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# THE NATIONAL LABOR RELATIONS BOARD—IMPLEMENTER OF THE NATIONAL LABOR POLICY OR VICE VERSA?*

OWEN FAIRWEATHER**

U.S. managements bargain with unions that have grown during the last 35 years to become the most powerful in the world. The Supreme Court said recently, that Unions have come of age and hence the national labor policy should no longer emphasize "the protection of the nascent labor movement," but rather "the encouragement of collective bargaining and administrative techniques for the peaceful resolution of industrial disputes."[1]

The alternative to free collective bargaining as the process by which employee wages and benefits are established in the private sector is their establishment by governmentally sponsored tribunals—an alternative that most people do not want.[2]

* Based on a paper presented to the Missouri Bar Association at St. Louis, September 25, 1970.

** Partner, Seyfarth, Shaw, Fairweather & Geraldson, Chicago, Illinois.

1. Boys Markets, Inc. v. Retail Clerks Union, Local No. 770, 398 U.S. 235, 257 (1970).

2 The process of seeking an alternative to bargaining usually starts with a proposal for advisory fact-finding by a governmentally appointed tribunal and ends with a third party determination of wage and benefits that the employer must provide. When these are determined, governmental determination of prices, and hence profit levels, inevitably follows. The railroad industry managements now believe that advisory fact-finding under the National Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1954) merely establishes a high bargaining floor, thereby increasing the bargaining strength of the railroad unions, and they believe binding third party determination would be preferable. *See* Address by Daniel P. Loomis, Pacific Coast Transportation Institute, BNA DAILY LAB. RPT. No. 96, May 15, 1963. *See also* Nixon Message Concerning Proposed Legislation on National Emergency Disputes in Transportation, BNA DAILY LAB. RPT. No. 40, Feb. 27, 1970.

If free collective bargaining is to prevail, it must be a procedure which generally produces settlements of employee-employer contests over wage and benefits levels which are compatible with the interests of the public.

Secretary of Labor James Hodgson has identified one segment of industry where collective bargaining is in disrepair. He said that construction settlements "are consistently double national wage movement patterns—the result is bad news—bad news to the economy and bad news for the industry."[3] The standard he used to identify disrepair in collective bargaining is disproportionately high settlements due to distortions in the relative bargaining strength of the contesting parties.[4]

The claim that collective bargaining is in disrepair is also made when the level of settlements is so high that it cannot be absorbed by improvements in productivity and must be reflected in increases in prices. The annual increases in earnings since 1968 have been more than double the rate of plant productivity improvement. When this happens, the standard of living of working people does not rise. In fact, the factory worker has been sliding into an economic hole. In 1965, the average worker earned a gross pay of $107.53 per week, equal to $88.06 in real income when adjusted to 1957-1959 dollars, but by May of 1970 his gross pay was $133.67, equal to a real income of only $86.07—lower than it was five years before.[5]

3. Speech by Secretary of Labor, James Hodgson to the Labor Relations Law Section of the American Bar Association, *Collective Bargaining Today: A Potomac Perspective*, BNA DAILY LAB. RPT. No. 155, August 11, 1970.

4. The building trades, which include eighteen unions with nearly three million members in 10,000 locales, are able to . . . control the labor supply and have created an artificial labor shortage. Taking advantage of the industry's fragmentation, they have used that shortage to push up . . . wages . . . faster than manufacturing and other industrial wages. Recently the pace of the increase has been accelerating. In 1968, wage increases of 1,254,000 construction workers under collective-bargaining contracts averaged close to 8 percent for the first year of the contract; last year the rate jumped to 14 percent; in the first half of 1970, according to Labor Department figures, the 'mean adjustment' was 17.1 percent. In many instances, wages were slated to double in the next three years.

Burch, *The Building Trades v. the People*, FORTUNE, October 1970, at 95. These high settlements in construction are contributing to the general cost-push inflation by establishing inappropriate bargaining targets for other union leaders, reducing the standard of housing working people can afford, and increasing the taxes such people must pay to build needed schools, roads and public buildings.

5. Part of the wage increases from 1965 to 1970 were going for higher federal and social security taxes, but the rest has been swallowed by inflation. In construction, the workers enjoyed a real income gain. In 1965, construction workers' gross weekly income was $138.38, equal to a real income of $111.48; in May, 1970, gross weekly income was $194.44, equal to a real income of $122.76.

When price increases are being forced by exorbitant wage and benefit settlements (substantially greater than productivity improvement), many contend that wage controls should be established by the government.[6] Wage controls, of course, mean a giant step away from free enterprise toward a controlled economy; and President Nixon has said that wage and price controls should be contemplated only as a "last resort appropriate only in an extreme emergency such as all-out war."[7]

This means we intend to rely generally on free collective bargaining as the process to regulate wage and benefit levels. However, if free collective bargaining is to be the regulator, it must produce settlements that permit real incomes to rise rather than settlements which fuel an inflation which will cause serious economic hardship. When collective bargaining is evaluated as a regulator, the bargaining strength of the employer is as important as the bargaining strength of unions, because unless employers generally have sufficient power to keep the rate at which wage and benefit levels rise somewhat compatible with the rate at which productivity improves, prices will rise; and, if prices rise too rapidly, injurious inflation results.

To minimize the economic harm caused by cost-push inflation, managers should be encouraged to introduce more efficient machines and more productive procedures, referred to as the rate of productivity improvement, as fast as they practically can. If the rate of productivity improvement is maintained at the highest practical level, the maximum amount of the earnings rise will be absorbed in cost reductions and the least amount will be reflected in price increases—reducing the cost-push inflation effect of the annual increases.[8]

That the maintenance of a high rate of productivity improvement should be an important part of our national labor policy was underscored by President Nixon when he said as he announced the establishment of the National Commission on Productivity:[9]

6 For example, Senator Fred Harris proposed a board with power to impose a freeze on wages and prices. BNA Daily Lab. Rpt. No. 36, Feb. 20, 1970, A-4.

7 BNA DAILY LAB. RPT. No. 160, August 18, 1970, A-16.

8 Since 1967, the unit labor cost in manufacturing has been rising, which means the increase in plant productivity has not been sufficient to absorb the wage increases, or, stated the other way, the wages have been increasing at a faster rate than productivity. The unit labor cost index increased between August and September, 1970, 3.2% and was then 8% higher than in September, 1969. In 1967, by contrast, the index rose only 2.5%. BNA DAILY LAB. RPT. No. 210, October 28, 1970, B-1.

