Jurisdictional Disputes and the Labor Management Relations Act of 1947

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PRIVATE SETTLEMENT OF JURISDICTIONAL DISPUTES

In our previous discussion of the procedural aspects of the right of the National Labor Relations Board to hear and determine jurisdictional disputes under section 10(k) of the Labor Management Relations Act of 1947, we emphasized the importance of a voluntary adjustment, or an agreement by the parties to adjust, such disputes. We observed that the primary purpose of section 10(k) was to encourage private, rather than governmental, settlement of jurisdictional disputes. We should again refer to the language of section 10(k) pertaining to voluntary settlement. It provides that "satisfactory evidence" of the existence of an agreement among the parties to a jurisdictional dispute to resolve their problem without governmental intervention is sufficient to preclude the exercise of jurisdiction by the National Labor Relations Board under section 10(k). We have also seen that an actual adjustment of a jurisdictional dispute by the parties would not only prevent the Board from exercising jurisdiction to hear and determine the dispute under section 10(k) but also cause a dismissal of the charge of an unfair labor practice as proscribed by section 8(b)(4)(D) of the 1947 Act.

It seems impossible to overstress the importance of a statutory provision which compels a federal administrative agency to refuse jurisdiction in a case involving an alleged violation of the National Labor Relations Act where there is reason to believe that the disputants have entered into an agreement to settle their own difficulties and which compels the agency to dismiss the unfair labor practice charge itself if
the parties have actually settled their own case. It is quite clear that Congress by its choice of language in section 10(k) considered voluntary settlement of a jurisdictional dispute by the disputants the equivalent of a determination by the National Labor Relations Board; in fact, by allowing the parties ten days to present, to the satisfaction of the Board, evidence that they have arrived at a method of private settlement, the Act clearly puts primary emphasis on voluntary negotiation and settlement rather than settlement by government since "satisfactory evidence" of such voluntary agreement requires that the Board relinquish jurisdiction which has been invoked by one or more of the parties. The Board also agrees with this interpretation of the statutory law and considers the primary purpose of section 10(k) to be the encouragement of private, and not governmental, settlement of jurisdictional disputes.\footnote{See, Local 25, Iron Workers Union, A.F.L.-C.I.O., \textit{(Pittsburgh Plate Glass Co.)} 125 N.L.R.B. 1035, 45 L.R.R.M. 1221 (1959); Local 1102, Millwrights Union, A.F.L.-C.I.O., \textit{(Don Cartage Co.)} 121 N.L.R.B. 101, 42 L.R.R.M. 1295 (1958); Local 2, Lathers Union, A.F.L.-C.I.O., \textit{(Acoustical Contractors Assn. of Cleveland)} 119 N.L.R.B. 1345, 41 L.R.R.M. 1293 (1958); Local 1, Sheet Metal Workers Union, \textit{(Meyer Furnace Co.)} 114 N.L.R.B. 924, 37 L.R.R.M. 1068 (1955); Local 9, Lathers Union, A.F.L., \textit{(A. W. Lee, Inc.)} 113 N.L.R.B. 947, 36 L.R.R.M. 1414 (1955).}

In citing the Congressional Record,\footnote{\textit{93 Cong. Rec. 4155} (1947).} the Board has stated its position as follows: "Clearly, the purpose of these provisions (section 10(k)) was to provide the parties with an opportunity to settle jurisdictional disputes among themselves without government intervention whenever possible."\footnote{\textit{Local 943, Carpenters Union, A.F.L.,} \textit{(Manhattan Construction Co.)} 96 N.L.R.B. 1045, 29 L.R.R.M. 1002 (1952), \textit{petition for review denied,} 198 F. 2d 230 (10th Cir. 1952), 30 L.R.R.M. 2464 (1952).} In another case, the Board recognized that "where there is an agreed upon method of private adjustment, the parties themselves have supplied the forum for hearing and determining the dispute."\footnote{\textit{Local 2, Lathers Union, A.F.L.-C.I.O.,} \textit{(Acoustical Contractors Assn. of Cleveland), supra note} 246, 41 L.R.R.M. at 1299.} And, even though the jurisdictional dispute involves a violation of the National Labor Relations Act, the Board has emphasized the priority of voluntary settlement as follows: "Section 10(k) necessarily assumes the existence of activities prohibited by Section 8(b)(4)(D), but nevertheless clearly provides for the voluntary settlement of jurisdictional difference without government intervention."\footnote{\textit{Local 1102, Millwrights Union, A.F.L.-C.I.O.,} \textit{(Don Cartage Co.), supra note} 246, 42 L.R.R.M. at 1296.} Perhaps the most important statement concerning the relative status of an agreement by the parties to settle their jurisdictional controversy was that enunciated by the Board in the \textit{Newark & Essex Plastering Company} case:\footnote{\textit{Local 175, Lathers Union, A.F.L.-C.I.O.,} \textit{(Newark & Essex Plastering Co.)} 121 N.L.R.B. 1094, 42 L.R.R.M. 1519 (1958).} "The legislative history of the Act shows that in enacting sections 8(b)(4)(D) and 10(k), Congress had three broad objectives in view. These..."
were: (1) to encourage the settlement of jurisdictional differences without Government intervention; (2) to empower this Board to determine disputes not resolved by private arbitration, and thus avoid complaint proceedings; and (3) to outlaw jurisdictional strikes in the interest of neutral employers and the public.252

Since we have considered in Part One the procedural effect of the private settlement of jurisdictional disputes, it is our present concern to analyze the substantive law involving such voluntary settlements. Our immediate objective, therefore, is to consider the type of agreement which would satisfy the National Labor Relations Board that the parties have agreed upon a method or procedure for settling their jurisdictional dispute. Although the Board has endeavored to encourage the private adjustment of jurisdictional problems, and thereby promote the legislative purpose of section 10(k), it has nevertheless developed through its decisions certain definite principles to guide itself in determining whether the evidence supports a finding that either an actual adjustment, or an agreement to adjust, exists. First, the Board determines if there is an express or implied manifestation of an intention to settle a jurisdictional dispute by private, rather than governmental, means. Second, the Board insists, if such an agreement exists, that all parties to the jurisdictional dispute be also parties to the agreement of settlement.

Agreements for the settlement of jurisdictional disputes may involve specific existing disputes, or they may prescribe certain arbitration procedure for the settlement of future jurisdictional disputes. The most recent plan for settling future jurisdictional controversies was that approved at the A.F.L.-C.I.O. convention in December, 1961.253 A more limited plan covering the construction trades has been in existence since 1948, and is the most prominent agreed upon method recognized and approved by the National Labor Relations Board.254 The Board has held that the plan of the Building and Construction Trades Department

252 Id. 42 L.R.R.M. at 1521.
253 "The plan approved by the convention is in form of amendments to the AFL-CIO constitution and will be effective until the next AFL-CIO convention in 1963 when it may be revised in light of experience with its operation. As approved, the plan calls for these steps. An opportunity will be given the disputing unions to come to a voluntary settlement. Failing that, the AFL-CIO president will appoint a mediator from within labor's ranks to hear the dispute. . . . If a settlement is not reached within 14 days an impartial umpire will move into the case. . . . An umpire's determination may be appealed within five days to a subcommittee of the executive council. . . . If the subcommittee sees substance in the appeal it turns the case over to the federation's executive council. . . . If an umpire's determination is not appealed or is upheld on appeal to the executive council, the unions involved are required to comply with the decision. . . . If the council members find that the charged union has not complied with an umpire's determination, a program of quarantine could be invoked." 49 Labor Relations Reporter 193, 194, Bureau of National Affairs, Inc., Wash., D.C.
254 This Plan for the Settlement of Jurisdictional Disputes was approved by the Building and Construction Trades Department, A.F.L.-C.I.O., May 1, 1948.
of the A.F.L.-C.I.O. which set up a private tribunal, called the National Joint Board, for the resolution of jurisdictional disputes constitutes "satisfactory evidence" of an agreed upon method within the meaning of section 10(k). But, to be acceptable, the agreement need not be either national or regional in scope. It can be applicable to a specific employer exclusively. Thus, in the *Wm. F. Traylor* case, the Board approved, as a sufficient agreed upon method, an agreement between an employer and a union providing for a determination of work assignments by the business representatives of the unions involved if such work was within the jurisdictional territory of more than one local union.

