MANAGEMENT'S RESERVED RIGHTS AND THE NATIONAL LABOR RELATIONS BOARD—AN EMPLOYER'S VIEW

WALTER P. LOOMIS, JR.*

AND

JOSEPH HERMAN**

I. THE RESERVED RIGHTS THEORY

Until recently, the prevailing approach to post-contractual labor management relations in the United States has been the reserved rights theory, under which an employer retains all rights to manage its enterprise except for those specifically surrendered in the collective bargaining agreement. Since its rights are "reserved" under this theory, an employer does not look to a collective agreement to ascertain its rights; it looks to the agreement only to ascertain the extent to which it has ceded away or agreed to share its rights and powers.

Two rationales for this approach were established. The first, on a conceptual level, was that since management was hired by the owners, all the rights to deal with the enterprise inherent in ownership were delegated to management, the only restrictions on its control arising from contractual commitments. This explanation, while superficially appealing, is not altogether satisfying, particularly to the non-manager. For one thing, the "enterprise" is composed of people as well as things and the only authority given by property ownership is over things. In our society, the only source of authority over people is their consent. Accordingly, the right to manage cannot be derived directly from prop-

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1. That is, subsequent to the execution of a collective bargaining agreement.


5. Obviously, in certain situations, such as the armed forces, this consent is largely symbolic.
ergy rights since it depends also upon the consent of the employees. In addition to ignoring the cooperative nature of the "enterprise," many of those who approach the issue of management rights in this way start from the assumption that, as a matter of law, "management has all management rights before the collective bargaining contract is signed." As a statement of the law in effect in the United States since 1935, this assumption is clearly erroneous, for section 8(a)(5) of the Labor Management Relations Act requires that:

[O]nce a union is properly designated as the collective-bargaining representative of a group of employees, the employer cannot change any of the wages, hours, or terms

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6. Some commentators have construed this right of employees to withhold their services as constituting a right to participate in the direction of the enterprise. Thus Professor Stanley Young has declared that:

[T]he employee has always had the legal right to participate in the decisions or agreements with respect to his duties. Consequently, joint determination between management and union in the decision-making process is no legal change. What has happened is that, through the union, the employee has acquired sufficient economic power to exercise the legal right that he has always possessed.

Young, The Question of Managerial Prerogatives, 16 Ind. & Lab. Rel. Rev. 240, 244 (1963). If by a "legal right" Professor Young means a legally enforceable right, then clearly he is wrong, for, absent some applicable contractual commitment, an employee never had a right enforceable in court to be consulted about anything prior to the enactment of the National Labor Relations Act. 49 Stat. 449 (1935), as amended by 61 Stat. 136 (1947), as amended by 73 Stat. 526 (1959), 29 U.S.C. § 151 et seq. (1964). That is, prior to 1935, an employer could freely reduce his wages or subcontract his operations, and, unless he was violating some contractual provision, his employees could not have reversed his action in court. As shall be seen below, and as is acknowledged by Professor Young, the situation is different today. However, this difference in the right of employees to participate in many managerial decisions is the result not of the rise of unions, but of the enactment of § 8(5) of the National Labor Relations Act. The role of unions was, and still is, to make meaningful a threat to quit or strike. However, the right to quit or strike does not constitute a "legal right to participate" in management decisions and from other portions of his article (e.g., id. at 248, n.22), it is clear that this was not what Professor Young meant by a "legal right."

Finally, it should be noted that the only authority cited by Professor Young as support for his assertion that "the employee has always had the legal right to participate in the decisions or agreements with respect to his duties" is the economist Frank Knight, and the portions of Knight's writings that are referred to by Professor Young in no way support this statement.


8. This section, numbered § 8(5) in the National Labor Relations Act (Wagner Act), 49 Stat. 452 (1935), was renumbered § 8(a)(5) in the Labor Management Relations Act (Taft-Hartley Act) without other change. 29 U.S.C. § 158(a)(5) (1964). For convenience the form § 8(a)(5) will be used throughout the rest of this article.
and conditions of employment of the employees without first negotiating with the union . . . . [W]henever there is a duly designated union and there is no collective-bargaining contract in effect . . . all unilateral changes by an employer are “per se” violative of the National Labor Relations Act.9

Thus, even where this assumption is written explicitly into a collective bargaining agreement in the form of a reservation to the employer of all “prior” rights of management, the National Labor Relations Board has ruled that the employer may not take unilateral action relating to a mandatory subject of bargaining:

[I]n the instant case the rights reserved to the Respondent to transfer and promote employees are merely those which “the Company had prior to the signing of the Agreement” (See article XXIII, par. 23.01), which rights “continue to be vested in the Company” (article XXIII, par. 23.02). Such “prior” rights did not include the right to take unilateral action concerning a bargainable subject while the Union was the certified bargaining agent.10

However, although the theory of reserved rights cannot be justified by legalistic arguments resting upon the rights of property or by historical arguments based upon the rights of the parties in some pre-contractual Garden of Eden, support for it is provided by a consideration of management’s function. By deriving management’s rights from the necessity to establish and preserve that allocation of functions most likely to maximize efficiency and productivity, this functional approach makes clear the social desirability, to manager and non-manager alike, of preserving management’s right to manage, for the dilution of this right inevitably

9. Schatzki, The Employer’s Unilateral Act—A Per Se Violation—Sometimes, 44 TEXAS L. REV. 470 (1966). In NLRB v. Katz, 369 U.S. 736 (1962), the Supreme Court held that “an employer’s unilateral change in conditions of employment . . . is . . . a violation of Section 8(a)(5) . . . .” Id. at 743.

10. Clifton Precision Products Division, Litton Precision Products, Inc., 156 N.L.R.B. 555, 563 (1966). This statement of the trial examiner’s was specifically endorsed by the Board. Id. at 556, n.1. See also New Orleans Board of Trade, Ltd., 152 N.L.R.B. 1258, 1264 (1965). The dispute in Clifton arose during the term of a first contract, so that “prior” referred to the pre-contractual period. Such language gives rise to interesting questions, however, where the dispute occurs during the term of subsequent contracts. Thus in Hughes Tool Co., 100 N.L.R.B. 208 (1952), the employer unilaterally subcontracted certain operations. As in Clifton, the contract reserved to the employer “all of the rights which it had prior to the execution of this agreement.” Id. at 209. The previous contract had contained a management rights clause expressly reserving to the employer complete control over subcontracting. Finding that the right to subcontract unilaterally was one of the “prior” rights guaranteed by the contract provision, the Board ruled that there was no unlawful refusal to bargain.
results in a loss of productivity and efficiency.

As applied, the reserved rights doctrine means that management is the “acting” party; that is, that it makes and implements its decisions without prior consultation with the union. As Professor George Taylor has noted:

It is important for management to retain this right [the right to initiate action] because a plant can be operated effectively under collective bargaining only if management makes the operating decisions, the union being guaranteed the right to appeal.\(^{11}\)

The union’s role begins only after this initial action, when it can challenge the propriety of management’s action under the contractual grievance procedure.

Some union leaders, carried away by their own slogans of “industrial democracy,” have proposed changing this system for one in which unions and management would jointly make the day-to-day decisions required to run industrial enterprises. On a philosophical level, they fail to see the fundamental difference between political society and a factory. As Peter Drucker has noted, “the main function of the enterprise is the production of goods, not the governance of men.”\(^{12}\) The fact that we make certain decisions, such as who shall govern us, in one way has no necessary bearing on how we make other, very different decisions, such as how to produce the kinds of automobiles we use. Because political decisions such as the choice of our governors are not generally amenable to expertise, all men are given an equal role in making such decisions. However, there is a special skill applicable to the decisions necessary to produce automobiles, and because of this, the making of these decisions is lodged in those possessing this skill, management.

More importantly, on a more mundane level, those who argue for “industrial democracy” ignore the practical impossibility of efficiently operating an industrial enterprise on a “consensus” basis. As economist John Kenneth Galbraith has recently observed in analyzing the failure of “industrial democracy” in certain European countries, democracy “cannot be brought to bear in any meaningful way on the decisions of the modern large-scale industrial enter-

\(^{11}\) Taylor, Effectuating the Labor Contract Through Arbitration, in The Profession of Labor Arbitration 20, 32 (1957); See also: Justin, How to Preserve Management’s Rights Under the Labor Contract, 11 Lab. L.J. 189, 193 (1960); Fairweather & Shaw, supra note 7, at 315.

prise. . . . [Management] is . . . , by its nature, if it is to be efficient, somewhat authoritarian."\(^\text{13}\)

Our own brief experience during World War II with joint management in the quickly dissolved Office of Production Management confirms the wisdom of this analysis. In summarizing the reasons for its failure, one observer stated that joint management turned "a production organization into a debating society."\(^\text{14}\)

In the light of these observations, perhaps it is not surprising that labor's most enlightened spokesmen have endorsed the reserved rights theory, sometimes with greater clarity and forthrightness than representatives of management. Thus United Nations Ambassador Arthur Goldberg, when he was General Counsel for the United Steelworkers, stated:

The right to direct, where it involves wages, hours, or working conditions, is a procedural right. It does not imply some right over and above labor's right. It is a recognition of the fact that somebody must be boss; somebody has to run the plant. People can't be wandering around at loose ends, each deciding what to do next. Management decides what the employee is to do. However, this right to direct or to initiate action does not imply a second-class role for the union. The union has the right to pursue its role of representing the interest of the employee with the same stature accorded management. To assure order, there is a clear procedural line drawn: the company directs and the union grieves when it objects.

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13. Galbraith, *The New Industrial State: The Bearing on Socialist Development*, 76 *The Listener*, Dec. 15, 1966, at 882. Of course this elevation of expertise and efficiency over democratic participation assumes agreement with the primacy given in our society to satisfaction through consumption, as opposed to satisfaction through work. If these priorities are not accepted, so that work is viewed primarily as an end in itself, and participation in managerial decision-making is seen to be important in making work more satisfying, then the objection to such participation on the ground of lowered production loses much of its weight. Thus Graham Wooten has written that "what matters is . . . the reality of sharing decisions in industry, and all that implies for the gratification of men's root-needs . . ." Wooten, *Workers, Unions and the State* 159 (1967) (emphasis added). In appraising the desirability of such a shift in priorities, it is important to note that:

"The easy assumption . . . that fraternity and abundance necessarily go hand in hand merely obscures the moral choice that might have to be made. The difficulty encountered by social experiments designed to change nature is that too often they depend for their success on the change having already been made.*


14. William Leiserson, former member of the National Labor Relations Board and Railway Mediation Board, as cited in Fairweather & Shaw, *supra* note 7, at 308.
Management determines the product, the machine to be used, the manufacturing method, the price, the plant layout, the plant organization, and innumerable other questions. These are reserved rights, inherent rights, exclusive rights which are not diminished or modified by collective bargaining as it exists in industries such as steel. It is of great importance that this be generally understood and accepted by all parties. Mature, cooperative bargaining relationships require reliance on acceptance of the rights of each party by the other. A company has the right to know it can develop a product and get it turned out; develop a machine and have it manned and operated; devise a way to improve a product and have that improvement made effective; establish prices, build plants, create supervisory forces and not thereby become embroiled in a labor dispute.