9. BNA DAILY LAB. RPT. No. 117, June 17, 1970.

> In order to achieve price stability, healthy growth and a rising standard of living, we must find ways of restoring growth to productivity.
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> * * *
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> In general, productivity is a measure of how well we use our resources; in particular, it means how much real value is produced by an hour of work. In the past two years productivity has increased far less than usual.
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> * * *
>
> We must achieve a balance between costs and productivity that will lead to more stable prices.

Hence, if, as the Supreme Court says, our national labor policy should be designed to encourage free collective bargaining, it must contain these two elements:

> (1) The avoidance of governmentally induced artificial shifts in the power balance between the contesting parties, which might result in settlements at levels incompatible with the public interest;[10] and,
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> (2) The encouragement of the highest practical rate of productivity improvement in production enterprise to absorb the maximum amount of the cost impact of annual wage and benefit improvements.[11]

If this is true, the National Labor Relations Board should fashion

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10. Some thoughtful observers contend that free collective bargaining cannot function as a regulator in a manner compatible with the public interest unless union power is curtailed. *See* C. LINDBLOM, UNIONS AND CAPITALISM (1949); LUTZ, INDUSTRY WIDE COLLECTIVE BARGAINING: PROMISE OR MENACE (1950); R. POUND, LEGAL IMMUNITIES OF LABOR UNIONS AND PUBLIC POLICY 122 (1958); D. RICHBERG, LABOR UNION MONOPOLY (1957); WOLMAN, MONOPOLY POWER AS EXERCISED BY LABOR UNIONS (1957); Chamberlin, *Economic Analysis of Labor Union Power*, in LABOR UNIONS AND PUBLIC POLICY 1 (1958); Roman, *Labor Unions, Intimidation and Monopoly*, 65 COM. L.J. 98 (1960). *See also* a legislative proposal, S. 2573, 87th Cong., 1st Sess. (1961). Hence, the first element of a national labor policy designed to protect free collective bargaining [identified as (1) above] which does not contemplate any diminution of union bargaining strength is a most modest policy standard against which to evaluate the past and current decisional process of the Board. On the other hand, when strikers are made eligible for poor relief payments from state funds, the state is intervening in the contest and changing the power balance. If it is proper for strikers to obtain this relief from the economic hurt of the strike, employers should be able to have the state pay interest charges during the strike period.

11. Exporting products makes jobs at home and aids in the maintenance of a sound balance of payments. Hence, increasing exports and decreasing imports should be a national policy objective. An increase will only occur if the rate of wage cost rise moderates and the rate of productivity increases. Robert W. Roosa, formerly Undersecretary for Monetary Affairs, explained:

> The only sure way to re-establish strength in the balance of payments is to increase the country's ability to compete. . . . The primary need . . . is an upward shift in the rate of investment—investment that can raise productivity, lower costs, and in general give a new thrust to the competition potential of American business.

the law which it develops in its pattern of decisions in a manner that is consistent with these two elements of policy. However, an examination of Board decisions in recent years suggests that the Board has not been fashioning the law in a manner consistent with these two elements needed to protect free collective bargaining, but rather on the assumption that our national labor policy is still the protection of a fledgling labor movement and maximization of union bargaining power—objectives which the Supreme Court says are now outmoded.

If the two simple elements of national labor policy set forth above are essentials and free collective bargaining is to function as a regulator, it should then be determined whether the decisional process of the National Labor Relations Board can still implement them or whether the law developed by the Board emphasizing a different policy objective has been so hardened that legislative change would be needed to redirect the development of the law.

Those who worry whether the Board will implement or block these two simple elements of national labor policy breathed a sigh of relief on August 29 of last year as they read the majority opinion in *Ex-Cell-o.*[12] The Trial Examiner had found that Ex-Cell-O had refused to bargain because it wanted to obtain a court review of certain election procedures, a review that could only be obtained by an appeal of a refusal to bargain determination by the Board. However, because of the delay the appeal would cause in the commencement of actual bargaining, the Trial Examiner recommended to the Board that Ex-Cell-O be ordered to pay to the employees an amount equal to the wage increase which would have been granted to the employees if Ex-Cell-O had negotiated an agreement with the union instead of seeking court review. The amount of the increase in wages that would have been granted if there had been bargaining would be only a speculation, but since the retroactivity period by the time *Ex-Cell-O* was decided was a few days under five years, the penalty for refusing to bargain to obtain court review would have been astronomical. Members McCulloch and Brown voted to support, and Members Fanning and Jenkins voted not to support the unusual remedy recommended by the Trial Examiner, and a deadlock resulted. It was not until Chairman Miller joined the Board that the tie was broken. He sided with Fanning and Jenkins and the recommended penalty was rejected.[13]

12. 185 N.L.R.B. No. 20 (1970).

13. Three similar retroactive penalty 8(a)(5) cases were deadlocked and decided on a basis similar to *Ex-Cell-O—Zinker Foods, Herman Wilson Lumber Co.* and *Rasco*

The Court of Appeals for the District of Columbia would have supported the two dissenters. During the argument of the *Tiidee Products* case[14] it was asserted that the employer refused to bargain by raising "frivolous" issues at the bargaining table. The court remanded the case to the Board with the suggestion that the employer be punished for his refusal to bargain by the assessment of a retroactive wage increase. However, the *Ex-Cell-O* decision is so written that the remedy suggested by the court will not be issued by the Board. The majority opinion said it would be improper to assess a retroactive wage increase penalty even though the refusal to bargain was "frivolous" rather than "debatable," because what is "debatable" to the Board may appear "frivolous" to a court, and vice versa.

In addition to the reasons given in the Board's majority opinion in *Ex-Cell-O,* the real service to the public rendered by the majority when it closed the door to the assessment of a financial penalty against an employer in an 8(a)(5) refusal to bargain situation is the fact that to have done otherwise would have converted managements into weaker bargainers. Managements would have had to add to the loss from a strike the risk of the financial loss that the Board could assess if it, at a union's request, evaluated the proposals made by the management and found the company a law violator because its proposals were too *hard,* as the Board did in *Stuart Radiator Core.*[15] There, the employer proposed three well drafted clauses to the union. One clearly reserved to management the right to manage; another clearly stated that the union waived bargaining during the agreement (similar to the well-

*Olympia*—emphasizing the broad impact on the power balance had *Ex-Cell-O* been decided the other way.