Although the parties may have at one time entered into an agreement to settle future jurisdictional disputes, to effectively forestall the exercise of jurisdiction by the National Labor Relations Board to hear and determine such disputes under section 10(k), the agreement must either be in existence at the time the charge of an 8(b)(4)(D) violation is filed with the Board's regional director or be in existence within ten days thereafter. Thus, in a recent case, the Board found that a contract, in which it was alleged the employer had agreed to submit jurisdictional disputes to the A.F.L.-C.I.O.'s Joint Board for settlement, had expired before the jurisdictional dispute occurred and had not been renewed. Similarly, in another case, the Board held: "We find that the Employer and Local 12 have, through mutual inaction, abandoned their 1955 agreement. It follows that the Employer is not currently bound to an agreed upon method for the adjustment of this dispute, and the statutory prohibition to our determination of the dispute is inapplicable." It is, of course, consistent with the law of contracts that parties may not only enter into agreements but may rescind such agreements as well. Therefore, an agreement to submit future jurisdictional disputes to the National Joint Board for resolution would, under these circumstances, constitute "satisfactory evidence" of an agreed upon method within the meaning of section 10(k).

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255 Probably the most important early case on this point is the *Manhattan Construction Company case*, supra note 248; in citing this case, the NLRB has said: "Consistent with the statutory provisions for private settlement of jurisdictional disputes whenever possible, the Joint Board was established with the knowledge of this Board, for the purpose of considering and deciding jurisdictional disputes in the building and construction industry. We have held that where all parties to a dispute i.e., the disputing unions and the employer responsible for the assignment of the disputed work, are bound by the agreement which established the Joint Board and which provides for the submission of dispute to it, the parties have 'agreed upon methods for the voluntary adjustment of the dispute' within the meaning of Section 10(k), and that we are therefore without authority to determine the dispute." Local 9, Lathers Union, A.F.L., *Ad. W. Lee, Inc.* supra 246, 36 L.R.R.M. at 1415.


259 Id. 41 L.R.R.M. at 1414.
disputes to private arbitration may either be rescinded or abandoned and be ineffective for the purpose of depriving the National Labor Relations Board of its jurisdiction to hear and determine a jurisdictional dispute under section 10(k).

It can readily be seen that the determination of the existence of an agreement among parties to settle their own jurisdictional dispute is necessarily related to the Board's requirement that such an agreement must include all the parties to the dispute. The National Labor Relations Board has continually insisted that evidence of an agreement for the private settlement of a jurisdictional dispute is not "satisfactory" within the meaning of section 10(k) if any one of the parties to the dispute is not a party to the agreement. A jurisdictional dispute involves, at the very least, three parties, namely, the employer and two competing groups of workers seeking the assignment of the work in dispute. Of course, if three different groups are seeking an assignment of jurisdictionally disputed work, four parties are necessary to an effective voluntary settlement, and so on. It is apparent, therefore, that an agreed upon method for the private settlement of a jurisdictional dispute cannot be within the contemplation of section 10(k) if the settlement procedure involves the disputing unions and not the employer or if it involves the employer and only one of the disputing unions. The Kansas City Power & Light Company case presents an interesting set of circumstances which the Board found did not reveal participation by all the parties in an agreement to adjust their jurisdictional dispute. The dispute involved an assignment by the employer, a public utility company, of steam pipe installation to members of the Electrical Workers Union (I.B.E.W.). The Pipefitters Union contested the assignment and was subsequently charged with a violation of section 8(b)(4)(D). Because of the strike, the City, for whom the pipe was being installed, gave the job to another company, using members of the Pipefitters Union. Before the National Labor Relations Board had exercised jurisdiction under section 10(k) to hear the dispute, as being jurisdictional in character, the respondent union charged with the violation of section 8(b)(4)(D) sent a letter to the Board's regional director stating that "it was not lawfully entitled to force or require the Company to assign the work of tying steam pipe to its members (and that) it will not induce or encourage employees to strike in order to force such assignment." The language used in the letter was substantially that used by


the National Labor Relations Board in its 10(k) determinations against unions which it finds reasonably charged with an 8(b)(4)(D) violation. The respondent union claimed that it had "taken all the action required under the law" and that the Board had no jurisdiction to determine the dispute under section 10(k). The Board agreed with the Company "that the letter . . . constituted neither satisfactory evidence that the parties have adjusted or agreed upon methods for adjustment nor an informal settlement (since) the letter was a unilateral declaration not accepted by the Company or the IBEW and not approved by the Regional Director." The Board was not impressed with the efforts of a union, charged with forcing an assignment of work, to settle the dispute after it had been successful in obtaining the work.

The question of proper parties to a private arbitration procedure was involved in a recent case—Food Employers' Council, Inc. The case involved an agreement between the Retail Clerks Union and an association of food store owners—the Employers' Council—concerning "shelving" work. The work of replenishing the shelves and racks in the various food stores was being performed by employees of the companies supplying the stores and by members of the Teamsters Union. The Retail Clerks Union claimed that "shelving" was within its contract with the Employers' Council. The contract between the Clerks and the Council contained an arbitration clause—an agreement by the parties to submit contractual disputes to private arbitration. The National Labor Relations Board, in a three to two decision, disagreed with the Clerks' interpretation of this clause. The members of the majority stated: "The argument of the Clerks that the agreement to arbitrate need include only itself and the Council is based upon the contention . . . that the dispute is exclusively concerned with the meaning to be given to the recognition and work assignment clauses of the . . . agreement." The majority then went on to state that even if the Clerks' Union agreed to submit its claim to arbitration under its agreement with the Employers'

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262 Id. 38 L.R.R.M. at 1082. [Italics supplied.]
263 The Board noted: "[T]he Respondent's efforts were successful; the Company lost the contract; and the Respondent did secure the work assignment. Then at the very last moment, immediately before the hearing in this proceeding came to order, the Respondent submitted a letter to the Regional Director stating that it will not violate Section 8(b)(4)(D). We would be shortsighted indeed and remiss in our responsibility under the statute were we to accept that document as a settlement. To terminate this proceeding at this stage without a determination would leave the Board with the possibility of again facing a last minute effort to forestall Board action at some time in the future. Under the circumstances we believe that the policies of the Act and the direction of section 10(k) impel that we make findings of fact and issue a Determination of Dispute in this proceeding." Local 533, Plumbers and Pipefitters Union, (Kansas City Power & Light Co.) supra note 261, 38 L.R.R.M. at 1083.
265 Id. 45 L.R.R.M. at 1196.
Council, the Board would nonetheless be compelled to decide the question concerning the Clerks' right to force a re-assignment of the work in dispute. The majority went on to hold: "This is a statutory problem which only the Board is qualified to pass upon. The Council and the Clerks may be essential parties in determining whether there has been a violation of the agreement, but the Teamsters and the suppliers are equally essential parties to the voluntary method of adjustment contemplated in Section 10(k). Without their consent to participate in an arbitration proceeding, there can be no effectual voluntary settlement of the dispute."\(^{266}\) The Board's dissenting members, however, thought that the contract between the Retail Clerks' Union and the Employers' Council, providing for the arbitration of their contractual disputes, was controlling. The minority opinion in the *Food Employers' Council* case was expressed as follows:

The Board has long recognized the value, in its disposition of jurisdictional disputes, of requiring parties to adhere to their agreements by denying relief under Section 10(k) to an employer who has assigned work to one group of employees in derogation of the unambiguous assignment of that work to another group of employees by contract.\(^ {267}\) ... But now the Board refuses to take the next step, which is essential to the logic of its position—that a contract which provides for final and binding arbitration of its meaning is not an ambiguous contract. ... The parties provided a method of self-governance in their contract through the grievance and arbitration procedures ..., even to the extent of agreeing on means for determining whether a particular dispute is arbitrable.\(^ {268}\)

The majority of the Board members in the *Food Employers' Council* case replied to the dissenting position as follows:

Our dissenting colleagues would find that the Clerks-Council agreement is a defense to the charges (of an 8(b)(4)(D) unfair labor practice) because its ambiguous work assignment provisions are susceptible to eventual determination through arbitration and are, therefore, potentially unambiguous. They would treat an admittedly ambiguous work assignment clause with the same effect as a Board order or certification for purposes of


\(^{268}\) 45 L.R.R.M. at 1199, 1200.
exoneration, if the meaning of the clauses can be arbitrated. The members of the majority, on the other hand, believe that a contractual provision for arbitration constitutes an agreed upon method for the voluntary adjustment of a work assignment dispute under Section 10(k), and may be a defense to Section 8(b)(4)(D) charges only when all the parties to the dispute have agreed to be bound by such method. . . . We believe that our view of the effect to be given an agreement to arbitrate in a work assignment dispute, i.e., the necessity that all parties be bound, is preferable to that of our dissenting colleagues because we are of the opinion that in this respect arbitration to settle the meaning of an ambiguous work assignment clause should be treated like arbitration to settle conflicting claims arising thereunder. In both cases, the arbitration procedure is ineffective unless all parties having an interest in the outcome of the dispute agree to be bound.269

The issue debated by the majority and dissenting members of the National Labor Relations Board in the Food Employers' Council case is indeed an important one. It involves not only the question of proper parties to an agreement to settle a jurisdictional dispute within the meaning of section 10(k) but also the related question of whether a union claiming a contractual right to jurisdictionally disputed work can have its claim settled according to arbitration procedure set forth in its contract with the employer without the participation of the other group or groups claiming a right to the work. The real difference between the majority and minority views concerns the nature of the problem. Is it essentially a statutory problem? Or, is it essentially contractual? If the charge of conduct in violation of the jurisdictional dispute provisions of section 8(b)(4)(D) is emphasized, the problem is then a statutory one. If, however, the interpretative and arbitrable characteristics of the claim of the Retail Clerks Union is emphasized, the problem is essentially contractual—involving the application of the terms of a contract between the parties concerned. The majority in the Food Employers' Council case decides in favor of the statutory view. The dissenting members of the Board recognize that there "is an overlap between statutory and contractual rights" but feel that the problem "should be settled wholly by resort to the contract itself."270

In support of its contention in the Food Employers' Council case that the claim of the Retail Clerks Union should be resolved according to the arbitration procedure prescribed in its contract with the Employers' Council, the minority opinion cites as authority the Board's refusal "to remedy the statutory violation" in other cases involving allegations of "violations of Section 8(a)(3) and 8(a)(5) which arise from conduct that may also be considered a contract violation . . . if the grievance and

269 Id. 45 L.R.R.M. at 1198, n. 5.
270 Id. 45 L.R.R.M. at 1200.
arbitration procedures of the contract have not been invoked."\textsuperscript{271} The dissenting Board members then conclude that they would "uphold the validity of an agreement to arbitrate, even when the charging party is thereby denied the immediate protection of a Section 10(k) determination."\textsuperscript{272} But, if a union involved in a dispute with another union over an assignment of work bases its claim to the disputed work on a contract with the employer and then contends that the dispute should be settled according to the arbitration procedure set forth in is contract with the employer, what about the right of the other union to present, for consideration by the employer, its claim to the disputed work? It would seem, therefore, that the National Labor Relations Board's preference for private arbitration procedure in cases involving the conduct of an employer which is alleged to be violative of certain statutory provisions as well as a union's contractual rights would not be applicable in jurisdictional dispute cases. If, for example, an employer's conduct encourages or discourages union membership in violation of section 8(a)(3) of the National Labor Relations Act, or his conduct amounts to a refusal to bargain with a union in violation of section 8(a)(5), and the employer's conduct in either of these situations is also in violation of the particular union's contract with the employer, then the Board could, by invoking the arbitration procedure prescribed in the contract, settle the statutory violation as well as the parties' contractual differences without the necessity of resorting to government intervention. This can be stated in another way. Violations of the Act by the employer which involve either the statutory sections cited by the dissent in the \textit{Food Employer's Council} case, and which also involve a contractual violation, result in a controversy between the particular union and the employer. The controversy is not a three-party affair as is the jurisdictional dispute. Thus, an act of an employer which a union charges to be in violation of its contractual, as well as its statutory, rights could be settled by the National Labor Relations Board only after the union has exhausted its primary remedy of private arbitration set forth in its contract. However, if the charge of a statutory violation involves union conduct proscribed by section 8(b)(4)(D), it would not be proper to utilize the arbitration machinery set forth in the contract between such union and the employer to the exclusion of any other union or group asserting a claim to the disputed work. Therefore, despite the fact that one of two contending groups seeking an assignment of jurisdictionally disputed work claims its dispute is contractual and subject to arbitration within the terms of its contract with the employer, the problem to be resolved in a jurisdictional dispute is essentially statutory, if the dispute has been the cause of conduct by

\textsuperscript{271} Ibid. \\
\textsuperscript{272} Ibid.
either of the competing groups to force the employer to assign the work in violation of section 8(b)(4)(D). Such a problem is statutory not merely because it involves an alleged violation of section 8(b)(4)(D) but because the charge of an 8(b)(4)(D) violation requires the initial applicability of section 10(k) which provides for a hearing and determination of the basic jurisdictional dispute by the National Labor Relations Board, if all the parties to the dispute have not agreed upon their own method of settlement.

We agree, then, with the view that if the contract between an employer and a union does not clearly assign jurisdictionally disputed work to one of the contending unions, all interested parties must be represented in an agreement to arbitrate. It was to this point that the majority opinion in the Food Employers’ Council case referred when it stated that “arbitration to settle the meaning of an ambiguous work-assignment clause should be treated like arbitration to settle the conflicting claims arising thereunder.”273 The majority opinion went on to conclude that “arbitration procedure is ineffective unless all parties having an interest in the outcome of the dispute agree to be bound.”274 This means, of course, that as far as jurisdictional disputes are concerned the arbitration procedure specified in a contract between an employer and one of the disputing unions is not “satisfactory evidence” of an agreed upon method of private settlement within the meaning of section 10(k) unless the other disputing group or union is also a participant in such procedure.

It should be emphasized that in our discussion of the Food Employers’ Council case we have been concerned exclusively with the question of the acceptability of arbitration procedure contained in a union’s contract with an employer as an agreed upon method for the settlement of a jurisdictional dispute within the meaning of section 10(k). In agreeing with the majority opinion, we merely conclude that for such arbitration procedure to be an acceptable agreed upon method within section 10(k) the employer and all contending groups of workers should participate. This conclusion is based on the premise that a real jurisdictional dispute exists. There may, however, be serious question whether in a given case a jurisdictional dispute within the meaning of section 8(b)(4)(D) actually exists. Of course, if the Retail Clerks Union had a right to have the disputed work assigned to its members by virtue of its contract with the Employers’ Council, then appropriate conduct in behalf of that union’s members to obtain such work would certainly not be in violation of section 8(b)(4)(D); for, the National Labor Relations Board has interpreted section 8(b)(4)(D) to exclude

273 Id. 45 L.R.R.M. at 1198, n. 5.

274 Ibid.
the claim of a union to certain work based on a clear manifestation of contractual right as well as such claims based on an "order or certification of the Board" as specified in section 8(b)(4)(D). And, it would appear, that the decision of the Supreme Court in the recent Columbia Broadcasting System case, in which the Court instructed the National Labor Relations Board to make affirmative rather than negative determinations in jurisdictional dispute cases, would not affect the Board's policy that a dispute is not jurisdictional within the meaning of section 8(b)(4)(D) if the union charged with violating section 8(b)(4)(D) has a clear contractual right to the work sought by another group of workers. If contractual agreements are to have binding effect, it would be clear that in such a case a jurisdictional dispute, determinable within the meaning of section 10(k), could not exist merely because one group or union sought to invade the contractual domain of another group or union. We wish to emphasize, however, that in cases where the claim of a union or group of workers to disputed work is neither clearly expressed nor implied in its contract with the employer, it would not appear that a clause in such contract providing for private arbitration of contractual disputes would render any greater certainty to that part of the contract pertaining to the disputed work. It would seem to follow, therefore, that the rights of any group claiming an arbitrable right to disputed work by virtue of its contract with the employer would not be detrimentally affected by the participation in the arbitration proceeding of the other group or groups asserting a claim to the disputed work, if the group claiming the arbitrable right is correct that a reasonable interpretation of its contract would favor an assignment of the work to its members. On the other hand, if the group, asserting its claim to disputed work to be arbitrable within the terms of its collective bargaining contract, is unreasonable in its interpretation of the contract pertaining to the assignment of work, then it would also appear not to be detrimental to its cause that the arbitration proceeding in which it asserted its claim involved a third or fourth party. The difficulty in such cases is that if a union charged with forcing an assignment of work as proscribed by section 8(b)(4)(D) is correct in its contractual claim to the disputed work, then, the preliminary investigation of the National Labor Relations Board should reveal this fact and neither a private nor a governmental determination of any jurisdictional dispute under section 10(k) would be necessary.