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In addition to these exclusive rights to do things without any union say, the exclusive rights to manage and direct should be very clearly understood by all parties. The union cannot direct its members to their work stations or work assignments. The union does not tell people to go home because there is no work. The union does not notify people who are discharged to stay put. The union does not tell employees to report for work after a layoff (except perhaps as an agent for transmitting information in behalf of management). The union does not start or stop operations unless perhaps some urgent safety matter is involved and there is some contractual or other basis for such action.

This is not an easy concept. Very often union men are disturbed by decisions they consider entirely wrong. Nevertheless, a company's right to make its own judgements is clear.

But the union has rights too; the worker has rights. In fact, the union has the duty and as a union man the employee has the duty as well as the right to challenge the company's acts when they violate the workers' rights. That challenge is made through the grievance procedure, not through rebellion.15

While some labor arbitrators apply a theory of implied limitations, the vast majority have adopted the reserved rights approach.16 Thus, Arbitrator Clarence Updegraff has stated:

It is now a well-established generalization that every em-

ployer continues to have all powers previously had or exercised by employers unless such powers have been curtailed or eliminated by statute or by contract with a union. \(^{17}\)

Similarly, Arbitrator Dudley Whiting has declared that the collective agreement

\[ \ldots \text{ operates as a limitation upon the previous absolute right of the employer to establish working conditions but only to the extent that conditions of employment are thereby established. The pre-existing right of the employer still continues as to all matters not covered by the agreement. The employer thus has an absolute right to establish or change working conditions for which the collective agreement makes no provision.} \]

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[S]uch action may be challenged and tested through the grievance procedures of the contract. But there is no legal requirement that the consent of the employees' bargaining agent be obtained before initiation of the change under such circumstances. \(^{18}\)

Thus, under the reserved rights theory, management's rights come not from the collective bargaining agreement, but from pre-contractual property rights and the functional necessities of decision-making. Under this theory, a collective bargaining agreement was viewed only as a source of restrictions, and not of rights. As a result, a management rights clause, explicitly defining the rights of management, was not of critical importance. Indeed, although such clauses are quite common, they were seen to be the least important part of the contract from management's point of view:

The management clause is actually the least important method of protecting management's rights. \ldots [I]f no management clause existed in the contract, management would still have all the rights not bargained away elsewhere in the contract. \(^{19}\)

II. DEVELOPING LABOR BOARD RESTRICTIONS UPON MANAGEMENT'S RIGHTS

Recent developments, however, have seriously undermined the legal basis of the reserved rights approach and made contractual provisions dealing with management's rights of central importance if employers are to retain their right to manage. The forum for these developments has been the National Labor Relations Board,

\(^{19}\) Fairweather & Shaw, supra note 7, at 314.
rather than private arbitration tribunals, and the basis for them has been section 8(a)(5) of the Labor-Management Relations Act, which makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees.”

This duty to bargain collectively is defined in section 8(d) as the duty “to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . .” While this duty “does not compel either party to agree to a proposal or require the making of a concession,” it does require that neither party take any unilateral action until an “impasse” has been reached in the negotiations.

Unfortunately, when Congress imposed this duty to bargain upon employers, it did not have a very clear conception of what it was doing and there was surprisingly little discussion as to what this duty would mean in practice. However, there is the statement of Senator Walsh, one of the architects of the whole Act and the Chairman of the Committee on Education and Welfare, that:

"The bill does not go beyond the office door. It leaves the discussion . . . voluntary and with that sacredness and solemnity to a voluntary agreement with which both parties to an agreement should be enshrouded."

When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is escort them to the door of the employer and say, "Here they are, the legal representatives of your employees." What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.

Since section 8(a)(5) “does not go beyond the office door,” its function is limited to establishing a collective bargaining relationship. Once that relationship is established and a collective bargaining agreement signed, the duty to bargain does not cease but is channeled into procedures established by the collective bargaining agreement. The correctness of this interpretation of the scope of section 8(a)(5) can be seen from many early decisions in this

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area. Thus in *NLRB v. Newark Morning Ledger Company*, the United States Court of Appeals for the Third Circuit stated that the purpose of section 8(a)(5) and the rest of the National Labor Relations Act was only

...to open the way for collective bargaining on a basis of equality of bargaining power between employer and freely chosen representatives of employees to the end that voluntary agreements between them as to wages, hours and other conditions of employment will be reached and thus industrial strife and unrest will be reduced. The function of the Board under the Act is to pave the way for the achievement of that final goal. When an employer...bargains with that organization...and enters into a genuine collective bargaining agreement with it, the goal of the act has been achieved and the Board has no further jurisdiction with respect to the labor dispute which has been settled by the agreement. The parties having bargained and agreed upon the terms and conditions of employment for a definite period of time, their rights and obligations are fixed for that time and all that remains is for them to carry out the terms of the contract upon which they have agreed.

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A. **THE LABOR BOARD AND ARBITRATION: ABSTENTION VERSUS INTERVENTION**

Since the reserved rights approach assumes that arbitration becomes the primary arena for unions to challenge management's action during the term of a collective bargaining agreement, its necessary corollary is deference by the Labor Board to contractual arbitration procedures in situations where the union is alleging

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24. 120 F.2d 262 (3d Cir. 1941).

25. *Id.* at 265. Similarly, in *NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 342 (1939), the Supreme Court stated that "[T]he purpose of the statute was to compel employers to bargain collectively with their employees to the end that...contracts binding on both parties should be made." This objective was not changed by the Taft-Hartley amendments to the Wagner Act. As the Supreme Court noted in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960): "The present federal policy is to promote industrial stabilization through the collective bargaining agreement."

that the company has acted unilaterally on a matter which is a
mandatory subject of bargaining under section 8(a)(5) and which
also is subject to the contractual grievance procedure. The only
statutory provision directly governing the relationship of the Labor
Board to arbitration is section 10(a) of the Labor Management
Relations Act, which provides that:

The Board is empowered, as hereinafter provided, to pre-
vent any person from engaging in any unfair labor prac-
tice (listed in section 8) affecting commerce. This power
shall not be affected by any other means of adjustment or
prevention that has been or may be established by agree-
ment, law or otherwise.\textsuperscript{27}

In determining the relevance of this provision to the present prob-
lem, it is important first to note that its applicability is conditioned
upon the existence of an unfair labor practice. According to Pro-
fessors Cox and Dunlop “an employer does not commit an unfair
labor practice by refusing to discuss, outside the framework of a
grievance procedure, matters to which the procedure applies.”\textsuperscript{28}
If this view is correct, then the Board is without power to deal
with an alleged refusal-to-bargain where the employer offers to
handle the dispute in the contractual grievance procedure.\textsuperscript{29} In
such a situation, section 10(a) has no effect because the condition
for its operation, the existence of an unfair labor practice, does
not exist.

The Labor Board has rejected this view, ruling that it has the
power to act in any “unfair labor practice case,” regardless of the
existence of private arrangements between the parties for the reso-
lution of disputes by arbitration.\textsuperscript{30} Even if the Board were correct
in its assumption that it has jurisdiction in this area, it is only
“empowered” by section 10(a) to act, not directed. This means
that it may refrain from acting “if in its reasoned judgment the
policies of the act would be best served by that course.”\textsuperscript{31}

\textsuperscript{27} 29 U.S.C. § 160(a) (1964). (emphasis added).

\textsuperscript{28} Cox & Dunlop, \textit{The Duty to Bargain Collectively During the

\textsuperscript{29} Bernard Samoff, the Regional Director in the Board's Fourth Re-


\textsuperscript{30} \textit{See, e.g., The Flinkote Co.}, 149 N.L.R.B. 1561, 1563 n.1, where the
Board declared that: “While for reasons of policy we may decline to
entertain a particular unfair labor practice case in appropriate circum-
stances in this area, we do so as a matter of discretion and not for lack
of power. § 10(a) of the Act.” (emphasis added). As the italicization
makes obvious, the Board has misread § 10(a) and inserted the word “case”,
so that the condition on the existence of its power becomes the existence
of an “unfair labor practice case” rather than the existence of an “unfair
labor practice,” which is no condition at all.

\textsuperscript{31} Haleston Drug Stores v. NLRB, 187 F.2d 418, 421 (9th Cir. 1951),
other words, the question of whether the Board should defer to arbitration is committed by statute to the Board's discretion.\textsuperscript{82}

To supply a guide to the Board for exercising this discretion, Congress declared in section 203 (d) of the Labor Management Relations Act of 1947 that:

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.\textsuperscript{83}

In explaining the policy underlying this provision, the Supreme Court has stated:

That policy can be effectuated only if the means chosen by the parties for the settlement of their grievances under a collective bargaining agreement is given full play.\textsuperscript{84}

Unfortunately, the Board has failed to use this statutory guide or its interpretation by the Supreme Court to develop a consistent policy as to when it will exercise its discretion to defer to arbitration. Instead, it has developed two seemingly contradictory rules, one of abstention and one of intervention.

The abstention tradition began with Consolidated Aircraft Corporation,\textsuperscript{85} where the employer established the working hours for a third shift and adopted a job classification schedule without notifying or consulting the union with which it had a collective bargaining agreement. While finding that the employer had taken "unilateral action in a matter involving the interpretation and administration of its collective contract with the Union," the Board dismissed the complaint "without prejudice" insofar as it charged an unlawful refusal to bargain on the ground that the union had "failed to utilize this contractual machinery for the settlement of the disputes which have given rise to the present proceeding."\textsuperscript{36} In

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\item \textsuperscript{82} Ramsey v. NLRB, 327 F.2d 784, 787-88 (7th Cir. 1964).
\item \textsuperscript{83} 29 U.S.C. § 173(d) (1964).
\item \textsuperscript{84} United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566 (1960).
\item \textsuperscript{85} 47 N.L.R.B. 694 (1943), enforced as modified, 141 F.2d 785 (9th Cir. 1944). Cited with approval by the Supreme Court in Smith v. Evening News Ass'n, 371 U.S. 195, 198 n.6 (1962). Except where otherwise noted, all of the cases discussed in this section arise out of situations in which an employer takes unilateral action during the term of a collective bargaining agreement containing a provision for the arbitration of unsettled grievances.
\item \textsuperscript{36} Id. at 705. For the same reason, the Board also dismissed without
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thus ruling, the Board explained that:

[1] It will not effectuate the statutory policy of “encouraging the practice and procedure of collective bargaining” for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act. On the contrary, we believe that parties to collective contracts would thereby be encouraged to abandon their efforts to dispose of disputes under the contracts through collective bargaining or through the settlement procedures mutually agreed upon by them, and to remit the interpretation and administration of their contracts to the Board. We therefore do not deem it wise to exercise our jurisdiction in such a case, where the parties have not exhausted their rights and remedies under the contract as to which the dispute has arisen. 37

Similarly, in Crown Zellerbach Corporation, 38 the employer was charged with having violated section 8(a)(5) by unilaterally changing piece rates. Because of the union’s failure to utilize the contractual grievance procedure, the Board dismissed the complaint, stating:

[7] The stability of labor relations which the statute seeks to accomplish through the encouragement of the collective bargaining process ultimately depends upon the channelization of the collective bargaining relationship within the procedures of a collective bargaining agreement. By encouraging the utilization of such procedures in this case, we believe that statutory policy will best be effectuated. Affirmative Board action would on the other hand put the Board in the position of policing collective bargaining agreements, a role we are unwilling to assume. 39

Abstention received strong judicial endorsement in Timkin Roller Bearing Company v. NLRB, 40 where the Sixth Circuit held explicitly that “the duty to bargain . . . may be channeled and directed by contractual agreement” 41 and that therefore there is no duty to bargain outside of the framework established in the agreement. According to the court:

Adjustment of grievances by conferences between griev-
ance representatives of management and grievance committees of the union and leading, in the event of failure, to arbitration, is itself a bargaining process, and we know of no mandate of the law that bargaining must be undertaken and pursued in a particularized manner, excluding every other. . . . No provision of the Act, either expressly or by reasonable implication, limits the right of employer and employees to agree upon the mode in which bargaining is done.

