHOULD THE NLRB WITHHOLD JURISDICTION PENDING AN ARBITRATION

In the typical modern collective bargaining agreement, disputes which arise between the parties during the term of the contract are made subject to resolution through the grievance-arbitration provisions of the agreement. However, the conduct underlying certain of these disputes might also constitute unfair labor practices, which are within the province of the National Labor Relations Board (NLRB). It is necessary, therefore, to delineate those situations in which the NLRB should refrain from issuing a complaint charging unfair labor practices, thereby permitting the grievance-arbitration provisions of the collective bargaining agreement to be used to resolve the dispute, in accord with the intent of the parties as expressed in the language of their agreement.

Section 10(a) of the National Labor Relations Act provides that the power of the Board with respect to unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . ."[1] Notwithstanding the foregoing, the Board, for reasons of policy, has seen fit in appropriate circumstances to withhold or limit the jurisdictionally permissible scope of its powers. It is the premise of this paper that when the parties have agreed to pursue settlement of a dispute through the grievance-arbitration provisions of their collective bargaining agreement, the Board should not issue a complaint until an arbitration award has been made.

To establish that premise, it is first necessary to show the role of the grievance-arbitration procedure in the collective bargaining system and then to demonstrate the strong public policy in favor of labor arbitration. The Supreme Court, in the *Steelworkers* trilogy,[2] described its conception of collective bargaining. In *United States Steelworkers v. Warrior & Gulf Nav. Co.*, the Court observed: "A collective bargaining agreement is an effort to erect a system of industrial self-government."[3] Thus, the agreement becomes more than a mere contract; rather, it is a generalized code to cover the entire relationship

[1] Labor Management Relations Act (Taft-Hartley Act) §10(a), 61 Stat. 146 (1947), 29 U.S.C. §160(a) (1965).

[2] United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). As the Board pointed out in Aerodex Inc., 149 N.L.R.B. 192 (1964), these cases are inopposite as authority for the proposition that the Board should withhold its own jurisdiction in favor of arbitration, but nonetheless these cases do set forth the policy in favor of the arbitration of labor disputes.

[3] 363 U.S. 574, 580 (1960).

between the parties, including the myriad of situations which no draftsman could anticipate. As the late Dean Shulman said, the written collective bargaining document is:

> . . . 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.[4]

Thus the gaps which arise during the existence of the collective bargaining agreement must be filled. It is the function of the grievance-arbitration provisions to provide a procedure by which these disputes can be settled without a strike or other industrial strife. The result of a smoothly functioning arbitration procedure is that the area of agreement between the parties is continually expanded. In the *Warrior & Gulf Nav. Co.* case, the Supreme Court concluded that:

> . . . 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 unforseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.
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> 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.[5]

Thus to the same extent that there is a federal policy in favor of the collective bargaining system, there is a public policy in favor of the grievance-arbitration provisions which form an integral part of that system.[6] This public policy in favor of the voluntary adjustment of collective bargaining disputes through the use of grievance procedures is manifested in section 201(a) and (b) and section 203(d) of the Act.[7] Section 203(d) provides:

> 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

[4] Shulman, *Reason, Contract, and Law in Labor Relations,* 68 HARV. L. REV. 999, 1005 (1955).
[5] United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 581 (1960).
[6] *Id.* at 578.
[7] 61 Stat. 152, 53 (1947), 29 U.S.C. §§171, 173 (1965). See Brown, *Collective Bargaining in a Free Society,* 51 L.R.R.M. 96 (1962).

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

The National Labor Relations Board has endorsed this policy in favor of arbitration in *International Harvester Co.*

> If complete effectuation of the Federal policy [in favor of arbitration] is to be achieved, we firmly believe that the Board, which is entrusted with the administration of one of the many facets of national labor policy, should give hospitable acceptance to the arbitral process as "part and parcel of the collective bargaining process itself," [citing *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960)] and voluntarily withhold its undoubted authority to adjudicate alleged unfair labor practices charges involving the same subject matter. . . .[8]

A situation in which the Board will sometimes withhold its own jurisdiction in favor of grievance-arbitration procedures is when an arbitration award has already been made.[9] In *Spielberg Mfg. Co.*,[10] the Board set out the criteria by which it would review arbitration awards to determine whether it would withhold its own jurisdiction: The criteria are: 1) the arbitration proceedings must have been fair and regular; 2) all the parties must have agreed to be bound to the award; and 3) the decision of the arbitrator must not be clearly repugnant to the purposes of the Act.

The Board has indicated that in certain circumstances it would withhold its own jurisdiction even when an arbitration award had not been made. In the *Adams Dairy* case,[11] the Board asserted jurisdiction and distinguished the case at hand where none of the parties had moved for arbitration even though the agreement provided for arbitration from a situation where the Board would withhold its own jurisdiction because of a pending arbitration. The Board said that before it would withhold its own jurisdiction: 1) the case must turn primarily on an interpretation of a specific contractual provision; 2) the case must unquestionably be encompassed by the arbitration provisions of the contract; and 3) it must be reasonably probable that the eventual arbitration settlement would also put to rest the unfair labor practice controversy in a manner sufficient to effectuate the policies of the Act.