In the Pulitzer Publishing Company case, the National Labor Relations Board again had occasion to consider the problem concerning

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the applicability of an arbitration provision contained in the collective bargaining contract of a union which claimed work assigned by the employer to members of two other labor organizations. The dispute involved the employer's assignment of work in operating a tape recording machine which was used by the employer's television and radio stations. The employer assigned various phases of the operation of the machine to members of three unions, namely, the Electrical Workers (I.B.E.W.), the Musicians Union, and the Newspaper Guild. The I.B.E.W. claimed that certain functions assigned to members of the other unions should have been assigned to its members "and sought to invoke the arbitration clauses of its contractual grievance procedure." There was no work stoppage, but the I.B.E.W. started an action in federal court to enforce the arbitration provision of its contract. The Company charged the union with a violation of section 8(b) (4) (i) (D) which served to invoke the jurisdiction of the National Labor Relations Board under section 10(k). The I.B.E.W. sought to have the 10(k) proceedings dismissed "alleging that (1) the disputed work of library filing, indexing, and record keeping is covered by its contract (2) the company has refused to arbitrate the issue, and (3) the union has filed suit in federal court to compel arbitration." The Board held that the contract between I.B.E.W. and the employer did "not, in unambiguous terms, include the work of library filing, indexing and record keeping." In reply to the I.B.E.W.'s contention that the arbitration procedure specified in its collective bargaining contract should be invoked, the Board stated: "The IBEW . . . contests the Board's jurisdiction in this case on the grounds, among others, that the arbitration provisions of its contract with the Company provide a method for adjustment of the dispute. We find no merit in this contention. For, assuming applicability of the arbitration clauses (a question we need not decide), it is clear that neither the Musicians nor the Guild would be bound by any award issued thereunder." The Board leaves no doubt after its decisions in the Food Employer's Council and Pulitzer Publishing Company cases that a union involved in a dispute with another labor group or groups over the right to an assignment of work cannot utilize arbitration procedure set forth in its contract with the employer to settle the dispute as if it were exclusively a matter between itself and the employer. If the contract between a union and an employer is either silent or unclear with respect to an assignment of jurisdictionally disputed work, arbi-
tration procedure specified in the contract for the settlement of contractual disputes does not qualify as a "satisfactory" method for the settlement of the jurisdictional dispute unless all the parties, including the other disputing labor group or groups, agree to participate in the private arbitration.

Another problem involved in the acceptability of an agreement by the parties to settle their own jurisdictional dispute concerns the method or procedure of the parties' participation. Does such participation have to be direct, express, or simultaneous? The National Labor Relations Board has answered each of the three parts of this question in the negative, and has found "satisfactory evidence" of an agreement within section 10(k) by the parties to settle a jurisdictional dispute even though the participation of one or more of them is indirect, implied, and not simultaneous. Thus, an international union organization has been said to be a participant in an agreed upon method for settling a jurisdictional dispute because of its membership in the A.F.L.-C.I.O.²⁸⁰ Such participation in the procedure of the A.F.L.-C.I.O.'s private tribunal—the National Joint Board—for the determination of jurisdictional disputes could be considered indirect. The National Labor Relations Board has also held that the "Carpenters International was bound, by its membership in the Building and Construction Trades Department, AFL-CIO, which is a signatory to the Plan for Settling Jurisdictional Disputes, . . . to accept and comply with decision of the Joint Board."²⁸¹ And, in the often cited A.W. Lee case,²⁸² the N.L.R.B. in holding that the Lathers' International, as a member of the Building and Construction Trades Department of the A.F.L.-C.I.O., was a participant in its Joint Board determinations went on to conclude as having "no merit" the contention of the local Lathers Union "that it did not become subject to the Joint Board agreement by virtue of the fact that he Lathers' International was a party to it, and that a local union cannot be bound by the agreement without its express consent. . . ."²⁸³ Therefore, just as international union organizations affiliated with the A.F.L.-C.I.O. are parties to an agreed procedure of the A.F.L.-C.I.O. for the settlement of

²⁸⁰ Finding the international organizations of the Carpenters and Lathers to be parties to the A.F.L.-C.I.O.'s plan for arbitrating jurisdictional disputes in the construction trades, the N.L.R.B. stated: "Accordingly, we find that both these Internationals and their subordinate affiliates, including Lathers 46, are bound by the Plan notwithstanding the efforts of the Lathers International to dissociate itself therefrom." Local 46, Lathers Union, A.F.L.-C.I.O., (Building Trades Employers Assn. of Long Island) 120 N.L.R.B. 837, 42 L.R.R.M. 1060, 1061 (1958). See also, Local 46, Lathers Union, A.F.L.-C.I.O., (Jacobson & Co.) 119 N.L.R.B. 1658, 41 L.R.R.M. 1367 (1958) and Local 2, Lathers Union, A.F.L.-C.I.O., (Acoustical Contractors Assn. of Cleveland), supra note 246.


²⁸² Supra note 246.

²⁸³ Id. 36 L.R.R.M. at 1415.
jurisdictional disputes so also are local unions parties to such procedure through their affiliation with the international organizations. In the A. W. Lee case, the N.L.R.B. referred to the Constitution of the Lathers' International which gave it "decisional rights in jurisdictional matters" and authorized it "to bind its locals to the official method for deciding jurisdictional disputes adopted by all of the International Unions of the Building and Construction Trades Department of the AFL."\(^{284}\) In the Meyer Furnace case,\(^{285}\) the N.L.R.B. again stated that each of the disputing unions was a party "to an agreed upon method for adjustment of jurisdictional disputes within . . . Section 10(k) by virtue of the fact that the Internationals of both unions (were) signatories to the Joint Board agreement."\(^{286}\)

In the Wm. F. Traylor case,\(^{287}\) the National Labor Relations Board recognized the voluntary participation by a union in a method for settling jurisdictional disputes which had been set forth in a contract between the employer and another union. The contract between the employer and the union prescribed that jurisdictional disputes would be settled by the business agents of the unions involved. It is obvious that such an agreement could, in the beginning, be contractually binding only upon the employer and the one union; it could not bind any union which may in the future be involved in a jurisdictional dispute with the first union unless the second chose to comply with the prescribed procedure. The N.L.R.B. recognized this when it stated: "Originally, only the Company and Local 934 were bound by the agreement because it was part of their contract and because the nature of the agreement itself also necessarily confined it to, and could only bind, these two parties. However, by apparently acting pursuant to the agreement . . . , Local 236 (the union subsequently involved in the dispute) has demonstrated that it considers that it too is bound by the agreement."\(^{288}\)

Participation by employers in agreements to settle jurisdictional disputes has its own special problems. Just as a union may be a party to an agreed upon method to settle a jurisdictional dispute because of its affiliation with a regional or national labor organization so also may an employer become a participant through membership in an association

\(^{284}\) Id. at 1416. It should be noted that the facts in the Lee case occurred before formation of the A.F.L.-C.I.O.

\(^{285}\) Local 1, Sheet Metal Workers Union, (Meyer Furnace Co.) 114 N.L.R.B. 924, 37 L.R.R.M. 1068 (1955).