14. International Union of Electrical, Radio and Machine Workers (Tiidee Products) v. NLRB, 426 F.2d 1243 (D.C. Cir. 1970). The final curtain has not been run down on *Ex-Cell-O,* because an appeal has been filed by the General Counsel to the Circuit Court of the District of Columbia which has expressed its viewpoint in the *Tiidee* remand. Tiidee Products has filed a petition for certiorari. BNA DAILY LAB. RPT. No. 178, Sept. 14, 1970, A-1.

15. 173 N.L.R.B. No. 27 (1968). Senator Walsh, Chairman of the Senate Committee, explained the obligation to bargain being incorporated into the law:

> . . . The bill indicates the method and manner in which employees may organize, . . . manner of selecting their . . . spokesmen, and leads them to the office door of their employer with the legal authority to negotiate for their fellow employees. The bill does not go beyond the office door. It leaves the discussion between the employer and the employee, and the agreements which they may or may not make, voluntary . . . .

Smith, *The Evolution of the Duty to Bargain Concept in American Law,* 39 MICH. L. REV. 1065, 1087, 1085 (1941). The Board in *Stuart Radiator Core,* 173 N.L.R.B. No. 27 (1968), did what Congress said would not be done. It looked over the shoulder of the employer and evaluated the proposals he made and then, saying that the proposal would be unacceptable to the union, held the employer guilty of violating the law.

known agreement between General Motors and the UAW);[16] and the third clearly stated that the agreement was the only agreement between the parties.

The Board found the company guilty of a refusal to bargain because the proposal of these three clauses was "more than hard bargaining," stating that "the [company] certainly could not have offered [these clauses] *with any reasonable expectation* that they would be acceptable to the union, we can only conclude that the [company] did not approach negotiations in good faith." Therefore, the Board is saying, or at least said, that acceptability of a proposal by the union is a proper standard to determine an employer's good faith as a bargainer. What a surprise this would be to the senators who urged their fellow senators to vote for the Act in its original form with these words:[17]

> The Committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. . . . *[T]he essence of free collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.* (Emphasis added)

Free collective bargaining is based on the premise that the power on the union side is the economic hurt a strike can cause the employer by no sales income and loss of customers, and the power on the employer's side is the economic hurt a strike can cause employees by loss of wage income (reduced substantially when strikes occur when temporary work is readily available). The risk of additional financial penalty assessed by a government board against the employer would, of course, be an arbitrary increase in the unions' bargaining power and would be a Board decision inconsistent with the first of the two essential elements in the national labor policy.

Some might say the damage to free collective bargaining that would have been caused if *Ex-Cell-O* had been decided the other way is overstated when illustrated by the penalties that could be assessed against an employer-bargainer proposing clauses similar to those in *Stuart Radiator Core.* It might even be pointed out that the Board

16. C.B.N.C. 21-1 (BNA 1970).

17. S. REP. No. 573, 74th Cong., 1st Sess. 12 (1935).The 80-day injunction is a governmental action which arbitrarily blocks the free collective bargaining process for 80 days. This interference with the process is not a rejection of it and is justified on the ground that, in the particular contest, too many others are hurt by the process and more bargaining time should be provided. This procedure is in no way inconsistent with the thesis that the public is vitally interested in settlements produced by free collective bargaining as opposed to a bargaining process where one party is aided by a government board to obtain excessive concessions from the other.

members may now realize that that decision went too far. In *Cartriseal,*[18] and in its second *Long Lake Lumber*[19] decision, the Board found that the company did not violate the law when it proposed three clauses similar to those found "too hard" in *Stuart Radiator Core.* However, even though the Board may have backed away from *Stuart Radiator Core* in these latter decisions, the Board is still saying that it has the right to evaluate the "hardness" of proposals made by the employer, and if it determines that the proposals are too "hard" the company can be found guilty of a refusal to bargain.[20]

Furthermore, the denial of a retroactive penalty in *Ex-Cell-O* should not cause managements to become too relaxed. The majority said that even though retroactive pay would be an improper remedy for an 8(a)(5) violation, an injunction under 10(j) or 10(e) might well be a proper remedy to cause an employer to cease a refusal to bargain.[21] What does this mean? Could the Board order an employer to withdraw a proposal or modify one if it thought the proposal was *too hard* and could not have been offered "with any reasonable expectation that [it] would be acceptable to the union,"[22] and then issue an injunction directing the employer to adjust his bargaining stance?

Even prior to the Board's decision in *Ex-Cell-O,* the General Counsel had obtained a 10(j) injunction from a District Judge in northern Indiana ordering the Portage Realty Corporation[23] to refrain,

> . . . from failing or refusing upon request to submit counterproposals for a collective bargaining agreement;
> from demanding or insisting upon unreasonable or oppressive concessions from the unions.

If decisions like this become common, employers will become *weaker*

18. 178 N.L.R.B. No. 47 (1969).

19. 182 N.L.R.B. No. 65 (1970).

20. If the Board members continue to espouse this view, they will be confessing that they were not listening to the Supreme Court. In H.K. Porter Co., Inc. v. NLRB, 397 U.S. 99 (1970), the Court said the Board has no right to order an employer to agree to a checkoff clause. This means the Board should not concern itself with the merits or demerits of the proposals of the employer or the union. The Supreme Court's opinion was the basis of the Board's opinion in *Ex-Cell-O.* This recognition of the teaching of *Porter* may cause the Board to abandon its evaluation of the "hardness" of proposals made by the employer.

21. A 10(e) injunction against *Ex-Cell-O* has been petitioned for by the Board. BNA DAILY LAB. RPT. No. 201, Oct. 15, 1970, AA-1.

22. Stuart Radiator Core, 173 N.L.R.B. No. 27 (1968).

23. Little v. Portage Realty Corp., ____ F. Supp. ____, 73 L.R.R.M. 2971 (N.D. Ind. 1970).

bargainers because the threat of punishment for contempt will be added to the risk of loss from a strike, increasing the unions' bargaining power. How is the employer to judge what the Board or court might find "unreasonable" or "oppressive"? The use of a 10(j) or 10(e) injunction, just as an order of retroactive pay to enforce employer compliance to what the Board believes the employer should propose or not propose at the bargaining table, is a governmental interference with the free collective bargaining process. Bargaining then ceases to be free and is not the institution now being relied upon as the regulator? When the government arbitrarily changes the relative bargaining strength of either of the two contestants, the first of the two elements of national labor policy, identified earlier herein, has been violated.