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The purpose of bargaining is to reach agreement resulting in a contract binding on both parties and providing the framework within which the process of collective bargaining may be carried on.

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The law invites, though it may not compel, a collective bargaining agreement. If adjudication bases no sanctions on commitments made therein by the bargaining agent, it imparts futility to a bargaining process hopefully developing in the interest of industrial peace. If the law penalizes one party to the contract for standing on a bargain not itself violative of law, there may still be compulsion to bargain, but the virtue of agreement vanishes. It may well be that industry will concede much for a no-strike covenant and orderly grievance procedures. It may also result that it will concede little for promises, the performance of which may be insisted upon only at the risk of condemnation for unfair labor practices. The law, we think, does not compel such result.42

This view that the duty to bargain is satisfied by an offer to follow the contractual grievance procedure was adopted by the Board in McDonnell Aircraft Corporation.43 The employer, without consulting the union, had assigned the clerical work performed by some toolroom attendants to other employees not included in the unit covered by the collective bargaining agreement. The union filed a grievance protesting the reassignment, but the grievance was not settled and the union did not process it to arbitration. Noting this failure by the union to exhaust its contractual remedies, the Board dismissed the complaint on the ground that the reassignment "gave rise to a dispute over the interpretation and administration of the agreement which should be and was resolved through the collective bargaining process."44 The Board went on to state that:

Under § 8(a)(5) of the Act, the Board is not concerned with the inherent merits of any labor dispute; its sole func-

42. Id. at 954-56.
44. Id. at 934.
tion is to establish the basic ground rules for collective bargaining and to see that all disputes affecting wages, hours, and conditions of employment between employers and the statutory representative of their employees are fully subjected to the collective-bargaining process.

We accordingly hold that the Respondent satisfied its obligation to bargain under the Act by treating the Union’s complaint about the reassignment of the clerical work in question as a grievance under the applicable contract clause, by processing the matter through the first three steps of the established grievance machinery and by evincing a willingness to permit the matter to go to the final (arbitration) step of the grievance procedure.45

In National Dairy Products Corporation46 the employer unilaterally subcontracted certain delivery operations. The union filed a grievance claiming that the subcontracting violated the contract, but the employer denied the grievance and refused to proceed to arbitration on the ground that the grievance was not arbitrable. The union sued to compel arbitration and at the same time filed unfair labor practice charges with the Board, alleging that the employer’s unilateral action violated section 8(a)(5). As in the above cases, the Board dismissed the complaint on the ground that “the dispute between the Union and the Respondent was concerned solely with the interpretation of their contract . . . .”47 This finding that the dispute was solely one of contract interpretation was based not only on the fact that “the parties so viewed their dispute,”48 but also on the fact that “there was a sound arguable basis for Respondent’s interpretation.”49

The Board applied the same standard as to when a dispute is based primarily upon conflicting contract interpretations in Vickers, Inc.50 The employer, without consulting the union in advance, created a new hourly rate to replace the salary formerly paid to a previously unrepresented group of employees who had just voted to be included in the existing bargaining unit. Un-

45. Id. at 935.
46. 126 N.L.R.B. 434 (1960).
47. Id. at 435.
48. Id.
49. Id. at 439.
der the contract, the employer was to establish temporary rates for all "new job classifications." The union protested the employer's action to the Labor Board, claiming in part that it violated section 8(a)(5) because of its unilateral character. The employer argued that its action was not only justified, but compelled by the contractual provision relating to "new job classifications." Against this, the General Counsel contended that the employer's construction of the contract was "obviously" incorrect because the parties clearly intended the phrase "new job classifications" to cover only classifications which came into existence after the signing of the contract. The Board, however, dismissed the complaint, adopting the trial examiner's conclusion that:

The Board is not the proper forum for parties seeking an interpretation of their collective-bargaining agreement. Where, as here, an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it, and there is "no showing that the employer in interpreting the contract as he did, was motivated by union animus or was acting in bad faith," the Board ordinarily will not exercise its jurisdiction to resolve a dispute between the parties as to whether the employer's interpretation was correct.51

Ranged against these abstention cases is a long line of cases in which the Board has intervened into contractual disputes. For example, in Beacon Piece Dyeing and Finishing Company52 the employer unilaterally increased workloads and granted a general wage increase. Refusal-to-bargain charges were filed against the employer, but the trial examiner dismissed the complaint, in part because the union had failed to utilize the contractual grievance and arbitration procedure. The Board, however, reversed.

The policy of intervention received its clearest exposition in Cloverleaf Division of Adams Dairy Company,53 where the employer unilaterally subcontracted a substantial part of its delivery operations. The union filed refusal-to-bargain charges and, on the basis of the abstention cases discussed above, the employer argued that the complaint be dismissed because of the union's failure to

51. Id. at 570. (emphasis added). See also Crescent Bed Co., 157 N.L.R.B. 296 (1966), enforced per curiam, 63 L.R.R.M. 2480 (D.C. Cir. 1966), where the Board declined to intervene in a dispute over a unilateral reduction of incentive rates on the ground that the dispute was primarily over the meaning of the contract.


53. 147 N.L.R.B. 1410 (1964).
proceed to arbitration. The Board, however, found these cases inapposite on the ground that:

The contract subjects to its arbitration procedures only such disputes as concern "the interpretation or application of the terms of this Agreement." But in the instant case, the precise union claim, which is the subject of the complaint before us, does not relate to the meaning of any established term or condition of the contract, or to any asserted misapplication thereof by Respondent. It is directed instead at Respondent's denial to it of a statutory right guaranteed by § 8(d) of the Act, namely, the right to be notified and consulted in advance, and to be given an opportunity to bargain, about substantial changes in the working conditions of unit employees in respects not covered by the contract. As the particular dispute between the Union and Respondent now before us thus involves basically a disagreement over statutory rather than contractual obligations, the disposition of the controversy is quite clearly within the competency of the Board, and not of an arbitrator who would be without authority to grant the Union the particular redress it seeks and for which we provide below in our remedial order.54

Accordingly, the Board concluded that this was not an appropriate situation for it to exercise its discretion and defer to arbitration since the case was not one

. . . involving an alleged unfair labor practice, the existence of which turns primarily on an interpretation of specific contractual provisions, unquestionably encompassed by the contract's arbitration provisions, and coming to us in a context that makes it reasonably probable that arbitration settlement of the contract dispute would also put at rest the unfair labor practice controversy in a manner sufficient to effectuate the policies of the Act. On the contrary, it is highly conjectural that arbitration in this case, even if resorted to by the Union, could have effectively disposed of the basic issue in this case—whether Respondent acted lawfully in engaging in the unilateral actions to which the instant complaint is addressed.55

54. Id. at 1415.
55. Id. at 1416. In deciding that arbitration was not likely to have resolved the dispute between the parties, the Board emphasized that in a prior arbitration involving the identical issue the arbitrator had found the contract inapplicable. In addition, the Board noted that in this arbitration, the employer had argued that the dispute was not arbitrable and that it had neither repudiated the position it took on the 1961 grievance with respect to the arbitrator's want of jurisdiction, nor offered to submit it to the jurisdiction of an arbitrator with respect to the instant dispute. We thus find Respondent in the contradictory position of arguing before the Board that the Union must submit its grievance
Although agreeing with the majority's finding that the employer had violated sections 8(a)(5) and 8(a)(1), Board Member Brown disagreed with the majority's approach. In particular, he dissented from the majority's failure to articulate criteria or guidelines regulating the Board's relations to arbitration. According to Member Brown, such standards can be derived from the different functions served by arbitrators and the Board, the former providing retrospective adjudication by determining rights under existing agreements and the latter providing prospective adjudication by creating new rights or modifying existing rights through enforcing the duty to bargain. Applying this framework to the problem of whether the Board should defer acting where no arbitration award has been rendered, Member Brown thought it

... inconsistent with the statutory policy favoring arbitration for the Board to resolve disputes which, while cast as unfair labor practices, essentially involve a dispute with respect to the interpretation or application of the collective-bargaining agreement. Accordingly, he would have the Board act according to the following guidelines:

Wherever the record establishes that the parties to be dispute as part of their collective-bargaining relationship, consciously, by contract, bargaining history, or past practice have waived statutory rights, bargained such rights away, or bargained to agreement with respect to the subject matter of the dispute I believe we should leave to the arbitrator the question of the nature of their bargain and the respective rights and obligations of each party.

Where, however, the parties have not by practice, bargaining history, or contract resolved their respective rights and obligations with respect to the subject matter of the dispute, we should not defer action on the unfair labor practice case even though the dispute may be generally subject to the arbitration provisions of the collective-bargaining agreement. Since an arbitrator can only enforce the provisions of the contract, to defer to arbitration in such cases would in effect imply a waiver of statutory rights where the only evidence that a waiver was intended would be the silence of the agreement. The existence of an arbitration clause alone might result in the denial or delay in the exercise of all statutory rights not guaranteed by the contract. Such a result would clearly be contrary
to an arbitrator who, according to it, nevertheless lacks jurisdiction to hear the dispute.