\(^{286}\) Id. 37 L.R.R.M. at 1069. See also, the Jacobson & Co. case, supra note 280, wherein the Board in referring to the Acoustical Contractors case, supra note 246, stated "that the Lathers International, by retaining membership in the Building Trades Department, AFL-CIO, 'continued to subject itself and its locals to all constitutional requirements of Department membership, including the requirement that it recognize and be bound by the Joint Board agreement. . . . .'" 41 L.R.R.M. at 1369.

\(^{287}\) Supra note 256.

\(^{288}\) Id. 29 L.R.R.M. at 1189, n. 10.
of employers. However, as is probably more often the case, the employer may participate in a private settlement of a jurisdictional dispute on his own. One thing is quite clear. Participation by the employer is necessary to the acceptability of a private agreement to adjust a jurisdictional dispute within the meaning of section 10(k). In the *Bay Counties District Council* case, the N.L.R.B. had exercised jurisdiction under section 10(k) to hear and determine a jurisdictional dispute on the charge of one union (the Roofers) that another union (the Carpenters) was forcing certain employers to assign work as prohibited by section 8(b)(4)(D). The employers were not served by the regional director with formal notice of the 10(k) hearing and were, therefore, not parties to the action. They did, however, appear as witnesses at the hearing and entered no objection at not being served with notice. The N.L.R.B., in asserting that the employer is a necessary party to a hearing conducted by the Board under section 10(k), stated its position as follows:

Since rival unions involved in a jurisdictional dispute cannot adjust their dispute over a work assignment or agree upon a method of voluntary adjustment of the dispute without the consent of the employer responsible for the work assignment, it follows that Section 10(k) contemplates a participation of the employer in the proceeding as a necessary party. Although a Board determination in a 10(k) proceeding is not directed against the employer, it contains a determination that the union charged with unfair labor practices is or is not lawfully entitled to force or require the employer to assign the disputed work to one group of employees rather than to another. Such determination, therefore, vitally affects the employer's prerogative to make work assignments.

When the N.L.R.B., however, held in the *Bay Counties District Council* case that the error of not serving the employers with notice of the 10(k) hearing was not prejudicial, because the employers knew about the proceeding and elected not to intervene, one of the Board members dissented:

The majority's approach fails to recognize the Board's function as an arbitrator in a 10(k) proceeding. . . . The 10(k) proceeding . . . is in the nature of compulsory arbitration, where the arbitration tribunal, before it can proceed with the determination of the dispute must obtain jurisdiction over all of the parties to the dispute either by their voluntary submission or by service of process on such parties. . . . The majority decision also gives lip service to the second objective of Section 10(k), namely, to encourage the voluntary settlement of jurisdictional disputes by the parties themselves. . . . (U)nless the employer involved in the dispute is made a party to the 10(k) proceeding, no full and real

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290 Id. 38 L.R.R.M. at 1170.
opportunity is afforded the competing unions either to adjust the dispute or agree upon a method for the voluntary adjustment of the dispute. . . . As an employer's non-participation in such a proceeding may ultimately prejudice the possibility of a voluntary adjustment of a jurisdictional dispute, his election to intervene or not intervene in the proceeding is of no legal significance, and does not relieve the Board from its obligation under the Act to afford the parties to the dispute a real opportunity to settle the dispute without the Board's intervention.291

 Apparently, the dissenting position in the Bay Counties District Council case is based on the premise that the exercise of jurisdiction by a judicial or administrative tribunal of government is an incentive to the parties involved in the case to reach a settlement on their own rather than risk losing the case. Of course, as a practical matter, governmental intervention can, and does, have this effect. The dissenting position, therefore, is that the employer should not be allowed the choice of not participating in a 10(k) proceeding, and that, with the employer required to participate, there would be greater incentive for the employer to promote a settlement between the two disputing unions. The difficulty with this view, despite its practical advantages, is that in the Bay Counties case the National Labor Relations Board had exercised its jurisdiction under section 10(k) because one union had charged another union with forcing certain employers to assign work contrary to the provisions of section 8(b)(4)(D). Since an employer did not initiate the unfair labor practice charge in the Bay Counties case and since the prohibition of section 8(b)(4)(D) involves union conduct exclusively, it is not easy to conclude that employers, who elect not to intervene as parties in a 10(k) proceeding, are nevertheless required to do so for the purpose of encouraging the employer and unions involved in a jurisdictional dispute to adjust their own difficulties. Despite the merits of promoting private settlement of jurisdictional disputes, neither section 8(b)(4)(D) nor section 10(k) would appear to compel an employer to participate in a 10(k) proceeding instigated by a union's charge that another union has engaged in an 8(b)(4)(D) unfair labor practice.

Although the National Labor Relations Board has held that an employer is not bound by an arbitration agreement which the employer has not signed,292 the general rule to which the Board subscribes recog-

291 Id. at 1174.
292 In the General Riggers case, the N.L.R.B. in finding that there was "no agreed upon method for voluntarily adjusting jurisdictional disputes such as would free this Board from the mandate to hear and determine the dispute," emphasized that the employer was "not a signatory to the Dunlop Award relating to the disputed work." Local 1102, Millwrights Union, (General Riggers & Erectors, Inc.) 127 N.L.R.B. No. 2, 45 L.R.R.M. 1494, 1495 (1960). And, in the Painting & Decorating Contractors case, the N.L.R.B. in noting that "[t]he National Joint Board agreement specifically provides that only those
nizes that an employer may be a participant in private arbitration pro-
cedure through indirection or implication. Even when the N.L.R.B. found that neither an employers' association nor a member thereof was bound by a decision of the A.F.L.-C.I.O.'s Joint Board, since there was no evidence that either the association or the employer had "signed a stipulation" as specified in the National Joint Board agreement, the N.L.R.B. emphasized the importance of implied participation in a private method of settling jurisdictional disputes by considering in the same case the question of whether the employer's "cooperation" with the private tribunal of the A.F.L.-C.I.O. was a manifestation of consent by the employer to abide by its decision.293

The Pittsburgh Plate Glass Company case294 is one example of the time and manner of employer participation in a pre-existing method for the settlement of jurisdictional disputes. The dispute involved the Glaziers and Iron Workers Unions which had through their international organizations agreed to submit their jurisdictional problem to the A.F.L.-C.I.O.'s Joint Board for resolution. The employer, the Pittsburgh Plate Glass Company, signed a purchase order agreeing to settlement of jurisdictional disputes by the Joint Board. The National Labor Relations Board said:

In the present case, the record clearly discloses, and we find, that all parties agreed to such a method for voluntary adjustment. By signing the ... subcontract, it is clear Pittsburgh committed itself to all the terms contained therein. ... It may be noted that the language of Section 10(k) does not require, and the Board has never held, that the agreed-upon method envisaged by that section be set forth in a single instrument, signed by all the parties to the dispute. Indeed, as the chairman of the Joint Board ... testified, jurisdictional agreements between trade unions are virtually always signed only by the disputing unions, and not by the employers involved, who agree to be bound thereunder in separate instruments, as here, or by various other means.295

contractors are bound who 'have signed a stipulation' to that effect," went on to hold that the employer "was not bound by the Joint Board's determination because of his membership in the Painting & Decorating Contractors Association," and that there was no evidence that the employer, "or the Painting & Decorating Contractors Association on its behalf with authority to do so, had signed such a stipulation." Local 450, Operating Engineers Union, A.F.L.-C.I.O., (Painting & Decorating Contractors) 119 N.L.R.B. 1725, 41 L.R.R.M. 1399, 1401 (1958).