Consistent with the principle that free collective bargaining should be encouraged and arbitrary shifts of bargaining power by Board decisions should be avoided, the Board, after a strong nudge from the Supreme Court, has cleared off more of the legal cobwebs that had accumulated on the employer's right to lockout, making it more clear that the lockout was a counter to the union's strike power. The Board has held that, where a strike is called by the union against another employer in a group of employers who traditionally are forced to follow the pattern established by the first settlement in the group (situations like the negotiations between the UAW and the Big Three auto companies), any one of the employers can lock out. In *Evening News Association,*[24] the employees of one newspaper who were members of a union striking another newspaper were locked out because their employer knew the settlement at the other paper would be his pattern.[25]

Fortunately, as unions grew in power and settlement levels rose, U.S.

24. 166 N.L.R.B. 219 (1967). The Board's original decision in *Evening News* found the lockout to be a violation of Sections 8(a)(1) and 8(a)(3) of the Act. 145 N.L.R.B. 996 (1964). The sixth circuit reversed the Board's decision, 346 F.2d 527 (6th Cir. 1965), and on appeal the Supreme Court vacated, 382 U.S. 374 (1966), and instructed the sixth circuit to remand the case back to the Board for reconsideration in the light of the Supreme Court's opinion in American Ship Building Co. v. NLRB, 380 U.S. 300 (1965). It was pursuant to this ordered reconsideration that the Board held the lockout to be lawful. Since the Board's second decision and the sixth circuit's second review, 404 F.2d 1159 (6th Cir. 1968), are reconsiderations directed by the Supreme Court and certiorari was denied, 395 U.S. 923 (1969), the case is most significant.

25 In Davis Friedland, 158 N.L.R.B. 571 (1966), a lockout by contractor-employers in an employers' association in support of employers in the neighboring association was held to violate the law even though employees from the neighboring association were working for member contractors in the other association. This case appears inconsistent with *Evening News* and certainly is detrimental to the efforts of contractor-employers to improve their bargaining strength *vis-a-vis* the building trades unions which has caused the problems reported in note 4 *supra.*

managements have been able to raise the productivity of manufacturing plants. Otherwise, prices would not be as low as they are today. For example, the cost of an automatic washing machine has risen only 9.6% in the last 15 years, whereas the wages paid to the employees who make the machines rose nearly 100% in the same period.[26] The wage increases that were not passed on in price increases were absorbed in reduced production costs that managements have been able to obtain through improved machinery and more efficient procedures.

In some countries, managements have not been able to introduce improvements fast enough to avoid gigantic unit labor cost increases. This has been especially true in England. There, managements in many industries have been retarded by labor relations procedures which emphasize advance joint consultation on all managerial changes that affect employees. If a dispute arises, the status quo must be maintained until agreement with the union is reached or the dispute is processed to impasse months later before a management court in York, England.[27] These procedures create a swampy path through which an English management, attempting to improve efficiency, must slowly struggle to improve the productivity of a plant.

A very articulate Englishman, an executive of a plant in Coventry, England, put his finger squarely on the problem. He explained to the Royal Commission, sitting in London, why English managements have not been able to introduce improvements as fast as their counterparts in North America, causing English plants to slip behind in productivity. What he said is very important:[28]

> 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 a union representative to object by filing grievances and processing them through a procedure culminating in arbitration if he believes management has acted in a manner inconsistent with the agreement.
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> The effect is that . . . management is able to produce change at a much faster rate than we are able to do in this country. Any change

26. Maytag Bulletin, September 10, 1970. While wages increased nearly 100% in the past 15 years, the cost of Maytag dryers declined 6.5%.

27. H. SEYFARTH, L. SHAW, O. FAIRWEATHER & R. GERALDSON, LABOR RELATIONS AND THE LAW IN THE UNITED KINGDOM AND THE UNITED STATES 83 (1968).

28. *Testimony of H.J. Hebden*, in ROYAL COMM'N ON TRADE UNIONS AND EMPLOYERS' ASSOCIATIONS, MINUTES OF EVIDENCE 25, 1004 (1966).

> 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.
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> 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 that the compromise when finally worked out will be a less efficient change than the North American equivalent action taken by management. . . .

In labor relations language, this Englishman was explaining that the success of U.S. plants is based on what is referred to as the "reserved rights principle". This simply means that managements, hired to manage, must have the right under the labor agreement to promptly initiate change, subject to one limitation: that the change that is initiated does not violate some specific provision of the agreement. This simple "reserved rights principle" has permitted the many needed productivity improvements to be introduced quickly into U.S. plants, and has avoided the debating society condition in U.S. plants which continuous bargaining over every managerial change has generated in English plants.[29]

The simple and understandable "reserved rights principle" which has permitted U.S. plants to increase productivity rapidly is deeply impressed upon the labor relations of this country. For over 35 years arbitrators have respected it.[30] One arbitrator, after analyzing the

29. The problem caused by continuous day-to-day debate in a production plant over efficiency improvements that management desires to introduce was well expressed by William Leiserson, a former member of the National Labor Relations Board, when he said:

> . . We do not have to be versed in the philosophy of management to understand that it is not practical to mix the policy-making functions of an organization with the operating functions.
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> It does not work and it satisfies no one. It leads to maneuvering and argument about policy among operating officials whose sole duty should be to carry out promptly and efficiently the operating orders . . . . It turns a production organization into a debating society.

As quoted in Fairweather & Shaw, *Minimizing Disputes in Labor Contract Negotiations*, 12 LAW & CONTEMP. PROB. 308 (1947).