Id. at 1416, n.17.
56. Id. at 1422.
57. Id. at 1423. See also Member Brown's dissent in Thor Power Tool Co., 148 N.L.R.B. 1379 (1964), enforced, 351 F.2d 584 (7th Cir. 1965).
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to the policies of the Act as it would tend to increase the likelihood of industrial strife by reducing the number of disputes which could be peacefully resolved through either arbitration or an unfair labor practice proceeding. Moreover, such a result may have an adverse effect on the use of arbitration itself since the attractiveness of arbitration clauses may be seriously diminished if they have the effect of cutting off all statutory rights which are arguably comprehended within the meaning of an arbitrable dispute but are neither waived nor guaranteed by the contract.58

In Smith Cabinet Manufacturing Company,59 the employer unilaterally instituted a second shift and established a shift premium for second shift employees. Although the union filed a grievance challenging the employer's action, it filed refusal-to-bargain charges with the Board rather than proceeding to arbitration. The Board found that the gravamen of the union's complaint was the employer's failure to bargain with it about the institution of the second shift rather than any violation of the contract.60 Accordingly, the Board ruled that the situation was not one on which it should defer to arbitration.

Similarly in Gravenslund Operating Company61 the employer unilaterally ceased paying a non-contractual Christmas bonus which it had paid for fourteen years. Finding that the case was not one "in which the existence of alleged unfair labor practices turns on an interpretation of the parties' collective bargaining agreement,"62 the Board held that the employer's action violated section 8(a)(5). Member Brown, dissenting, would have withheld acting until the parties had submitted the matter to arbitration.

58. Id. at 1423-24. As Member Brown notes, the application of this test necessarily involves the Board in contract interpretation, insofar as it is necessary to determine the scope of the arbitration provision, for otherwise the Board could not determine the arbitrability of the issues in dispute. Id. at 1424.

59. 147 N.L.R.B. 1506 (1964).

60. In analyzing the union's complaint as arising out of a deprivation of its statutory rather than contractual rights, the Board relied on the fact that the contract made no mention of a second shift or of shift premiums and that the union's grievance cited no contractual provision claimed to have been violated. Id. at 1509 n.3. This reliance on the union's failure to cite specific contractual provisions in its grievance as an indication that the dispute was one of deprivation of statutory rights rather than contract breach conflicts with the Board's treatment in McDonnell Aircraft Corp., 109 N.L.R.B. 930 (1954), of the union's filing of a grievance as an acknowledgment that the disputed issue was one of breach of contract.

61. 168 N.L.R.B. No. 72 (1967).

62. Id. at 14.
In *Univis, Inc.* the union demanded that the employer furnish it with copies of time studies and other information relating to a wage incentive plan established in the collective bargaining agreement. The employer refused to give the requested information and so the union filed a grievance. However, instead of appealing the grievance to arbitration, the union filed refusal-to-bargain charges with the Board. The Board, Member Brown dissenting, found that the employer's refusal constituted a violation of section 8(a)(5). It declined to defer to arbitration on the ground that, since "the Union's right to the information in question is based entirely on statute," the disputed issue was not primarily contractual. Member Brown's dissent was on the basis that the Board should have deferred to arbitration because "permitting a party to refuse to use the agreed-upon settlement machinery is inconsistent with the national labor policy."

Some have suggested that these two groups of cases are not really inconsistent, but merely involve distinguishable situations. They see the abstention cases, or at least the more recent ones, as being based primarily upon disputes over contractual obligations, and the intervention cases as being based primarily upon disputes over statutory obligations. As a litmus paper test for determining the ultimate nature of a dispute, they would refer to whether the party raising the contract issue does so from a "sound arguable basis" in the contract.

Conceptually, such a rigid categorization seems difficult to justify. It assumes that statutory and contractual obligations are separate and distinct, while the Board would seem to have merged the two in a series of recent cases reinterpreting section 8(d) so as to make every breach of contract, or at least every breach having a continuing impact upon the terms and conditions of employment, an unlawful "modification."

Moreover, the reliance upon whether one party has a "sound
arguable basis” for its position is too reminiscent of the thoroughly discredited Cutler-Hammer doctrine.\textsuperscript{69} It is not a question of the Board’s power to construe collective bargaining agreements,\textsuperscript{70} but rather of its expertise vis-à-vis arbitrators. And as the Supreme Court has noted, grievances involving the interpretation of a collective bargaining agreement

\ldots are not normally within the Board’s unfair labor practice jurisdiction, [so that] it can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts . . . .\textsuperscript{71}

Relative expertise is not the only important consideration in determining the propriety of Board interpretation of collective bargaining agreements in the intervention cases. In particular, it is essential to remember that the primary purpose of the National Labor Relations Act was to establish a system of industrial self-government based upon private decision-making. As Professor Cox has observed:

The Wagner Act left substantive terms and conditions of employment entirely to private negotiation. . . . It provided no governmental machinery for the adjustment of disputes concerning substantive terms and conditions of employment. The basic theory of the law in its original form, as today, was that the arrangement of substantive terms and conditions of employment is a private responsibility.\textsuperscript{72}

\textsuperscript{69} International Ass’n of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917, 67 N.Y.S.2d 317 (1947), aff’d, 297 N.Y. 519, 74 N.E.2d 464 (1947). This case held that there is no arbitrable dispute if the contract language does not require interpretation because it is unambiguous, that is permits of only one tenable construction.

\textsuperscript{70} Any doubts as to the Board’s power to engage in such construction were removed by NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967).

\textsuperscript{71} Vaca v. Sipes, 386 U.S. 171, 181 (1967). See also Bernard Dunau’s observation that “The National Labor Relations Board has no special expertise in the interpretation of the substantive provisions of a collective bargaining agreement.” Dunau, supra note 67, at 81.

\textsuperscript{72} Cox, LAW AND THE NATIONAL POLICY 11 (1960). See also the statement of Senator Walsh, supra note 22. For a comprehensive discussion, see Cox & Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board, 63 HARV. L. REV. 389 (1950). The importance of private decision-making was well described by the United Automobile Workers in a brief submitted to the Supreme Court:

It is a basic prerequisite of a free economy that decision-making power be decentralized. See J.K. Galbraith, AMERICAN CAPITALISM, THE CONCEPT OF COUNTERVAILING POWER (Boston, 1952) Chapter XII. This approach favors the practice of having economic decisions made by private units rather than public authorities. It has been found that, insofar as the employment relationship and wage structure is concerned, the process of free collective bargaining between labor unions and employers best implements this philosophy and practice. . . . It follows from this that the widest
And, according to the Supreme Court, "the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government."\(^7\) It is impossible to reconcile this promotion of private decision-making with the centralization of decision-making which is inherent in Board intervention.

As Otto Kahn-Freund has observed:

> The estrangement of people from the handling of their own affairs and the temptation to forego the exercise of powers of self government . . . in the long run involve that abdication of the citizen . . . which is the real danger to democracy.\(^7\)

Moreover, apart from the intrinsic value which one may attach to private decision-making, functional considerations clearly point to the superiority of private over public agencies to deal with the kind of particularized disputes with which we are here concerned. As a governmental agency, the Labor Board is inevitably (and properly) concerned with resolving disputes in a manner that will have general application to all disputes of a similar nature. In contrast, though an arbitrator may refer to general principles, his primary concern is with the effect of his decision on the parties before him. These considerations were cogently summarized by Trial Examiner Norman Sommers, who concluded that the Board should dismiss a complaint because the dispute out of which it grew involved

> . . . the adjustment of . . . equities turning on a multiplicity of variables and particulars, some of them reaching outside the specific issue before us. In the posture before us, they are a briar patch, which . . . would make it the better part of wisdom for us not to seek to meet them on the basis of a rationale of general application, that a quasi-judicial body of Government must make . . . Rather, do they lend themselves to the kind of particularized and individual adjustments, which an arbitrator is in a position to make by possible discretion should be given to the parties in the collective bargaining process."

Brief for Petitioner Union at 22, 33, Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). Similarly, Professor Sanford Rosen has declared that:

> [T]he state . . . should not intrude so far in its necessary regulation of other power centers as to destroy their essential independent and private character. This follows from a belief that efficient social activity and continued individual liberty require, to the extent possible, that power not be overly concentrated.


applying his sound judgment and sense of equity in interpreting the contract of the Union with the Respondent (as well as of the Union with the employees who become members), in the light of all the particulars unfolded by the situation in this case. As a corollary, his award would apply to the instant situation, and would control no other case for the future.\textsuperscript{75}

Undoubtedly, it is because the Board recognizes the particularized nature of these disputes that it has relied almost exclusively upon an ad hoc approach in resolving them. However, as in other areas of its jurisdiction,\textsuperscript{76} the result of this failure of the Board to articulate consistent general guidelines governing its relations to arbitration has been to leave those whose conduct it regulates, and even its own personnel, with nothing more than two irreconcilable lines of cases.\textsuperscript{77} The reasons underlying the need for clear-cut "standards" for administrative action are fundamental\textsuperscript{78} and to the extent it has failed to respond to this need, the Board has undermined its own processes, as well as those of private decision-making.

Since "group autonomy is impossible where government intervenes continually in ... domestic disputes,"\textsuperscript{79} Board intrusion into grievance and arbitration procedures inevitably undermines the system of private decision-making which the Act was designed to establish and promote. If continued, such intervention will reduce private decision-making in this area to a state of "perpetual immaturity."\textsuperscript{80} To appreciate the way in which Board intervention in

\begin{itemize}
  \item \textsuperscript{75} W. P. Ihrie & Sons, 165 N.L.R.B. No. 2 (1967), Trial Examiner's Decision 15. The Board did not follow the Trial Examiner's recommendation. See also Dunau, supra note 67, at 67-68.
  \item \textsuperscript{77} See Samoff, supra note 26, at 612 n.42.
  \item \textsuperscript{78} According to Judge Friendly, these reasons are: first, the basic human claim that the law should provide like treatment under like circumstances; second, the social value in encouraging the security of transactions; third, the requirement of the democratic process for some limitation on unbridled administrative discretion, which is satisfied by a clear statement of the standards to be applied; fourth, the maintenance of agency independence; and fifth, intra-agency advantages such as guiding agency members and reducing the volume of cases. Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards 19-24 (1962). See generally: Graham, How Effective is the National Labor Relations Board?, 48 MINN. L. REV. 1009 (1964); Peck, The Atrophied Rulemaking Powers of the NLRB, 70 YALE L.J. 729 (1961).
  \item \textsuperscript{79} Robbins & Hecksher, The Constitutional Theory of Autonomous Groups, 3 J. of Pol. 3, 12 (1941).
  \item \textsuperscript{80} Producers Grain Corp., 169 N.L.R.B. No. 68 (1968), Trial Examiner's Decision 22.
\end{itemize}
disputes arising during the term of a collective bargaining agree-
ment and subject to the grievance and arbitration procedures es-
established in that agreement undermines these procedures, it is es-
tential to remember that the "arbitration of labor disputes under
collective bargaining agreements is part and parcel of the collective
bargaining process itself."81 Professor Neil Chamberlain has de-
dcribed this bargaining aspect of grievance and arbitration settle-
ment as follows:

In principle, decisions in the grievance process are pre-
sumed to have a judicial quality, constituting determina-
tions of whether the terms of the agreement have been
properly applied by management or of whether disciplinary
penalties have been in accord with common-law standards
of equity. In practice, however, the process reflects the
bargaining power relationship, as the union seeks to widen
the area of the agreement by interpretation, or manage-
ment seeks to narrow it. At times one side may concede
on one case in exchange for victory in another. Or the em-
ployees in a shop may threaten an avalanche of grievances
against their foreman unless he sees things their way on
some matter vital to them. Or the company may overlook
some union or employee violation either to gain goodwill
or invite reciprocity. Or management may make a con-
cession in interpretation in exchange for the union's agree-
ment not to press a particular demand at contract negotia-
tion time. Even the question of how high in the multi-
stage appeals process a case should be carried may be a
matter of bargaining strategy, in particular the decision as
to whether the issue should be taken to arbitration.82

It is not difficult to see how the threat of outside interference
by the Board disrupts the operation of the bargaining which is an
essential element of the grievance and arbitration process. In-
evitably, the union's incentive to settle disputes in the lower steps
of the grievance procedure is diminished by the prospect of more
favorable and cost-free treatment by the Labor Board.83 And
since bargaining is possible only where both sides have something
to give, the employer's willingness to settle is similarly affected.
The problem is particularly acute in those situations where only a

    564, 578 (1960).
82. Chamberlin, The Corporation and the Trade Union, in THE COR-
    PORATION IN MODERN SOCIETY 122, 138 (Mason ed. 1961). Much of the bar-
    gaining that occurs in grievance settlement involves only groups of workers
    and their representative rather than the whole plant and so has been
described as "fractional bargaining." KUHN, BARGAINING IN GRIEVANCE
    SETTLEMENT (1961). For another perspective on the "bargaining" approach
to grievance and arbitration settlement, see Taylor, supra note 11.
portion of the union membership is aggrieved, for the union's ability to settle grievances on the basis of internal compromises\textsuperscript{84} is severely hampered by the prospect that members unhappy with the compromise would go to the Labor Board.\textsuperscript{85} These disruptive effects have been described well by the Supreme Court in considering the analogous question of whether an individual employee should be allowed to compel the arbitration of grievances which his union had decided not to appeal to arbitration:

If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully. ... It can well be doubted whether the parties to collective bargaining agreements would long continue to provide for detailed griev-

\textsuperscript{84} As the Supreme Court has noted:

Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such difference does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

\textit{Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). More recently, the Court has declared that:}

Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.

\textit{Humphrey v. Moore, 375 U.S. 335, 349-50 (1964). Daniel Bell has described these internal conflicts and the union's role in containing them as follows:}

In the evolution of the labor contract the union becomes part of the "control system" of management.

\textsuperscript{85} Under Rule 102.9 of the Board's Rules and Regulations, "any person" may file unfair labor practice charges. Accordingly, disgruntled employees would not need their union's approval to appeal to the Labor Board.
ance and arbitration procedures of the kind encouraged by L.M.R.A. § 203(d), supra, if their power to settle the majority of grievances short of the costlier and more time-consuming steps was limited by a rule permitting the grievant unilaterally to invoke arbitration.86

Thus, the one-sided forum-shopping which concurrent jurisdiction invites will result in the increasing bypassing of arbitration for Labor Board proceedings. While such forum-shopping is always repugnant to elemental notions of equal justice, it is particularly obnoxious where it allows one party to subvert the national labor policy by bypassing the federally preferred forum.87 That this bypassing has not already happened on a large scale can be attributed to a lack of general awareness of the possibilities. However, as this “cultural lag” is overcome, these disruptive effects will become more apparent.

Finally, it should be noted that as familiarity with the possibilities for Board action filters down from lawyers to local union personnel and the “rank and file,” the effect can only be to increase substantially the Board’s already mushrooming case load. To avoid this increase in a manner that directly promotes the national labor policy of giving “full play”88 to arbitration seems not only desirable but mandatory. As one overruled trial examiner recently noted:

The Board consistently and periodically exhorts its staff and all members of the agency to endeavor to settle cases. There appears to be two basic reasons for this emphasis. One is the unprecedented case load of the Board and the second is the saving in time and money for all concerned if settlement supplants litigation. In view of such considerations, we find it difficult to understand the failure to encourage the parties to use their built-in contract procedure of arbitration as a settlement method by requiring

87. Thus Trial Examiner Ramey Donovan has observed that:
   It scarcely encourages or effectuates the cited federal policy regarding contractual arbitration to permit bypassing the arbitral process and lodging the matter with the Board. In fact, by countenancing such bypassing, the Board is, in effect, making a federal policy subject to the unilateral determination of one party to a contract.

Producers Grain Corp., 169 N.L.R.B. No. 68 (1968), Trial Examiner’s Decision 21. Similarly, the Eighth Circuit recently noted that:
   [F]ree collective bargaining would be encouraged if the parties to ... a labor agreement would make use of the arbitration machinery before resorting to the Board, and if discretion were exercised in issuing complaints where the parties had failed to use the machinery they had established.

American Fire Apparatus Co. v. NLRB, 380 F.2d 1005, 1007 (8th Cir. 1967).
88. See text at supra note 34.
the exhaustion of that procedure before resort to the Board. If arbitrated, as provided by contract, many such matters would never reach the Board. Such cases as came to the Board despite the use of arbitration would be subject to the Spielberg standards.⁹⁰

Some employers have attempted a contractual solution to the problems created by concurrent Board and arbitral jurisdiction. That is, they have attempted in their collective bargaining agreements to condition recourse to the Board upon the exhaustion of contractual remedies. Thus, in Electric Motors and Specialties, Inc.,⁹⁰ the contract provided that:

No employee shall pursue any remedy at law against the Company or the Union under any provision of this contract, until as a condition precedent of such action, he shall have first exhausted his remedies under the grievance procedure hereinabove provided.⁹¹

The trial examiner⁹² ruled that this provision did not constitute "a clear and unequivocal waiver . . . of the right to file charges with the Board."⁹³ As a result, he found it unnecessary to pass upon "whether such an express waiver, if made, would be binding upon all parties."⁹⁴ Thus, the efficacy of this kind of contractual resolution of the problem is an open question.

B. Contractual Reservation of the Right to Manage: The Clear and Unmistakable Waiver Requirement

In addition to intervening into disputes that could be handled within contractual procedures, the Board has interfered with the employer's ability to exercise its rights of management in a more direct way by making it extremely difficult to secure these rights by contract. The obstacle erected by the Board to contractual reservation of the right to manage is the "clear and unmistakable waiver" requirement. As explained by the Board in The Press, Inc.,⁹⁵ this requirement means that:

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⁹⁰. 149 N.L.R.B. 131 (1964).
⁹¹. Id. at 136.
⁹². Since the Board dealt with the case on its merits, it would appear to have adopted this ruling.
⁹³. Id. at 137, n.12.
⁹⁴. Id.
⁹⁵. 121 N.L.R.B. 976 (1958). In The Press, the question was whether, by acquiescing in an employer's rejection of a demand in negotiations, the union waived its right to bargain over that subject during the term of the agreement reached in the negotiations. Since our concern here is with reservation of the right to manage through explicit contractual language,
Although a subject has been discussed in precontract negotiations, and has not been specifically covered in the resulting contract, the employer violates § 8(a) (5) of the Act if during the contract term he refuses to bargain, or takes unilateral action with respect to the particular subject, unless it can be said from an evaluation of the prior negotiations that the matter was “fully discussed” or “consciously explored” and the union “consciously yielded” or clearly and unmistakably waived its interest in the matter. 9

The most usual contractual vehicle for the reservation of management’s rights is a broadly worded provision devoted solely to this purpose. Such “management rights” clauses, however, very often fail to live up to their title by not satisfying the requirement of a clear and unmistakable waiver. Thus, in Proctor Manufacturing Company, 7 the management rights clause reads as follows:

The parties recognize that the right of management to direct and control the business and affairs of the Employer, and its right to control, supervise and administer the plant of the Employer, are functions belonging exclusively to the Employer, and nothing in this agreement will be interpreted in such a manner as to deprive the Employer of said management rights unless said interpretation is expressly required by the provisions of this agreement. 9

The employer unilaterally established new production quotas and piecework rates, justifying its failure to bargain with the union on the basis of the management rights clause. The Board, however, found that the reservation of control over all matters not expressly covered by the agreement did not constitute the necessary clear and unmistakable waiver.

Similarly, in Smith Cabinet Manufacturing Company, 9 the employer unilaterally instituted a second shift. Although there was no mention of a second shift in the contract, there was a provision reserving to the employer the right “to assign work and the number of hours to be worked.” The Board found, however, that this did not represent the requisite waiver of the right to bargain over the institution of a second shift and therefore that the employer violated section 8(a) (5).

In Allied Chemical Corporation, 100 the management rights

we are not interested in such implied waiver, except perhaps as it bears upon the construction of contract language. That is, our concern here is with waiver by contract rather than waiver by conduct.

96. Id. at 977-78.
98. Id. at 1168.
100. 151 N.L.R.B. 718 (1965), aff’d sub nom. District 50, United Mine Workers v. NLRB, 358 F.2d 234 (4th Cir. 1966).
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clause reads as follows:

It is recognized that all management functions whether heretofore or hereafter exercised, and regardless of frequency or infrequency of their exercise, shall remain vested exclusively in the Company. It is expressly recognized that these functions include, but are not limited to, (1) full and exclusive control of the management and operation of the plant, (2) the direction and the supervision of the working forces, (3) the scheduling of production, (4) the right to determine the extent to which and the means and manner by which the plant and the various departments thereof shall be operated or shut down, (5) the right to introduce new or improved methods or facilities, (6) the reduction or increase of working forces or production, and (7) the right to hire, train, suspend, discipline, discharge, promote, demote, transfer, release and lay off employees and establish, schedule and assign jobs, subject to the provisions of this Agreement.101

The employer unilaterally subcontracted some bargaining unit work and the trial examiner102 ruled that, although certain of the provisions of the management rights clause could be construed to cover subcontracting, the absence of any specific reference to subcontracting forestalled such an interpretation. Accordingly, since there was no clear and unmistakable waiver of the right to bargain over subcontracting, the employer was held to have violated its duty to bargain.

Specificity was also required in Puerto Rico Telephone Company103 where the management rights provision stated that:

Except as expressly limited by the terms of this Agreement, the Company retains and shall retain sole control over all matters concerning the operation, management and administration of its business, including, but without this being construed as a limitation, the administration and management of its departments and operations, the organization and methods of work, the assignment of working hours, the direction of the personnel, the right to hire, reclassify, transfer, discipline, suspend, separate or pension employees, and all functions inherent in the administration and/or management of the business. The above mentioned rights shall be used for economic and administrative purposes and not to discriminate against the Union or any of its members.104

101. id. at 724.
102. Although the Board decided to dismiss the complaint, it did not do so because it disagreed with the trial examiner's conclusions on the waiver question.
103. 149 N.L.R.B. 950 (1964), enforcement denied, 359 F.2d 983 (1st Cir. 1966).
104. id. at 964, n.40.
Adopting the trial examiner's finding, the Board ruled that this provision did not justify unilateral subcontracting because it did not make “specific reference” to subcontracting.\textsuperscript{105}

In \textit{Clifton Precision Products Division, Litton Precision Products, Inc.},\textsuperscript{106} the management rights clause vested in the company the exclusive right “to promote, transfer, and relieve employees from duty because of lack of work or other legitimate reasons.”\textsuperscript{107} Despite the specific reference to promotions, the Board held that the employer’s unilateral institution of a job posting procedure violated section 8(a)(5).