Member Brown, in his concurring opinion, more fully discussed situations in which the Board should withhold its jurisdiction before an arbitration award has been handed down. He concluded that "it is inconsistent with the statutory policy favoring arbitration for the Board to resolve disputes which, while cast as unfair labor practices,

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[8] International Harvester Co., 138 N.L.R.B. 923, 927 (1962), enforced *sub nom.* Ramsey v. N.L.R.B. 327 F.2d 784 (7th Cir., 1964).
[9] See *id.* and Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955).
[10] Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955).
[11] Cloverleaf Division of Adams Dairy Co., 147 N.L.R.B. 1410, 1415-1416 (1964), hereinafter called "Adams Dairy."

essentially involve a dispute with respect to the interpretation or application of the collective-bargaining agreement."[12] In such a situation Member Brown would withhold jurisdiction until there has been an arbitration award, and then review the award according to the *Spielberg* standard. Not only would he have the Board withhold jurisdiction in a situation where the subject matter of the dispute involved the interpretation of a specific contractual provision, but he would also have the Board withhold jurisdiction whenever the dispute would involve a more general question as to the relation of the parties, as long as the dispute involved a question of contract, past practice, or bargaining history of the parties.[13] In light of the broad role which arbitration is expected to play in our system of industrial government, it seems that Member Brown's standard would more fully give Board support to the arbitration process than does the standard of the *Adams Dairy* majority opinion.

In *Tex-Tan-Welhausen Co.*,[14] there were two grievances. The Valka grievance was filed but it was never taken to arbitration after being denied by the company at the first step of the several step grievance procedure. The Board held that merely because the grievant had a right to proceed to arbitration under the contract did not preclude him from going to the Board in order to protect his rights. The Debault grievance had gone to arbitration, though the award had not been handed down at the time of the Trial Examiner's opinion. The Board held that it would not withhold its own jurisdiction because the arbitration provisions of the agreement did not allow the arbitrator to make a *de novo* decision on the subject matter of the dispute but rather limited the arbitrator to reviewing the dispute to see if there was any evidence to support the action taken by the company.

On the basis of these cases it is possible to establish a set of criteria by which the Board should determine whether to withhold jurisdiction in favor of the grievance-arbitration provisions of the collective bargaining agreement.

1) The arbitration dispute must involve the same subject matter as the unfair labor practice charge.[15]

2) The arbitrator must have the authority under the agreement to be able to decide the entire dispute *de novo,* including those aspects which form the basis of the unfair labor practice charge.[16]

3) The dispute must be over the application or interpretation of an

[12] *Id.* at 1423.

[13] *Ibid.*

[14] 159 N.L.R.B. No. 141, 5 CCH 1966 LAB. REP. ¶20,612 (1966).

[15] International Harvester Co., 138 N.L.R.B. 923 (1962), enforced *sub nom.* Ramsey v. N.L.R.B., 327 F.2d 784 (7th Cir. 1964); Cloverleaf Division of Adams Dairy Co., 147 N.L.R.B. 1410 (1964)

[16] Tex-Tan Welhausen Co., 159 N.L.R.B. No. 141, 5 CCH 1966 LAB. L. REP. ¶20,612 (1966).

existing collective-bargaining agreement, even if the dispute is cast in unfair labor practice terminology.[17] The better view regarding this criteria is the view espoused by Member Brown in *Adams Dairy*[18] which includes subjects of past practice and bargaining history along with the interpretation of specific contract provisions as part of what constitutes the interpretation of a collective bargaining agreement.

4) All parties must have agreed to be bound to the decision of the arbitrator.[19] This means more than that the union and company had agreed to be bound by any arbitration which might occur during the course of the agreement. Rather, it would seem to require that, prior to the issuance of the complaint, the parties had agreed to pursue settlement of the particular dispute through arbitration.

There are several reasons for drawing the line where the parties have agreed to be bound to the decision of an arbitrator. The underlying reason why the Board would ever withhold jurisdiction in favor of arbitration is that the existence of both the Board and arbitration is directed at the same end: that is, they both exist to prevent industrial strife. As long as arbitration is functioning so as to reach that common end, there is no reason for the Board to intervene and duplicate the effort of the arbitrator.

Furthermore, when the Board does intervene after the parties had agreed to arbitration, the arbitration process becomes stymied. As long as the Board is exercising its own jurisdiction in the matter, the arbitrator loses his power to make a binding resolution of the dispute. In *Tex-Tan Welhausen Co.*,[20] for example, the Board issued a complaint after the parties agreed to arbitration but before the arbitration took place. At the arbitration the counsel for the union reserved all unfair labor practice questions for the Board, thereby preventing the arbitrator from ever getting to the heart of the dispute which was the same for both the Board action and the arbitration. In that case, the issuance of the complaint by the Board effectively stopped the arbitration process. Though the Board was justified in exercising its jurisdiction in that case, the result directly contravened the public policy in favor of arbitration.

In conclusion, when there is an arbitration clause in the contract but when none of the parties have sought to make use of that provision to settle a dispute which also might be an unfair labor practice, the Board should exercise its own jurisdiction in order to fulfill its statutory mandate.

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[17] Section 203(d) of the Act; Cloverleaf Division of Adams Dairy Co., 147 N.L.R.B. 1410 (1964).

[18] *Supra,* notes 11-15.

[19] Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955); Tex-Tan Welhausen Co., 159 N.L.R.B. No. 141, 5 CCH 1966 LAB. L. REP. ¶20,612 (1966).

[20] 159 N.L.R.B. No 141, 5 CCH LAB. L. REP. ¶20,612 (1966).