30 Omaha Cold Storage Terminal, 48 Lab. Arb. 24 (1967) (Doyle, Arbitrator); Olin Matheson Chemical Corp., 42 Lab. Arb. 1020 (1964) (Klamon, Arbitrator); American Sugar, 38 Lab Arb. 714 (1961) (Quinlan, Arbitrator); Colorado Fuel & Iron Corp., 9 Basic Steel Arb. 6697, 6699 (1961) (Valtin, Arbitrator); Texas-Portland Cement Co., 61-2 ARB ¶ 8343 (1961) (Autrey, Arbitrator); Great Lakes Steel Corp., 8 Basic Steel Arb. 5603 (1959) (Alexander, Arbitrator); Reynolds Metals Co., 25 Lab. Arb. 44 (1958) (Prasow, Arbitrator); Aurora Gasoline Co., 29 Lab.

decisions of many other arbitrators, said that ". . . there are countless hundreds of arbitrators, who follow and accept the reserved rights theory of management rights . . . ."[31]

Arbitrator Singletary explained:

> The overwhelming line of authority, however, seems to be that it is a fundamental principle and a construction of collective bargaining agreements that Management continues to retain all the rights that it had prior to entrance into an effective collective bargaining contract, which it did not give up in that contract.
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> This same principle has been stated in different ways, such as:
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> 'These are the residual rights of the Company, rights which remain with the Company because it has no agreement with the Union to forego them.'
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> 'These rights may be contracted away or modified by agreement, but are not removed by inference.'
>
> It has been generally accepted throughout the United States that managements' rights not specifically surrendered in a collective bargaining agreement are reserved to management.[32]

In this connection it should be noted that the Supreme Court has pointed out that arbitrators are the group that has the expertise when the construction of a labor agreement is in issue.[33]

Arthur Goldberg, when he was General Counsel for the United Steelworkers, respected it. He said, if plants are to be efficiently

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Arb. 495 (1957) (Howlett, Arbitrator); Olin Mathieson Chemical Corp., 27 Lab. Arb. 520 (1956) (Williams, Arbitrator); Monsanto Chemical Co., 27 Lab. Arb. 736, 743 (1956) (Roberts, Arbitrator); Babcock & Wilcox, 26 Lab. Arb. 172 (1956) (Kates, Arbitrator); United Wallpaper, 25 Lab. Arb. 188 (1955) (Sembower, Arbitrator); Celotex Corp., 24 Lab. Arb. 369 (1955) (Reynard, Arbitrator); Stewart-Wagner Corp., 22 Lab. Arb. 369 (1954) (Burns, Arbitrator); Great Lakes Carbon, 19 Lab. Arb. 797 (1952) (Wettach, Arbitrator); U.S. Potters Assn., 19 Lab. Arb. 213 (1952) (Uible, Arbitrator); McKinney Mfg. Co., 19 Lab. Arb. 291 (1952) (Reid, Arbitrator); Illinois Bell Telephone, 15 Lab. Arb. 213 (1950) (David, Arbitrator); Sommers & Co., 6 Lab. Arb. 283 (1947) (Whiting, Arbitrator); Blackhawk Mfg., 7 Lab. Arb. 943 (1947) (Updegraff, Arbitrator); Novelty Shawl, 4 Lab. Arb. 655 (1946) (Wallen, Arbitrator); Goodyear Tire Co., 1 Lab. Arb. 557 (1946) (McCoy, Arbitrator).

31. Mead Corporation, 46 Lab. Arb. 459 (1966) (Kilamon, Arbitrator).

32. American Sugar Refining Company, Chalmette Refinery, 61-1 ARB ¶ 8137 at 3664 (1961).

33. In United Steelworkers of Am. v. Warrior & Gulf N. Co., 363 U.S. 574, 582 (1960), the Court said that, when it comes to interpretation of labor agreements, the arbitrator has the expertise because he "is usually chosen because of the parties' confidence in his knowledge of the common law of the shop . . . the parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective agreement permits such factors as the effect upon productivity of a particular result. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance because he cannot be similarly informed."

operated, the management must have the right to direct efficiency improvements and the union should challenge the directed change *only* if it is believed that the change is inconsistent with some specific provision of the agreement.[34]

That the intention of the parties when they agreed to the typical management rights clause was to reserve to management the right to initiate changes not inconsistent with some specific clause of the agreement would seem to flow from the essentially uniform determination by arbitrators for 35 years that this was their intention. Furthermore, since construing management clauses to "reserve the right" to initiate changes rapidly is a reason why U.S. managements have initiated productivity improvements with great speed, enabling wage cost increases to be absorbed and real income to rise, its erosion should be prevented. For this very simple reason, the President's National Commission on Productivity[35] should make the protection of the "reserved rights" construction that arbitrators give to management clauses one of its primary goals.

During the last eight years the Board members, who the Supreme Court noted do not have any special expertise in labor contract interpretation,[36] have felt compelled to construe the typical management clause differently than it has been construed by the parties and arbitrators for 35 years. They have said it was not intended by the union to be its agreement to the general understanding that management reserved the right to manage—that is, the right to unilaterally initiate changes in plant operations that are not inconsistent with a specific provision of the agreement.

The acorn from which the large oak grew which is threatening to smother the long-established "reserved rights" construction of management clauses was planted in the *Fibreboard* decision in 1962.[37]

34. Goldberg, *Management's Reserved Rights: A Labor View*, in MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS 118, 123 (1956).

35. *See* note 9 *supra*.

36. In Vaca v. Sipes, 386 U.S. 171, 181 (1967), the Court pointed out that Board members do not have any more expertise in labor agreement interpretation than courts when reviewing "the substantive positions taken and policies pursued by a union in its negotiation of a collective bargaining agreement and in its handling of the grievance machinery; as these matters are not normally within the Board's unfair labor practice jurisdiction, it can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts . . . ." Board Chairman Edward B. Miller, sworn in on June 3, is the only member of the Board who has been personally involved in the collective bargaining process. For backgrounds of the other members *see* Stewart & Engeman, *Impasse, Collective Bargaining and Action*, 39 U. CIN. R. REV. 233, 240 n. 32 (1970).

37. Fibreboard Paper Products, Corp., 130 N.L.R.B. 1558 (1961), *reopened and redecided*, 138

There, the Board said that a management was obligated by law to consult with the union in advance before initiating a plan to reduce costs by having some work currently being performed by employees performed by an outside contractor and to bargain over this cost-reduction plan to an agreement with the union or to an impasse. Obviously, the plan to subcontract resulted from a "make or buy" cost analysis of a type made hundreds of times each day by U.S. managements. Such analysis is merely the regulator we call competition operating to generate the pressures we rely upon as a matter of national policy to improve plant productivity or to cause work to flow to where it can be performed at a lower cost—with either alternative holding down price rises to the benefit of the consumer.[38]

In spite of some of the attempts of some courts to limit the scope of the *Fibreboard* decision,[39] the Board in *Ozark Trailers*[40] in 1966

N.L.R.B. 550, *aff'd*, 322 F.2d 411 (D.C. Cir. 1962), *aff'd*, 378 U.S. 203 (1964). The continuing legal obligation to bargain during the term of the agreement was first enunciated by the Board in Tide Water Associated Oil Co., 85 N.L.R.B. 1996 (1949), but the implementation in the managerial decision-making area did not start until 1962.