Even where the subject claimed to have been waived is specifically mentioned, the requisite waiver may not be found because of possible inconsistencies between such a specific provision and other provisions in the agreement. Thus, in \textit{Boston Mutual Life Insurance Company},\textsuperscript{108} the contract provided that the employer had “sole discretion” as to the retention of employees during the probationary period. The contract also provided:

\begin{quote}
[T]he discharge of any employee . . . may be investigated by the union and the employer agrees . . . to furnish it with information and reasons in writing, if so requested, in respect to the cause of such discharge.\textsuperscript{109}
\end{quote}

The employer fired a probationary employee and, under the above provision, the union requested information as to the reasons for the discharge. The employer refused to disclose its reasons on the ground that under the contract, the discharge was within its “sole discretion.” The union then filed refusal-to-bargain charges against the employer with the Board, contending that under the \textit{Acme Industrial}\textsuperscript{110} case, the employer was obligated to give it any relevant information as to the discharge. In defense, the employer argued that, by ceding to the employer “sole discretion” as to the retention of disciplinary employees, the union waived its right to bargain, a part of which is its right to relevant information, over the discharge. The trial examiner, however, ruled that the inconsistency in the contract between the “sole discretion” provision and the provision committing the employer to give information as to “the discharge of any employee” “renders ambiguous any

\textsuperscript{105} Id. at 964.
\textsuperscript{106} 156 N.L.R.B. 555 (1966).
\textsuperscript{107} Id. at 561.
\textsuperscript{109} Id.
\textsuperscript{110} \textit{NLRB v. Acme Industrial Co.}, 385 U.S. 432 (1967).
claimed waiver of [the] right to information."

Not surprisingly, the requirement that the waived subject be specifically mentioned has not been applied with consistent rigor by the Board. For example, in *LeRoy Machine Company*, the employer unilaterally required that employees with poor attendance records submit to a physical examination. The applicable management rights clause provided that:

The Company retains the sole right to . . . hire, layoff, assign, transfer, promote and determine the qualifications of employees.

Finding that the term "qualifications of employees" included the employees' physical condition, the Board held that the union had waived its right to bargain about the requirements by virtue of the management rights clause.

In *Kennecott Copper Corporation*, the employer unilaterally subcontracted certain repair work which had previously been performed by unit employees. The management rights clause provided that:

Nothing in this agreement shall be construed to limit or impair the right of the company to exercise its own discretion in determining whom to employ, and nothing in this agreement shall be interpreted as interfering in any way with the company's right to alter, rearrange or change, extend, limit or curtail its operations or any part thereof, to decide upon the number of employees that may be assigned to work on any shift or the equipment to be employed in the performance of such work, or to shut down completely, whatever may be the effect upon employment, when in its sole discretion it may deem it advisable to do all or any of said things.

Finding that the right "to alter, rearrange or change, extend, limit or curtail its operations" included the right to subcontract, the trial examiner whose opinion was adopted by the Board, ruled that the union had waived its right to bargain over subcontracting.

Similarly, in *International Shoe Company*, the employer unilaterally shifted some of its warehousing operations from one

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112. 147 N.L.R.B. 1431 (1964).
113. *Id.* at 1433. (emphasis added).
115. *Id.* at 1655-56.
116. Characteristically, although it adopted the trial examiner's recommendation to dismiss the complaint, the Board stressed that its action was "based upon the particular circumstances of this case." *Id.* at 1654, n.1.
117. 151 N.L.R.B. 693 (1965).
location to another. Among the rights reserved to the company in the management rights clause was the right to decide as to the “methods of selling and distributing products.” Finding warehousing to be a part of the “methods of . . . distributing products,” the Board held that the union had waived its right to require the company to bargain over such intra-company transfers.

An express waiver was also found in Ador Corporation, where the company, without notice to the union and without bargaining as to the effects of its decision, stopped producing one of its products, and as a result laid off the employees engaged in producing the products. The management rights clause read as follows:

The management of the Company's plant and the direction of its working forces, including the right to establish new jobs, abolish or change existing jobs, increase or decrease the number of jobs, change materials, processes, products, equipment and operations shall be vested exclusively in the Company; . . . . Subject to the provisions of this agreement, the Company shall have the right to . . . lay off employees because of lack of work or other legitimate reasons.

The Board held that there was no violation of the Act because

the management rights clause

. . . gave to the Company the exclusive right to eliminate production of any of its products and to lay off employees who were, as a consequence of such decision, no longer needed. The parties had, in effect, bargained about the manner in which such decisions were to be made during the term of the collective bargaining agreement and had agreed that the Company would take unilateral action in this regard.

A good indication of the Board's flexibility in applying the “clear and unmistakable” waiver requirement can be seen in a recent case involving the Shell Oil Company. The Shell Oil Company had been contracting out various types of maintenance work for over thirty years. Throughout this period, the union had tried many times to modify this practice and to obtain contractual limitations upon the employer's right to subcontract. All the union had been able to obtain, however, was a protective wage clause

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118. Id. at 695.
120. Id. at 1659-60.
121. Id. at 1660. See also Huttig Sash & Door Co., Inc., 154 N.L.R.B. 1567, 1576-77 (1965).
guaranteeing that the subcontractors' employees would not be paid less than its members. Despite the fact that, read literally, the protective wage clause was no more than a prescription of wage rates to be paid on subcontracts, the Board found it to contain a "clear and unmistakable" waiver by the union of the right to bargain over maintenance subcontracts.

During its last term, in NLRB v. C & C Plywood Corporation, the Supreme Court was presented with the question of the degree of specificity necessary to satisfy the waiver requirement. In that case, the contract's wage article allowed the employer to pay a premium rate to "reward any particular employee for some special fitness, skill, aptitude, or the like." The Labor Board found that this provision did not authorize the employer to unilaterally establish a premium pay plan on the ground that such a plan would affect groups of employees whereas the provision in the wage article referred only to individuals. The Supreme Court agreed, relying upon the Board's "experience with labor relations."

Besides management rights clauses, another common contractual provision which is often claimed to encompass the necessary clear and unmistakable waiver is a specific "waiver" or "scope of agreement" provision. The prototype for such provisions appears in the agreement between General Motors Corporation and the United Automobile Workers. It reads:

The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Corporation and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter referred to, or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement.

123. 385 U.S. 421 (1967).
125. Id.
127. BNA COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS 21:47.
In Jacobs Manufacturing Company,\textsuperscript{128} the Board, citing (as an example of what it had in mind) an earlier but almost identical version of the General Motors provision, declared that:

\begin{quote}
If the parties originally desire to avoid later discussion with respect to matters not specifically covered in the terms of the executed contract, they need only so specify in the terms of the contract itself. Nothing in our construction of § 8(d) precludes such an agreement, entered into in good faith, from foreclosing future discussion of matters not contained in the agreement.\textsuperscript{129}
\end{quote}

Unfortunately, the promise which this forthright bargaining advice seemingly contains has not been realized. Thus, in Westinghouse Electric Corporation,\textsuperscript{130} the employer unilaterally subcontracted certain operations, relying on a General Motors-type waiver clause.\textsuperscript{131} The trial examiner, however, ruled that by agreeing to the waiver provision, the union merely waived its right to attempt to negotiate a provision relating to subcontracting during the term of the agreement. The union did not waive its statutory right to bargain over employer decisions to subcontract because "statutory rights . . . are not waived by such general language . . . ."\textsuperscript{132} The above statement of the Board in the Jacobs case was held inapplicable to the question of unilateral employer action. According to the trial examiner, the Board in Jacobs was only

\begin{quote}
. . . concerned with the right of the Union during the life of a contract to bargain over the addition of new substantive terms of employment, and a waiver of the right to bargain in those circumstances meant no more than that the terms of employment would continue unchanged. In the instant case leaving matters unchanged by contract leaves the Union with his statutory right. Again it is helpful to analysis to realize that when the bargaining commenced, the Union possessed statutory protection against the Company's taking unilateral action in contracting work out. To change that statutory condition the Company, not the Union, required contractual language waiving the Union's
\end{quote}

\begin{footnotes}
\item[128.] 94 N.L.R.B. 1214 (1951), enforced, 196 F.2d 680 (2d Cir. 1952).
\item[129.] Id. at 1220.
\item[130.] 150 N.L.R.B. 1574 (1965).
\item[131.] The waiver provision in Westinghouse differed from the General Motors provision in that it was limited to "any subjects or matters not specifically referred to or covered in (the contract) which were discussed during the negotiation of (the contract) . . . ." Id. at 1585. However, since the matter is dispute (subcontracting) had been discussed during negotiations, the effect of the provision was the same as if it covered, as the General Motors language does, matters not discussed during negotiations and not covered in the collective bargaining agreement.
\item[132.] Id. at 1587.
\end{footnotes}
right.\textsuperscript{133}

The General Motors waiver language has received similar treatment in other cases. Thus, in \textit{Clifton Precision Products Division, Litton Precision Products, Inc.},\textsuperscript{134} the Board found it did not "evidence that clear intent upon the union's part to knowingly relinquish its statutory rights, which would be required to support a finding of waiver . . . ."\textsuperscript{135} Similarly, in \textit{Dura Corporation v. NLRB},\textsuperscript{136} the Sixth Circuit found that mere inclusion of such a provision in a contract did not by itself establish a clear and unmistakable waiver of the statutory right not to be discouraged from union membership. In \textit{General Motors Corporation},\textsuperscript{137} the employer unilaterally contracted out\textsuperscript{138} certain parking operations. The agreement in effect between the parties contained the

\textsuperscript{133} Id. Since the Board dismissed the complaint on other grounds, it did not deal with the waiver issue. The trial examiner's interpretation of the Board's statement in Jacobs would seem to be clearly wrong. As a guide to the Board's probable intent, the following statement by its Associate General Counsel at the time is revealing:

[I]f for any reason it is desired in a particular situation to foreclose subsequent mandatory bargaining during the term of a contract in regard to matters not specifically contained therein, the parties need only insert such a provision (citing the General Motors language) in their agreement.