293 Local 450, Operating Engineers Union, A.F.L.-C.I.O., (Painting & Decorating Contractors), supra note 292.
295 Id. 45 L.R.R.M. at 1222, 1223. [Italics supplied.] See also, Local 1102, Millwrights Union, A.F.L.-C.I.O., (Don Cartage Co) 121 N.L.R.B. 101, 42 L.R.R.M. 1295 (1958), wherein the N.L.R.B. noted: "Before and since Riggers Local 575 ... contract with the Company, it and Local 1105 were bound by agreement to settle their jurisdictional dispute in accordance with the Dunlop decision. While the Company was not initially a party to such agreement, it later, within ten days of its filing the charge, did sign an agreement recognizing
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The A. W. Lee case illustrates employer participation in a voluntary settlement through submission or acquiescence. In this case, the employer was engaged in the installation of acoustical ceiling at a project for Westinghouse. The employer assigned the suspension system work to the Lathers Union and the work of inserting tiles to the Carpenters. The Carpenters submitted the work dispute over the suspension system to private settlement by the A.F.L.-C.I.O.'s Joint Board. When the Joint Board requested the employer to submit a description of the work and the details of the dispute, the employer complied; and, when the employer received a telegram from the Joint Board that the installation of the framework as well as the tiles, at the Westinghouse project only, should be done by the Carpenters, the employer complied by assigning the disputed work to the Carpenters. On the same day, Local 9 of the Lathers called a strike of twenty-three lathers on nine of the employer's jobs in protest. The Lathers went back to work pursuant to an agreement reached in the course of a section 10(L) proceeding. The issue concerning a violation of section 8(b)(4)(D) was nevertheless present, and the jurisdiction of the National Labor Relations Board to determine the dispute under section 10(k) was invoked. The Board, however, refused to hear the dispute on the ground that the parties had agreed to their own method of adjustment. Despite the fact that employers in the construction trades, to be bound by decisions of the A.F.L.-C.I.O.'s Joint Board, are supposed to sign the agreement with the Building and Construction Trades Department of the A.F.L.-C.I.O. by which the Joint Board was authorized to determine jurisdictional disputes, the employer in the Lee case did not do so. The N.L.R.B. put greater emphasis on the conduct of the employer and held:

It is true, as contended by Lathers Local 9, that the Company had never signed any stipulation such as specified (by Article II, sec. 7 of the Joint Board agreement) and was therefore not contractually bound by the Joint Board agreement at the time the dispute arose. The Company did, however, submit itself to the Joint Board's processes by replying to requests for information, by requesting reconsideration of the Joint Board's initial decision . . . , and by requesting the Joint Board to intervene to stop the Lather's work stoppage which was occasioned by the Company's compliance with the Joint Board decision. It is also true that the Company had acquiesced in Joint Board control of work disputes on its jobs . . . In view of these facts . . . we find that the Company had, at the time of the charge herein "agreed upon a method for the voluntary adjustment of the dispute."


297 Id. 36 L.R.R.M. at 1416.
In the *Meyer Furnace* case\(^{298}\) the National Labor Relations Board again stressed the importance of employer participation in a private method of settling a jurisdictional dispute through implication rather than expression. The Board in that case held: "Meyer, the employer responsible for the assignment of the disputed work here, has submitted itself to the Joint Board's processes by its submission of the dispute to that body. Under these circumstances it is unnecessary that Meyer be a signatory to the Joint Board agreement in order for Meyer to be deemed to have agreed upon a method for voluntary adjustment within the meaning of Section 10(k)."\(^{299}\)

Although the National Labor Relations Board has been satisfied within the terms of section 10(k) that the parties to a jurisdictional dispute have agreed by implication to resolve their differences, this does not mean that the Board finds such agreement among the parties in every case where there is a contention that the parties have settled, or agreed to settle, their problem. The Board has in a number of cases accepted jurisdiction to hear and determine jurisdictional disputes under section 10(k) on the ground that there was no "satisfactory evidence" that the parties had agreed to a voluntary method of adjustment.\(^{300}\) The Board has been quite insistent, despite its desire to imply an agreement of settlement by the parties, that the implication of an agreement by the parties to adjust their dispute be supported by the evidence. In the *Jacksonville Tile Company* case\(^{301}\) one of the disputing unions claimed that the employer had submitted for settlement a jurisdictional dispute to the processes of the National Joint Board of the A.F.L.-C.I.O. The N.L.R.B. observed that the record was silent with respect to the character of the information submitted by the employer and silent as to the

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\(^{298}\) *Supra* note 285.

\(^{299}\) *Id.* 37 L.R.R.M. at 1069. *See also, Local 46, Lathers Union, A.F.L.-C.I.O., (Building Trades Employers Assn. of Long Island), supra note 280, wherein the N.L.R.B. held: "Because [the employer] submitted the dispute to the Joint Board in the first instance, and ultimately assigned the work in question in the manner decided by the Joint Board, we find, in accordance with precedent that [the employer], too, has agreed upon a voluntary method for the adjustment of the dispute herein, namely, the Joint Board procedures." 42 L.R.R.M. at 1061.

\(^{300}\) In the *Pittsburgh's Great Southern Shoppers Mart* case, for example, the Board observed that "there was no showing . . . that the contractors . . . are parties to any agreement to be bound by determinations of the Joint Board, [of the A.F.L.-C.I.O.] or that they have submitted to the Joint Board's processes, as the employer in the Lee case . . . had done." Local 5, I.B.E.W., *Pittsburgh's Great So. Shoppers Mart* 115 N.L.R.B. 1196, 38 L.R.R.M. 1020, 1021 (1956). *See also, Operating Engineers Union, (Phnoro Electric Corporation), supra note 260; Local 386, Teamsters Union, (John M. King Co.) 124 N.L.R.B. No. 183, 43 L.R.R.M. 1920 (1959) ; Local 59, Lathers Union, A.F.L.-C.I.O., (Jacksonville Tile Co.), *supra* note 257; Locals 17, 17A, & 17B, Operating Engineers Union, A.F.L., (Empire State Painting & Waterproofing Co.) 99 N.L.R.B. 1481, 30 L.R.R.M. 1199 (1952); and Local 581, Carpenters Union, (Ora Collard) 98 N.L.R.B. 346, 29 L.R.R.M. 1333 (1952).

\(^{301}\) *Supra* note 257.
circumstances involved. The Board then held: "We are not convinced that the mere submission of unidentified 'information,' under unknown circumstances, is sufficient to establish that Jacksonville agreed to an adjustment of the work by the Joint Board." 302

In the Painting & Decorating Contractors case, 303 the National Labor Relations Board had occasion to consider the effect of an employer's "cooperation" with the efforts of a private tribunal in adjusting a jurisdictional dispute in which the employer was involved. Concerning the employer's "cooperation in supplying the Joint Board with information requested by it and the fact that it did not object to the Joint Board's assumption of jurisdiction over the work dispute until after the Joint Board made its award," the N.L.R.B. stated "we are not convinced that such cooperation is sufficient to establish that (the employer) thereby agreed to an adjustment of the work dispute by the Joint Board." 304 And, in another case, 305 in which a disputing union claimed the employer, a subcontractor, was bound by a previous determination of the A.F.L.-C.I.O.'s Joint Board involving the prime contractor and by the current Joint Board's determination in its favor, the National Labor Relations Board disagreed: "The Company here cannot be bound by any prior determination to which it was not a party. Nor is it bound by the determination of the Joint Board in this particular dispute since the evidence falls short of establishing that it ever submitted, or acquiesced in the submission of, the dispute to the Joint Board. In fact the evidence is to the contrary." 306 The N.L.R.B. distinguished the Pittsburgh Plate Glass Company case, 307 in which an employer became involved in the procedure of the A.F.L.-C.I.O.'s Joint Board through a subcontract, on the ground that in that case "the subcontract expressly stated it was 'subject to conditions on the reverse side' of the purchase order contract, and such purchase order contract included an agreement to be bound by the Joint Board." 308

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302 Id. 45 L.R.R.M. at 1068. At this point the Board cites as authority the Painting & Decorating Contractors case, supra note 292.
303 Supra note 292.
304 Id. 41 L.R.R.M. at 1401. The Board distinguished the Lee case, supra note 296, and the Meyer case, supra note 285, as follows: "In the Lee case, this Board found that the employer had submitted to the Joint Board's processes because, among other things, the employer had fully complied with the Joint Board's decision, requested the Joint Board to intervene to halt the union's work stoppage, requested it to reconsider its initial decision, and previously acquiesced in the Joint Board's control of its job. In the Meyer Furnace case, the employer submitted to the Joint Board's processes by itself submitting the dispute to the Joint Board for its determination. It is clear that the facts which persuaded the Board to find a voluntary submission in the decided cases are absent in the present case." 41 L.R.R.M. at 1401.
306 Id. 46 L.R.R.M. at 1376 (1960).
307 Supra note 294.
308 Id. 46 L.R.R.M. at 1378, n. 5.
Another version of an employer's "cooperation" with the activities of the A.F.L.-C.I.O.'s Joint Board was involved in the Contractors Association of New Jersey case. Among other things, the case involved a request by an employers' association that the Joint Board advise it concerning the effect of an assignment of work to the Operating Engineers Union. When the Joint Board refused to advise the association but offered instead to decide the actual dispute, the association did not reply. The National Labor Relations Board did not "believe that the Association's request for an advisory opinion constitute[d] a voluntary submission of the dispute within the meaning of section 10(k) in view of the fact that the Association did not accept the offer of the Joint Board to submit the dispute."\(^3\)