38. The Supreme Court recognizes the role of competition as a regulator and interprets the Sherman Act as a legislative effort to proscribe all restraints on the "free and natural flow of trade in the channels of interstate commerce" and the flow of work to a subcontractor should be part of the free and natural flow of trade. Eastern States Retail Lumber Dealers Assn. v. United States, 234 U.S. 600, 609 (1914). *See* Times Picayune Pub. Co. v. United States, 345 U.S. 594, 605 (1953); Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951).

39. In NLRB v. Adams Dairy, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966), a finding that a unilateral change in method of distribution of products without prior bargaining was reversed because "*To require Adams to bargain about its decision to close out the distribution end of its business would significantly abridge its freedom to manage its own affairs.* Bargaining is not contemplated in this area under the history and usage of § 8(a)(5)." 350 F.2d at 111. (Emphasis added) Similar reversals of the Board's view that an employer must bargain before it can close part or all of its operations are: Morrison Cafeterias, Inc. v. NLRB, ___ F.2d ___, 74 L.R.R.M. 3048 (8th Cir. 1970); NLRB v. Drapery Mfg. Co., 425 F.2d 1026 (8th Cir. 1970); NLRB v. Thompson Transport Co., 406 F.2d 698 (10th Cir. 1969); NLRB v. Transmarine Navigation Corp., 380 F.2d 933 (9th Cir. 1967); NLRB v. William J. Burns Int'l Detective Agency, 346 F.2d 897 (8th Cir. 1965); NLRB v. Royal Plating & Polishing Co., 350 F.2d 191 (3d Cir. 1964). The Board's finding that the employer must bargain (1) before instituting new operating procedures at a freight terminal even though it resulted in the layoff of some 15 employees was reversed in NLRB v. Dixie Ohio Express Co., 409 F.2d 10 (6th Cir. 1969); (2) before changing food prices in the cafeteria operated by an outside party, Westinghouse Electric v. NLRB, 387 F.2d 542 (4th Cir. 1967); (3) before changing prices in a cafeteria operated by the employer, McCall Corp. v. NLRB, __ F.2d __, 75 L.R.R.M. (4th Cir. 1970); (4) before subcontracting where the detriment to employees in the bargaining unit was not established, Puerto Rico Telephone Co. v. NLRB, 359 F.2d 982 (1st Cir. 1966); District 50, United Mine Workers v. NLRB, 358 F.2d 234 (4th Cir. 1966).

40. Recently the Board found violations where the employer was clearly improving efficiency or profitability but failed to engage in advance bargaining over the change up to the point of impasse when installing remote control equipment which dispensed with the cost of five employees,

made it perfectly clear that the new interpretation it was grafting onto the law was intended by the Board to mean that a management must either (1) discuss in advance with the union every intended change in manufacturing procedures which would affect the employees and bargain concerning the change until agreement is reached or impasse occurs, or (2) obtain from the union, and usually at a price,[41] a specific waiver of the union's right to bargain in advance over the change in manufacturing procedures. The Board said:

> We recognize, of course, that the Supreme Court's decision in *Fibreboard* was limited to the type of contracting out involved in that case, and did not explicitly deal with the question whether an employer must bargain concerning a decision to terminate a portion of its operations. We further recognize that two Courts of Appeal have held, in reliance on the concurring opinion in *Fibreboard,* that a decision of this nature need not be bargained about. Thus, in *N.L.R.B. v. Adams Dairy, Inc.,* 350 F.2d 108, 60 L.R.R.M. 2084, *cert. denied,* 382 U.S. 1011, 61 L.R.R.M. 2192, the Court of Appeals for the Eighth Circuit held that a managerial decision to substitute independent contractors for employees in the distribution of the employer's products was outside the mandatory bargaining requirements of the Act on the ground that it involved a 'basic operational change' and a 'partial liquidation and a recoup of capital investment.' Similarly, in *N.L.R.B. v. Royal Plating*

Richland, Inc., 180 N.L.R.B. No. 2, 73 L.R.R.M. 1017 (1969); when changing to bulk shipment from shipment in bags to save labor cost, Arkansas Rice Growers Association, 171 N.L.R.B. No 14, 68 L.R.R.M. 1453 (1968); when increasing "delivery and handling" charge to customers which narrowed the margin within which the employee-salesman on commission could negotiate car sales; when establishing more stringent safety rules to lower accident costs, NLRB v. Gulf Power Co., 384 F.2d 822 (5th Cir. 1967); when changing the end-of-shift clean-up procedure, Wald Mfg. Co. v. NLRB, ___ F.2d ___, 74 L.R.R.M. 2375 (6th Cir. 1970); when changing employment application form to include agreement to use of polygraph employer, NLRB v. Laney & Duke Co., 369 F.2d 859 (5th Cir. 1966); when instituting crew size changes and other operating improvements at a freight terminal, Dixie Ohio Express Co., 167 NLRB 573 (1967), *rev'd sub nom.* NLRB v. Dixie Ohio Express Co., 409 F.2d 10 (6th Cir. 1969).

41 *Before Fibreboard,* the traditional reserved rights view was that management possesses all rights needed to perform its function and initiate change unilaterally and rapidly unless the union has persuaded the management to specifically limit its managerial rights. *After Fibreboard,* the Board is saying that if management wants to perform its function unilaterally and rapidly it must obtain from the union a waiver of its statutory right to block change until the union agrees to the desired change or a bargaining impasse has been reached. This shift has placed the union in a position to exact a price for granting waivers and hence represents a development inconsistent with the first of the two elements of national labor policy discussed at the outset of this paper. However, since the Board's views, unless modified, will have a more adverse effect on management's ability to rapidly increase plant productivity so as to offset the cost-push effect of annual wage cost increases, the Board's view is evaluated herein under the second of the two essential elements of national labor policy.

> & *Polishing Co.*, 350 F.2d 191, 60 L.R.R.M. 2033, the Court of Appeals for the Third Circuit held that a decision to shut one of an employer's two plants involved a 'management decision to recommit and reinvest funds in the business' and a 'major change in the economic direction of the Company,' and, accordingly, that the employer was under no duty to bargain with the union respecting that decision.
>
> With all respect to the Courts of Appeals for the Third and Eighth Circuits, we do not believe that the question whether a particular management decision must be bargained about should turn on whether the decision involves the commitment of investment capital, or on whether it may be characterized as involving 'major' or 'basic' change in the nature of the employer's business.