Findling & Colby, \textit{Regulation of Collective Bargaining by the National Labor Relations Board}, 51 COLUM. L. REV. 170, 180 (1951) (emphasis added). Clearly, this was the inspiration for the Board's statement in Jacobs and the reference to "mandatory bargaining" should remove any doubt which the Board's use of "discussion" may have created on the question of whether such a provision could legitimate only a refusal to bargain as to union proposals, as suggested by the trial examiner in Westinghouse, or could also enable the employer to take unilateral action. More importantly, neither the Board nor the courts have viewed a refusal to discuss union proposals as any less a violation of § 8(a)(5) than unilateral action with regard to the subject matter of such proposals. Accordingly, there is no justification for reading a distinction between these two types of unlawful refusals-to-bargain into a contract provision. And the Board, in the later case of Rockwell-Standard Corp., 166 N.L.R.B. No. 23 (1967), in effect rejected this distinction by finding that such a provision does not authorize an employer to refuse to discuss union proposals.

\textsuperscript{134} 156 N.L.R.B. 555 (1966).
\textsuperscript{135} Id. at 563.
\textsuperscript{136} 380 F.2d 970 (6th Cir. 1967).
\textsuperscript{138} Although the Board on remand specifically found that the change in question did not constitute "contracting out," 158 N.L.R.B. 229, 230-32 (1966), the Court of Appeals disagreed. 381 F.2d 285, 286. (D.C. Cir. 1967).
General Motors waiver provision, but the trial examiner ruled that this provision only waived the making of contract proposals and not bargaining about the application and implementation of the agreement. According to the trial examiner:

[W]hether the Union waived its right to make proposals and negotiate on the general subject of subcontracting is not herein in issue. What is in issue is the Union's right to negotiate on a specific decision to transfer the OK Parking lot drivers' functions to another employer and the above contract clause does not waive that right.139

The requirement of "full discussion" and "conscious exploration," mentioned in The Press, Inc.140 as part of the clear and unmistakable waiver concept but not usually emphasized, was drawn upon by the Board to nullify a General Motors-type waiver provision in Rockwell-Standard Corporation.141 The union had requested information relating to a recently completed transfer of operations and the employer refused, contending that as a result of the inclusion of the waiver provision in the collective bargaining agreement, the union had waived its right to bargain as to the transfer. The Board found no waiver because:

Even when a "waiver" is expressed in a contract in such broad, sweeping terms as is the "waiver" in the present contract, it must appear that the particular matter was fully discussed or consciously explored. . . .142

The Supreme Court was presented with the opportunity to consider the effect to be given to these broad waiver provisions in the C & C Plywood143 case. Although the existence of such a provision was noted by the Court,144 no explicit consideration was given to it in the Court's opinion.145 Still, the mere fact that the Court gave no apparent weight to the provision is probably indicative of what its attitude would be were the issue to come up squarely before it.

139. 149 N.L.R.B. 396, 408 (1964). Since the Board found the necessary waiver in other provisions of the parties' contract, see text accompanying note 137 supra, it did not deal with this ruling of the trial examiner. However, since the issue of the waiver provision was raised in the employer's Petition for Certiorari (at 15), it can be presumed that it was raised before the Court of Appeals, which found no waiver. 381 F.2d 265, 267 (D.C. Cir. 1967).
140. See text at note 96.
141. 166 N.L.R.B. No. 23 (1967).
142. Trial Examiner's Decision 15.
143. 385 U.S. 421 (1967).
144. Id. at 423, n.4.
145. The waiver provision was not mentioned in the portion of the employer's brief containing the waiver argument. Brief for Respondent, 74-76.
Despite these consistent rejections of the General Motors waiver provision, however, a trial examiner recently upheld such language as authorizing unilateral action relating to otherwise bargainable work changes. According to the trial examiner:

Under ordinary rules of contract construction, effect should be given, if fairly possible, to the form of words which the parties have used, taking all parts into consideration. Whether the parties herein intended to commit to the provisions and procedures of their contract all possible disputes and the whole scope of their relationship—a sweeping and vital concession by the Union—need not be considered. For the purpose of the issues raised, it is sufficient, and I find, that the Union expressly and consciously waived in paragraph 116 its statutory bargaining rights where the subject is covered or referred to in the contract, or where it is fairly implied that the subject, though not specifically mentioned, is within the general embrace of the agreement.

Waiver provisions often take the abbreviated form of a “zipper” or “wrap-up” clause. Initially, the Board gave effect to such provisions. Thus, in The Borden Company the contract provided that:

It is understood and agreed that all matters subject to collective bargaining have been covered in this Agreement and it may not be opened before 1954 for change in its terms, or additions of new subject matter, except as may be mutually [agreed] upon by the parties.

The Board found that by agreeing to this provision the union waived its right to require the employer “to bargain on any matter during the life of the contract, whether or not such matter was contained therein or was discussed prior to its execution.” The weight to be given to such provisions was discounted, however, by the Second Circuit in International Union of Electrical Workers v. General Electric Company: “The wrap-up clause does no more than express the fact that the collective bargaining contract was intended to represent the complete agreement of the parties.”

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147. Id. at 7-8.
149. Id. at 805.
150. Id.
151. 332 F.2d 485 (2d Cir. 1964).
152. Id. at 489, n.3. Although the court was concerned with the very different question of the effect of such a provision on the arbitrability of a grievance, its appraisal is framed in terms that make it equally applicable to refusal-to-bargain situations.
The Board withdrew its stamp of approval from "zipper" clauses in *The New York Mirror*, where the contracts provided that:

The parties hereto agree that they have fully bargained with respect to wages, hours and other terms and conditions of employment and have settled the same for the terms of this agreement in accordance with the terms thereof.

The employer unilaterally terminated operations and the Board, though dismissing the complaint for other reasons, found that the provision did contain the necessary waiver:

This boilerplate clause, carried over from previous agreements, does no more than indicate that the parties embodied their full bargaining agreement in the written contracts. A wrap-up clause of this nature affords no basis for an inference that the agreement contains an implied undertaking over and beyond those actually written into the agreement.

Similarly, in *The Beacon Journal Publishing Company*, the "zipper" clause stated that:

This contract is complete in itself and sets forth all the terms and conditions of the agreement between the parties hereto.

The employer unilaterally changed the basis upon which Christmas bonuses were computed and the Board found that it would not...

... infer a union waiver of its bargaining right as to a particular subject not mentioned in the contract, merely because a broadly worded "zipper" provision limits the employees' terms and conditions of employment to those set forth in the contract.

Although the Supreme Court, in the C & C Plywood case would seem to have endorsed the Board's "clear and unmistakable waiver test," the federal courts of appeals have been unable to agree as to the degree of clarity and definiteness required. Thus, in *NLRB v. Honolulu Star-Bulletin*, the Ninth Circuit reversed the Board on the question of whether an employer violated section 8(a)(5) by refusing to bargain about a bonus plan. A schedule of minimum

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154. *Id.* at 837.
155. *Id.* at 840.
156. 164 N.L.R.B. No. 98 (1967).
157. Trial Examiner's Decision at 5.
159. 372 F.2d 691 (9th Cir. 1967).
salaries was included as part of the contract, along with the following statement: "Nothing in this agreement shall limit the right of the employer at its discretion to pay amounts in excess of the salary set forth above." The Board found that there was no waiver of the union's right to bargain over the subject of bonuses because of the absence of any provision dealing specifically with bonuses. The court reversed, rejecting the Board's contention that waiver must be specific in order to be clear and unmistakable.

In marked contrast is the District of Columbia Circuit's decision in United Automobile Workers v. NLRB, involving the propriety of unilateral subcontracting. Under the management rights clause, the employer retained exclusive control over the "methods, processes and means of manufacturing." The Board found that the employer's action was "within the scope of its managerial prerogative as explicitly recognized by the Union in the National Agreement." Disagreeing, the Court of Appeals concluded that it was not clear and unmistakable that "the methods, processes and means of manufacturing" included the parking of manufactured cars and that therefore the necessary waiver did not exist.

As with the Board's arbitration decisions, the necessary result of these conflicting applications of the "clear and unmistakable" waiver test is to rob from the law one of its essential characteristics, predictability. More than the substance of the decisions, their inconsistency makes it difficult for employers (and, to a lesser extent, unions) to protect their interests since they don't know what provisions will provide the desired protection. The effect is to prevent employers from securing that which is their primary objective in the negotiation of collective bargaining agreements, stability during the term of the contract through an end to bargaining outside of the grievance procedure.

As its brief to the Supreme Court in the C & C Plywood case makes clear, the Board has been quite candid in noting the inconsistency between the requirement of clear and unmistakable waiver as applied by it and the reserved rights doctrine. And

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160. Id. at 692.
162. 372 F.2d 691, 693.
165. 381 F.2d 265, 267. (D.C. Cir. 1967).
166. (The 'residual rights' doctrine) stands on its head the estab-
it has been no less candid in explaining that the result of its resolution of this conflict is to make "the management prerogatives of yesterday . . . the mandatory bargaining subjects of today."167

With the rejection of the reserved rights doctrine, employers must reevaluate their formerly defensive and passive approach to collective bargaining. Protecting what one already has is a valid approach only if one in fact already has it. With the demise of the reserved rights theory, however, employers must become acquisitive and aggressive in bargaining, much as unions always have been. The goal is explicit contractual recognition of those rights formerly presumed to be "reserved," so that collective bargaining agreements become sources of rights and powers for employers rather than of just duties and restrictions. Thus, the model management rights clause becomes a list, as long and detailed as possible, of each right which an employer thinks may be necessary for efficient operation.168

lished rule that a statutory waiver must be express and clear; it flows from an approach wholly inconsistent with decisions such as that of this Court in Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203.


168. See, e.g., the following example suggested by the National Association of Manufacturers:

In order to conduct its business efficiently, management shall have the following rights:

- to determine the number, location and types of plants;
- to decide on the products to be manufactured, the methods of manufacture, the materials to be used, and the discontinuance of any product, material, or method of production;
- to introduce new equipment, machinery, or processes, and to change or eliminate existing equipment, machinery, or processes;
- to discontinue, temporarily or permanently, in whole or part, conduct of its business or operations;
- to decide on the nature of materials, supplies, equipment, or machinery to be used, and the price to be paid;
- to decide on the sales methods and sales price of all products;
- to subcontract any or all of the processes of manufacture, facility maintenance, or location service work;
- to select the working forces in accordance with the requirements determined by management;
- to transfer, promote or demote employees;
- to lay off, terminate, discharge, discipline, or otherwise relieve employees from duty for lack of work or other causes;
- to direct and control the work force;
- to establish rules governing employment and working conditions;
- to determine the size of the work force, including the number of employees assigned to any particular operation;
- to determine the work pace and work performance levels;
- to establish, change, combine, or abolish job classifications and the job content of any classification;
- to determine the length of the work week, and when overtime
The result is to change fundamentally the nature of collective bargaining agreements and, as a consequence, to increase greatly the strains on the collective bargaining process. As Professor Archibald Cox has observed, a collective bargaining agreement is a unique form of contract because of the number of people it affects, the consequent need to be generally intelligible, the wide range of conduct and problems it covers, the long period over which it runs and the resulting impossibility of anticipating all the problems that will develop during its term, and the great pressure for initial agreement between the parties because of the high cost of disagreement. 169 One consequence of these characteristics is that many provisions of the labor agreement must be expressed in general and flexible terms, so that, to borrow Professor Cox’ phrase, a collective bargaining agreement becomes “an instrument of government” rather than “an instrument of exchange.” 170 The presumptions supplied by the reserved rights theory played a crucial role in permitting collective bargaining agreements to function as instruments of government. 171 With the destruction of these presumptions, management is forced to seek the inclusion of

shall be worked, and to require reasonable overtime.
All other rights of management are also expressly reserved, even though not enumerated above, unless they are limited by the clear and explicit language of some other provision of this agreement.