The problem of the extent to which an employer is obliged to submit a current jurisdictional dispute to private adjustment on the basis of his submission of such previous disputes to private arbitration is indeed a difficult one. Two cases are illustrative. In the *W. H. Condo* case,\(^3\) the question was whether an employer, Condo, and an association of contractors had agreed because of previous conduct to submit a jurisdictional dispute to the A.F.L.-C.I.O's Joint Board. The National Labor Relations Board stated: "The fact that the Association, (of employers) some nine months prior to the picketing at the high school and Union Electric projects, sought assistance of the Joint Board is not sufficient to establish submission to the Joint Board's processes by the Association or Condo. Further, the fact that the general contractors on the high school and Union Electric projects advised the Joint Board of the dispute involving Condo (a subcontractor) cannot be regarded as a submission to the Joint Board by Condo or the Association."\(^3\) In the *Contractors Association of New Jersey* case,\(^3\) the N.L.R.B. held that past submission by an employers' association of jurisdictional disputes to the Joint Board of the A.F.L.-C.I.O. and past acquiescence by the association in the decisions of the Joint Board did not give "rise to an implied agreement to submit the instant dispute to the Joint Board."\(^3\)

We can conclude from the above cases on implication of participation in private arbitration procedure that the National Labor Relations Board weighs the evidence carefully before being satisfied, within the meaning of section 10(k), that the parties have come to an agreement to settle their own jurisdictional dispute. Submission to a prescribed

\(^{310}\) Id. 40 L.R.R.M. at 1293.
\(^{312}\) Id. 41 L.R.R.M. at 1175.
\(^{313}\) *Supra* note 309.
\(^{314}\) Id. 40 L.R.R.M. at 1293.
procedure by which a jurisdictional dispute is to be determined outside the jurisdiction of the National Labor Relations Board necessarily involves a manifestation of intention by the parties concerned to abide by the determination rendered pursuant to their agreement. We have seen, for example, that the Board does not find such intention if the employer merely supplies information to a private tribunal which has asserted jurisdiction to decide a jurisdictional dispute or if the employer merely seeks advice from such a tribunal concerning the effect of a proposed assignment of jurisdictionally disputed work. Submission of a jurisdictional dispute to a private tribunal for determination, for the purpose of pre-empting jurisdiction within the meaning of section 10(k), must therefore involve the purpose by all parties of complying with the private tribunal's determination. If the National Labor Relations Board can reasonably conclude that the facts in a jurisdictional dispute case expressly or impliedly support the existence of an agreement which provides a method of voluntary adjustment, the Board is certainly motivated to come to such a conclusion. On the other hand, the Board does not, and cannot, construe the phrase "satisfactory evidence" in section 10(k) to mean equivocal or ambiguous evidence.

It might be thought that once the parties have agreed on their method of settling future jurisdictional disputes, and have therefore agreed to abide by the determinations pursuant thereto, subsequent problems would not arise. Unfortunately, this has not always been the case. In some instances, one of the parties to an agreed upon method announces in advance of, or subsequent to, a decision of adjustment an intention of not complying with such decision or award. The National Labor Relations Board has consistently held that none of the parties to an agreement for the settlement of a jurisdictional dispute can either by declaration or disassociation avoid the obligation imposed by the agreement to accept the decision rendered pursuant to the terms of the agreement. The Board has had occasion to consider the problem of the effectiveness of private awards in several leading cases. The Wm. F. Traylor case was one of the first important cases dealing with the binding effect of an award made pursuant to an agreed upon method. As we have seen, in this case the employer had agreed with a union to let the representative of the union settle any future jurisdictional dispute with a similar representative of whatever union would be involved in the dispute. When a jurisdictional dispute did occur and was settled by the representatives of the disputing unions, the employer refused to comply with the settlement on the ground that it would require replacement of regular employees. The question for the National Labor

316 Supra note 288.
Relations Board was whether the employer's refusal to abide by an award resulting from a private method of arbitration reactivated the Board's jurisdiction to hear and determine the jurisdictional dispute under section 10(k). If the refusal by a party to an agreed upon method to comply with the decision rendered through private arbitration nullifies the agreement to arbitrate, then the N.L.R.B. would be compelled to assume jurisdiction under section 10(k) to hear and determine the jurisdictional dispute which the private award tried to settle. The Board's decision to decline jurisdiction in the Traylor case was based on the following reasoning:

The fact that the Company had refused, in effect, to accept the determination of the dispute under the agreed upon method for adjustment is immaterial. The proviso to section 10(k), as already noted, applies equally to an adjustment or an agreement upon a method for adjustment. Moreover to hold that the Company's refusal to abide by the determination of the dispute, made pursuant to an agreed upon method for adjustment also nullified the agreement upon a method for adjustment would be to condone and sanction the Company's breach of that agreement. This would tend to discourage and render worthless the making of such agreements, contrary to the statutory purpose to encourage the voluntary adjustment of jurisdictional disputes. In effect, such a holding would permit a party to breach such an agreement with impunity because the determination of the dispute pursuant to the agreement was unfavorable to it, and then have recourse to this Board for another determination of the dispute which might be favorable to it. In our opinion, this would... abuse the Board's process.\textsuperscript{317}

In several cases,\textsuperscript{318} the National Labor Relations Board considered the efforts of the Lathers Union to disassociate itself from the A.F.L.-C.I.O.'s program for the settlement of jurisdictional disputes in the construction trades. In the \textit{A. W. Lee} case,\textsuperscript{319} the Board held: "The fact that Lathers Local 9 has refused to abide by the determination, in derogation of its agreement, is, in our opinion, immaterial. As previously noted, the proviso to Section 10(k) applies equally to adjustment or an agreement upon a method of adjustment. Otherwise, any party adversely affected by a determination made pursuant to the agreement could breach the agreement with impunity, and then have recourse to this Board for a redetermination of the dispute in the hope that the redetermination might be favorable."\textsuperscript{320} In the \textit{Lee} case, then, the Board

\textsuperscript{317} Id. 29 L.R.R.M. at 1189.
\textsuperscript{319} Supra note 296.
\textsuperscript{320} Id. 36 L.R.R.M. at 1416.
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takes the logical position that an agreement among the parties to abide by a private determination of their jurisdictional dispute does not become non-existent upon the election of noncompliance by the party whose interests were not favored by the private award. In the Meyer Furnace case, the National Labor Relations Board was concerned with what it thought was an expression of intent not to accept the results of private arbitration before there had been a determination by the method prescribed by the parties' agreement. The Board found in the Meyer case that the local unions involved in the jurisdictional dispute had agreed through their international organizations to abide by the decision of the A.F.L.-C.I.O.'s Joint Board. Before the Joint Board had made its determination of the dispute, the Pipefitters Union had expressed its contention that no method of settlement had been agreed upon by the parties and that the Joint Board, therefore, had no jurisdiction to decide the controversy. The N.L.R.B. addressed itself to the Pipefitters' contention as follows: "In asserting this position, the Pipefitters appears to be announcing in advance that it will not abide by any determination of the dispute made by the Joint Board. In the Lee case ... [w]e said that the Respondent's refusal to 'abide by the determination, in derogation of its agreement, [was] ... immaterial.' We find, therefore, that despite the Pipefitters' contention, it is a party to an agreed upon method for determining this dispute."°

In the Acoustical Contractors Association of Cleveland case, the National Labor Relations Board summarized its views on the binding effect of a private determination in settlement of a jurisdictional dispute:

To construe the Act so that a party dissatisfied with the agreed upon method can have an alternative tribunal—this Board—either to redetermine an adverse decision or pass upon the matter in advance of an unexpected adverse decision, is to frustrate the Congressional purpose of placing initial reliance upon voluntary agreements to settle jurisdictional strife. ... On the other hand, the Congressional purpose is clearly enhanced by a construction of the Act which does not countenance 'forum shopping' in the face of a private 'agreed upon method of adjustment,' which

321 Supra notes 285, 298.
322 Id. 37 L.R.R.M. at 1070 [Italics supplied.] See also, Local 1102, Millwrights Union, A.F.L.-C.I.O., (Don Cartage Co.) supra note 295, wherein the N.L.R.B. stated: "Nor does the fact that Riggers Local 575 disagreed with the decision of its International Union that under the Dunlop decision the work in dispute belonged to millwrights, or that the Company might, despite its ... Affidavit of Agreement, refuse to follow the agreed upon methods of settlement, alter the situation. We have held in view of the terms of Section 10(k) that neither the announcement in advance of a party to an agreed upon method for settlement that it does not intend to comply with the determination resulting therefrom, [citing the Meyer Furnace case] nor its subsequent failure to abide by the determination citing [Lee and Traylor cases] gives the Board power to determine the dispute." 42 L.R.R.M. at 1296.
323 Supra note 318.
keeps an 8(b)(4)(D) charge alive pending actual settlement of a jurisdictional dispute, and which, where the private adjustment machinery has broken down, provides a Board cease and desist order to stop a jurisdictional strike.\textsuperscript{234}

In considering the subject of an agreement by parties to settle their own jurisdictional dispute, the question might arise as to the means by which such "agreement" was reached. The problem concerns the element of voluntary participation which is inherent in the term "agreement." Real agreement, of course, is said to be a meeting of the minds. This is a basic principle of the law of contracts. Yet, when it comes to agreements to adjust an existing jurisdictional dispute, the employer is often confronted with a strike or picketing to "encourage" his participation in an agreement to settle the dispute. The National Labor Relations Board was requested to decide whether an employer's participation under such circumstances was really "voluntary" within the meaning of section 10(k). In the \textit{Don Cartage Company} case,\textsuperscript{3} the Board answered this question in the following manner: "The fact that the Company agreed upon this method of voluntary adjustment of the dispute in the midst of picket line activity does not detract from the force of the agreement insofar as the Board's power to determine the dispute is concerned. Section 10(k) necessarily assumes the existence of activities prohibited by Section 8(b)(4)(D) but nevertheless clearly provides for the voluntary settlement of jurisdictional difference without governmental intervention."\textsuperscript{326}

In its effort to uphold the validity of agreements to settle jurisdictional disputes by private arbitration, and therefore forestall its jurisdiction to determine such disputes, the National Labor Relations Board has given what could be considered a rather liberal interpretation to that part of section 10(k) which allows the parties ten days to submit evidence to the Board that they have reached an agreement by which they have settled, or will settle, their jurisdictional problem. The language of section 10(k) is clear. The Board is to hear and determine a jurisdictional dispute upon the filing of a charge of an unfair labor practice in violation of section 8(b)(4)(D) "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." When a company conceded the existence of an agreement for the voluntary settlement of a jurisdictional dispute but contended that the agreement was not effective because it was not brought to the attention of the Board within the prescribed period of ten days after the filing of the 8(b)(4)(D) unfair labor practice charge, the Board replied that

\textsuperscript{234} \textit{Id.} 41 L.R.R.M. at 1298 [Italics supplied.]
\textsuperscript{325} \textit{Supra} notes 295, 322.
\textsuperscript{326} \textit{Id.} 42 L.R.R.M. at 1296.
it "has not so construed the provisions of Section 10(k), nor would it be reasonable to adopt such a construction of procedural language to override the plain purport of the substantive provisions in Section 10(k) favoring voluntary methods for adjustment of jurisdictional disputes."327

It would seem appropriate at this point to consider the role of the National Labor Relations Board in the determination of the existence of either an agreement by the parties to have their jurisdictional dispute settled through private arbitration or an actual adjustment by the parties which would, as we have seen, dismiss the 8(b)(4)(D) unfair labor practice charge itself. As we have also observed, the existence of either the adjustment or method of adjustment is exceedingly important since the Board's decision to exercise jurisdiction under section 10(k) depends upon its satisfaction that the evidence does not reveal that the parties have so adjusted, or agreed to adjust, their dispute. This function of the Board in determining adjustment, or an agreement to adjust, is quite judicial in character and is fundamentally a question of contract law. Traditionally, the determination of whether persons are parties to, and bound by, agreements is a judicial, rather than an administrative, function. The problem of determining the existence of a voluntary adjustment of a jurisdictional dispute might concern not only the question of whether the parties have come to an agreement to settle the dispute but also whether the agreement is contractually binding. This involves the law of consideration. Of course, an employer and a labor union would be contractually obligated if their agreement to arbitrate jurisdictional disputes was in their collective bargaining contract. But, what about the subsequent promise of a disputing union to join in their agreement to arbitrate? Is such a promise supported by consideration? Also, two or more labor unions might be contractually obligated to follow a prescribed arbitration procedure which is a part of the terms of membership in their national labor organization. But, what about the subsequent promise of an employer to participate in such arbitration procedure? Is such a promise contractually binding? Of course, in either of these instances, there might very well be additional consideration to support these subsequent promises by third parties to join a pre-existing arbitration agreement. As far as section 10(k) is concerned, the question of the contractual character of an agreement by the parties to settle their own jurisdictional dispute appears to be more academic than real. Section 10(k) specifies that either an adjustment of a jurisdictional dispute by the parties, or their agreeing upon a method for such adjustment, is sufficient to deprive the National Labor Relations Board of jurisdiction to intervene. The Act does not refer to the contractual na-

ture of the adjustment or the agreement to adjust. And, it would seem, an agreement by the parties to settle their jurisdictional dispute would be sufficient to prevent intervention by the Board even though the agreement is non-contractual.

CONCLUSION

The role of the National Labor Relations Board in the determination of jurisdictional disputes under the Labor Management Relations Act of 1947 depends on two important sections of the Act, namely, section 8(b)(4)(D) and section 10(k). The one section—8(b)(4)(D)—prescribes the type of unfair labor practice; the other section—10(k)—prescribes the method of settlement. As construed by the Board, a jurisdictional dispute does not exist if the labor group charged with violating the Act has a right to the work in the dispute by contract or, as the Act provides, by previous order or certification of the Board. So, if none of the labor groups disputing an assignment of work has such right, the dispute is determinable by the parties or the Board within the meaning of section 10(k) upon the charge by one of the parties that one or more of the disputing labor groups has, or is engaging in, strike or picket activity to force an assignment of the work. However, even though the Board is reasonably convinced the charge has merit and therefore exercises jurisdiction under section 10(k), the Board does not really decide the merits of the charge in a 10(k) hearing; this would be done if there was a subsequent unfair labor practice hearing caused by a refusal by a party to abide by the Board’s 10(k) determination. Thus, the purpose of the 10(k) hearing is to determine and settle the jurisdictional dispute which has been the cause of the unfair labor practice charge. But, the Act clearly gives to the parties the prior right to determine their own dispute since the Board cannot intervene if they have agreed upon their method of settlement. Certainly, the recent Supreme Court decision in the Columbia Broadcasting System case would not disturb this important right of the parties. The Court in that case would have the Board decide which of the competing labor unions has the better right to the disputed work; this is designated as an "affirmative" award. And, the decision would not compel the Board to decide in favor of a labor group which the Board was reasonably convinced had violated the Act. Consequently, it would not appear to be a matter of great significance if the Board’s determination under section 10(k) is called "negative" or "affirmative" since in either case the Board would not determine a jurisdictional dispute in favor of a labor group which it feels is reasonably charged with an 8(b)(4)(D) unfair labor practice. If a labor union, however, charged with an 8(b)(4)(D) unfair labor practice has a right by contract or Board order, then a hearing and determination under section 10(k) would be unnecessary.