After this decision, it was clear that the Board intended to impose upon U.S. industrial managers the obligation to engage in advance joint consultation over any change the management desired to initiate and to refrain from making the change until the union agreed to it or until an impasse occurred. This joint consultation with the obligation to maintain status quo until agreement or impasse is the English procedure described by the Englishman as the root cause for the low rate of productivity improvement in plants in that country. The Englishman also said that, to avoid delays, compromises would be worked out which caused the change ultimately made to be less efficient than it would otherwise have been. The following statement in *Ozark* indicates that the Board recognized that its new views would likewise produce compromises which would mean that the change actually made would not be the most efficient change. It said:

> [D]espite management's interest in absolute freedom to run the business as it sees fit, the interests of employees are of sufficient importance that their representatives ought to be consulted in matter[s] affecting them, and that the public interest, which includes the interests of both employers and employees, is best served by subjecting problems between labor and management *to the mediating influence of collective bargaining.* (Emphasis added)

When it comes to bargaining over a managerial change which affects employees, *the mediating influence of collective bargaining* can only mean that the change ultimately introduced will affect fewer people and reduce cost less than would have otherwise occurred.[42]

42. Some observers argue that the legal obligation to bargain changes to improve efficiency to an agreement or an impasse can be justified on the ground that the bargaining produces the communication which will forewarn those affected by the change and reduce the suddenness that

The slow strangulation of the "reserved rights" construction of management clauses started with the *Fibreboard* decision, but it was the very narrow meaning given to the typical management rights clause by the Board that has done the actual damage. The typical clause was construed not to constitute a waiver by the union of its right to bargain over managerial changes which the management planned to introduce to reduce costs, because a waiver of a statutory right could only be established by a general reservation of the right of management to make changes. Only if the intended change was fully discussed with "alternatives conscientiously explored" and the waiver of the right to advance bargaining recorded in specific language, could the change be initiated without advance consultation.[43] For example, a typical management rights clause in the *Weltronic* labor agreement says:[44]

> The union agrees that the management of the company has the right to manage the affairs of the business, to control its properties, and equipment and to direct the working forces . . . in accordance with and

might generate a labor dispute which might obstruct commerce. Sigal, *The Evolving Duty to Bargain*, 52 GEO. L.J. 384-85 (1964). Any competent management knows that when employees are being asked to change working procedures or use new machines which will displace employees, advance explanation is wise and such explanations are made. The slowing down of the rate of productivity improvement by requiring the illusory point of impasse to pass before making the change cannot be justified on the ground that employees might otherwise violate the no-strike commitment assumed in the labor agreement. The law should support the benefits society gains from a rapid rate of productivity improvement and should not be designed to appease potential wildcat strikers.

43 Even where, in addition to a management clause reserving the right of management to initiate managerial change, there was a clause in the agreement stating that the union waives its statutory right to engage in bargaining during the life of the agreement, no waiver is found. Most waiver clauses are similar to the one in the General Motors agreement which says:

> 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.

This clause was held to be ineffective as a waiver of bargaining in International Union, United Automobile Workers v. NLRB, 381 F.2d 265 (D.C. Cir.), *cert. denied*, 389 U.S. 857 (1967). *Cf* United Drop Forge Div., 171 N.L.R.B. No. 73, 68 L.R.R.M. 1129 (1968); Litton Precision Products, 156 N.L.R.B. 555 (1966).

44. 173 N.L.R.B. No. 40 (1968), *enforced*, Weltronic Co. v. NLRB, 419 F.2d 1120 (6th Cir. 1969)

> subject to the terms of this agreement. Said functions of management include the right to hire, discharge or discipline for just cause, to establish new jobs and discontinue jobs, maintain discipline and efficiency of employees, to determine the type of products to be manufactured, the location of plants, plan scheduling of production, methods, processes and means of manufacture.

But in spite of these clear words, the Board found the union that signed the agreement containing them could not have intended to waive its statutory right to bargain over managerial change. Hence the management was obligated by the statute, the Board said, to consult with the union in advance over a change the management wanted to initiate to improve plant efficiency and to bargain over the proposed change until agreement is reached or impasse occurs.

The Board knew that a construction of labor agreement language which rejected the finding of a waiver from a clause reserving the right to management to initiate change subject to any specific limitations in the agreement, plus a clause in which the union agreed to waive its statutory right to bargain over managerial change, was a construction of labor agreement language contrary to the understanding of the parties because it knew this construction was contrary to the construction given this language by arbitrators. It also knew its construction of labor agreement language would clash with the more traditional construction and be the death knell to the "reserved right" to make changes. The Board's effort to undermine the traditional construction was made perfectly clear in a brief submitted to the U.S. Supreme Court where the Board said:[45]

> Many arbitrators . . . apply the so-called 'residual rights' theory when management takes unilateral action, holding that it is free to act unless the collective agreement expressly provides otherwise . . . . Such a doctrine, which bestows upon management all 'residual rights', *stands on its head* the established rule that a statutory waiver must be *express* and *clear*; . . . . (Emphasis added)

If, as the Englishman said, the "reserved rights" construction of the typical management clause is the secret of why productivity rises more rapidly in the U.S., this construction should be encouraged—not destroyed. Such clauses should be construed to be waivers by the union

45. Petitioner's brief at 28 n. 20, NLRB v. C & C Plywood, 385 U.S. 421 (1967).

of rights to bargain over managerial change during the term of the agreement.

If the Board in its decisional process has passed the point of no return so that management rights clauses cannot be written to accomplish their clear purpose, then the needed protection of the right to introduce change rapidly would require legislation. Fortunately, an analysis will show that legislation is not needed if the Board follows some of the guides it has announced in certain recent decisions.

About a year ago in *Marion Simcox,*[46] the Board was considering whether a management rights clause that said that "[T]he management of the yard, including . . . the extent to which locations . . . shall operate or be shut down shall be *solely* and *exclusively* the prerogative of the Company" constituted a waiver of the union's right to advance consultation over the closing of part of the business. The Board said this not untypical reserved rights clause was sufficient to waive the union's right to bargain and hence permitted a trustee in bankruptcy to make prompt unilateral changes without advance consultation so as to conserve assets.