NATIONAL ASSOCIATION OF MANUFACTURERS, PRESERVING THE MANAGEMENT FUNCTION IN COLLECTIVE BARGAINING (1956).

169. Cox, Reflections Upon Labor Arbitration, 72 HARV. L. REV., 1482, 1490-93 (1959). In a similar vein are Dean Shulman’s observations:

The agreement is negotiated and drafted by representatives on both sides for acceptance by numerous people. It must be satisfactory not to one person, but to a multitude. The multitude will contain a variety of objections to different provisions. What will pass one person or group will be harped on by another, so that each whole may be acceptable except for the one detail, none would reject the agreement because of that alone. But the aggregation of the diverse objections to the different details may create the impression of total inadequacy and unacceptability.

...The vagueness which to the interpreter shows no “meeting of minds” may be the very factor which made agreement possible. I am not speaking now of more or less unintended vagueness in setting down general rules without exploration of all the particulars. I am speaking rather of the purposeful vagueness which the parties embrace when they know that they cannot agree on more precise statement and prefer to take a chance on future application rather than break up in total disagreement.


170. Cox, supra note 169, at 1492.

171. Just as the “presumptions” supplied by the Tenth Amendment to the United States Constitution enable that document to be an effective governmental charter. The Tenth Amendment provides that: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”
countless specific provisions to guarantee rights that before had subsisted without expression. While justified by the Labor Board and the Supreme Court in terms of encouraging collective bargaining, the clear and unmistakable waiver requirement has just the opposite effect; it threatens collective bargaining with strangu-
lation from matters that formerly were left unsaid.

III. CONCLUSION

Some spokesmen for the Board have defended these developments on the ground that they only require the employer to bar-
gain with the union to impasse before acting and do not prevent him from ultimately acting after an impasse has been reached. Unfortunately, these spokesmen ignore the fact that bargaining to impasse, under the Board's rulings, is more difficult than common sense might indicate. Thus, in one case, the Board ruled that no impasse existed even though bargaining had been going on for over eleven months. More importantly, the practical impact on management of having to bargain before making and implement-
ing an operational change will many times be severe.

The requirement of advance notification to and discussion with the union inevitably slows action, and delay itself may block the change. The possibility that confidential plans, like those for a plant relocation, may become public information may make the contemplated action impractical. More important, such advance discussion effectively opens the possibility to the union of blocking, delaying, or modifying the contemplated action by threat or use of economic pressure. This introduces a new factor into the managerial decision. Estimates of cost savings from a contemplated change in operations must now take into account possible losses and uncertainties due to such economic pressure. Concessions and compromises may be made which would not otherwise be made. From the immediate viewpoint of the affected employees and the union, of course, such ability to forestall action is exactly the effect desired, but it must be recognized that it restricts the ability of the individual enterprise to achieve optimum operating results and the ability of the economy as a whole to adjust to changing conditions.

173. Algoma Plywood & Veneer Co., 26 N.L.R.B. 975, rev'd, 121 F.2d 602 (7th Cir. 1941).
Clearly, therefore, the requirement that employers bargain to impasse before making operational changes can have the effect of preventing such changes because of the crippling delays which bargaining often entails. Recently, however, a more direct and potentially more serious threat to management's ability to initiate change has arisen from the Labor Board. The source of this threat has been a reinterpretation of section 8(d), which provides that a party to a collective bargaining agreement cannot "terminate or modify" the contract without first sending certain notices to the other party and to federal and state mediation agencies. In addition, section 8(d) requires that a party to a collective bargaining agreement continue "in full force and effect . . . all the terms and conditions of the existing contract . . . until the expiration date of such contract . . . ."

Although hints of it have appeared earlier, this threat made its first full appearance in C & S Industries, Inc., where the employer unilaterally instituted an incentive pay system. The contract provided for specific hourly rates of pay for each job classification and was silent as to any form of wage incentive system. In addition, the contract provided that "there shall be no change in the method of payment of any employee covered by this agreement without prior negotiations and written consent of the Union." The Board found that the employer had violated section 8(a)(5) by acting unilaterally. But more importantly, it found the institution of the incentive system to be violative of section 8(d) regardless of its unilateral character because it constituted a "modification" of the agreement without compliance with sources such as labor unions can be high:

The effect of this denial of autonomy and the ability of the technostructure to accommodate itself to changing tasks has been visibly deficient operations. Delay occasioned by checking decisions has added its special dimensions of cost. In business operations a wrong decision can often be reversed at little cost when the error becomes evident. But the cost of a delayed decision—of the men and capital that stand idle awaiting the decision—cannot be retrieved.


175. In United Telephone Co., 112 N.L.R.B. 779, 781 (1955), the Board ruled the unilateral elimination of overtime did not constitute a violation of § 8(d), contra John W. Bolton & Sons, Inc., 91 N.L.R.B. 989 (1950).


the notice requirements of section 8(d).\textsuperscript{178}

A similar case is *Huttig Sash and Door Company, Inc.*,\textsuperscript{179} where the employer reduced the wages being received by certain employees. The employees had been receiving wages in excess of the contract minimums for the classifications and the reduction was to the stated contract minimums. Although the employer had given the union advance notice of the reduction and had engaged in some discussion with the union about the change, the Board found that this did not constitute bargaining because the employer had decided definitely to make the reduction prior to its discussions with the union. More importantly, according to the Board, even if the employer had bargained to an impasse on the subject of the wage reduction, the reduction would still have constituted an unlawful refusal to bargain because the employer had not complied with section 8(d). The Eighth Circuit agreed, holding that:

> In any event, the notices prescribed by § 8(d) . . . were admittedly not given. Even if a genuine bargaining impasse had come about, this, on the facts here, does not eliminate the necessity of compliance with the notice provisions.\textsuperscript{180}

In evaluating the validity of the Board's literal interpretation of section 8(d), it is important to remember that in 1947 Congress rejected a proposal which would have made breach of a collective bargaining agreement an unfair labor practice.\textsuperscript{181} Any construction of section 8(d) therefore must be consistent with the rule that a breach of a collective bargaining agreement is not per se an unfair labor practice.\textsuperscript{182} And it is precisely here that the Board's reading of section 8(d) runs into problems for it is clear that under the Board's current interpretation, every breach is a "modification." Interestingly enough, the Board has applied the rule quite faithfully to unions. Thus, where a union strikes in violation of an explicit contractual no-strike commitment, the Board has held that this does not constitute a violation of section 8(d), despite the

\begin{itemize}
\item \textsuperscript{178} Id. at 458. \textit{See also} Century Papers, 155 N.L.R.B. 358 (1965).
\item \textsuperscript{179} 154 N.L.R.B. 811 (1965), enforced, 377 F.2d 964 (8th Cir. 1967).
\item \textsuperscript{180} 377 F.2d 964, 968 (1967).
\item \textsuperscript{181} H.R. Misc. Doc. No. 510, 80th Cong., 1st Sess. 41-42 (1947): \textit{1 Legislative History Of The Labor Management Relations Act, 1947} at 545-46 (Gov. Print. Off. 1948). The House Conference Report states that "once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual process of the law and not to the National Labor Relations Board." \textit{Id.} at 542.
\end{itemize}
fact that such strike is no less a "modification" of a no-strike clause than is the institution of an incentive pay plan a "modification" of a wage article.  

It has long been recognized that:

[Management] in the performance of its function is necessarily an instigator of change, a responder to change. Management is operating in an economic environment within which change is the rule. The pressures of economic competition force it to be responsive to changes that are occurring around it. Thus, for management change is the law of life...  

In order to reconcile management's need to effect necessary operational changes and the social desirability of allowing employees to have a voice in the determination of their working conditions, the practice in this country has been to limit bargaining over the basic terms of employment to particular times, generally at the termination of contracts.

The consummation of an agreement reflects in part the desire of the parties for a stabilization of applicable principles over a period of time, and the collective agreement ordinarily specifies the period of time during which these principles shall prevail. If each projected action following the signing of the agreement must be negotiated anew, what then is the purpose of the agreement? Moreover, it requires little reflection to recognize that, under the concept of the agreement now being considered, either party could, if it chose, hamstring any effective action by unilateral stubbornness.


185. Brown, Management Rights and the Collective Agreement, in Proceedings of the First Annual Meeting, Industrial Relations Research Association 145, 147 (1949). To the same effect is Professor Taylor's observation that: "Continuous negotiation over the basic terms of employment doesn't contribute to a stable relationship and can seriously interfere with the main job of labor and management producing goods." Taylor, Government Regulation of Industrial Relations 298 (1948). Moreover, [T]he negotiation of agreements for a fixed term tends to focus the discussion of major subjects in annual and biennial negotiations, thus relieving the parties of the danger that a major controversy may arise at any time and enabling them to prepare for the kind of organized discussion which facilitates peaceful settlement.

Cox & Dunlap, supra note 28, at 1099-1100.
Since the current Board's reinterpretation of section 8(d) requires actual agreement by the union rather than merely an attempt to secure such an agreement, it poses a grave challenge to these well established principles, a much graver challenge than the mere prohibition of unilateral action. In effect, it establishes a system of joint management which some observers have likened to that operating in certain European countries. In analyzing the crippling effects which such a system has upon management's ability to initiate change, an English plant manager stated:

The major difference between the [industrial relations] system in North America and the system in the U.K. is that the method of collective bargaining in North America assigns to management a precise and specific management function which it may exercise during the term of the contract, subject only to the right of the union [representative] to [object] by filing grievances [and] process them through a procedure culminating in arbitration [if he believes management has acted in a manner inconsistent with the agreement].

The effect is that . . . management is able to produce change at a much faster rate than we are able to do in this country. For example, any change consistent with the terms of the contract may be introduced by management immediately . . . . There is a specific acknowledgment in every agreement with the trade unions that management has the right to make changes. In the U.K. because there is no enforceable recognition of management's specific functions, management must be prepared to negotiate every time it wishes to make a change. The result is that we tend to have to bargain under pressure all the time . . . . Because of this there is a tendency for the U.K. compromise [finally worked out] to be less efficient than the North American equivalent action by management . . . .

The imposition of such a system in this country by the National Labor Relations Board would be more than ironic.

186. See Fairweather, A Comparison of British and American Grievance Handling, to be published in the Proceedings of the Twenty-First Meeting of the National Academy of Arbitrators.