The small candle that was lighted in *Marion Simcox* became a lantern in *Consolidated Foods.*[47] There the Board reversed the Trial Examiner and held that another rather typical management clause should be considered a waiver of the union's right to bargain in advance over a managerial change. In a footnote, the Board distinguished the management clause in *Consolidated Foods* from the management clause in *Weltronic* by saying that in the former the authority to manage is reserved *solely* and *exclusively* to the management, and hence could properly be construed to mean that the union had relinquished its statutory right to bargain over future managerial changes.[48] These two decisions could well mean that if

46. 178 N.L.R.B. No. 85 (1969).

47. 183 N.L.R.B. No. 78 (1970).

48 The footnote stated:

In our opinion, *Weltronic Company,* 173 N.L.R.B. No. 40, enfd. 419 F.2d 1120 (C.A. 6), is distinguishable. There, the Board, in finding that the union had not negotiated away its rights to bargain about interunit job transfers, was confronted with a clause which, while reflecting the union's agreement that the employer was responsible for general management of the business, included no language expressing union assent to management's right to unilaterally make business decisions having an adverse impact on unit employees. Thus, unlike the instant case, the clause in issue there was devoid of language investing management with 'exclusive' or 'sole' discretion as to changes in mandatory subjects of collective bargaining. Nor did the *Weltronic* contract provisions have the scope of the instant one, which gives Respondent exclusive right at all times to

properly drafted management rights clauses reserving to management the *sole* and *exclusive* right to unilaterally initiate change are introduced into all labor agreements, the rate of productivity improvement in U.S. plants can be maintained at the fast rate that is needed to help offset the cost increases of the yearly wage and benefit improvements.

In addition to the change in the Board's views concerning what type of contract language constitutes a waiver of a union's right to bargain over managerial change, the Board's view concerning the obligation of an employer to bargain over a desired managerial change until agreement with the union is reached or *impasse* occurs may also be undergoing change.

The point in time when an impasse actually occurs has been difficult to determine.[49] Since the Board says the determination of the point of impasse is a judgment decision requiring the weighing of various factors—and actually is ultimately determined by the visceral reaction of the Trial Examiner and the Board—the employer cannot safely determine when an impasse first occurs:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.[50]

Unless the rate of productivity improvement is going to be overly slowed down, it is critical to the employer to determine the point when impasse first occurs, if an impasse must occur before a managerial change can take place. If he guesses wrong and initiates the productivity change too soon, he violates the law. The union's interest in the point of impasse is somewhat different. It wants to delay its occurrence so that the effectuation of the change will be delayed to push forward the time when employees will be affected.

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'change, modify or cease its operation, processes or production.' Additionally, that contract involved another clause protecting employees against the effects of job elimination and transfers, and such a restriction, not present here, was viewed as significant to the finding that the union in *Weltronic* had not waived its right to be consulted about the transfer of work from one plant to another.

49. It is at the point where the parties are simply deadlocked. NLRB v. Tex-Lan Inc., 318 F.2d 472, 482 (5th Cir. 1963).

50. Taft Broadcasting Co., WDAF AM-FM TV, 163 N.L.R.B. 475, 478 (1967), *aff'd*, 395 F.2d 622 (D.C. Cir. 1968).

The requirement that managerial change affecting employees cannot occur until there is an impasse may have been given a shattering blow by the Supreme Court in *American Ship Building Company v. NLRB*[51] and by circuit courts in *Lane v. NLRB*[52] and *Detroit Newspaper Publishers Association v. NLRB.*[53] These cases clearly establish the proposition that an employer can lock out employees before an impasse occurs. Since the most drastic change affecting employees that could be initiated by an employer is to put them out on the street without pay checks, and since this change can be initiated by the employer before an impasse, it should shatter the Board's theory that a managerial change that affects employees cannot be initiated until impasse.

If the Board desires to implement the national policy and encourage a high rate of productivity improvement, it need only take the lead from these court decisions and state that where it finds no waiver which permits management to initiate change, the management is only obligated to give the union notice of the contemplated change since the Act simply does not compel a delay in valid management improvement changes until impasse any more than the Act requires an impasse before a management can lock out.

But even more significant than these court cases on the delays that can grow out of an obligation to bargain over managerial change is the Board's own decision in the second *Long Lake Lumber* case this year[54] where the Board reversed the Trial Examiner and explained how the opportunity to bargain over a change can *follow* the initiation of the change and occur in the early steps of the contract grievance procedure:

> The 'management' authority which Respondent sought to reserve unto itself related only to matters on which the contract was left silent. . . . Respondent's management rights proposals would not have precluded future bargaining. The management authority Respondent

51. 380 U.S. 300 (1965).

52. 418 F.2d 1208 (D.C. Cir. 1969).

53. 346 F.2d 527 (6th Cir. 1965).

54. 182 N.L.R.B. No. 65 (1970). The fact that a strike was permitted at the conclusion of the grievance procedure under the *Long Lake Lumber* agreement was noted by the Board as distinguishing Stuart Radiator Core, 173 N.L.R.B. No. 27 (1968). Since arbitration is favored over strike action and is the quid pro quo for the no-strike clause, Lucas Flour Co. v. Teamsters Local 174, 369 U.S. 95 (1962), the Board certainly is not suggesting that the clause was proper only because there was a right to strike at the end of the grievance procedure. The management clause should also be proper if arbitration were substituted for a strike.

> demanded was only to take *initial* action without consulting the Union in advance. Once such action was taken, the Union would have the right, and Respondent the correlative obligation, to subject the action taken to *post hoc* review under the grievance procedure where the Union would be afforded the opportunity through give and take discussion to obtain a change in management's action. . . . Viewed in this light, the Trial Examiner's premise that the Union could not have accepted Respondent's management rights proposals without relinquishing its representative capacity for the contract term is revealed as an overstatement.

This recent statement of the Board is significant. Inherent in the reserved rights concept is the notion that management initiates the change but that the union may react and file a grievance if it feels that the action was a violation of the agreement. Such a procedure, the Board now explains, would satisfy the requirements of the Act even in situations where no waiver permitting management to make the change unilaterally has been established. The Board points out in *Long Lake Lumber* that the opportunity for the union to make proposals *post hoc* to cause the management to modify the change that has been initiated occurs during the discussion in the lower steps of the grievance procedure.

In addition to the acorns the Board planted during the mid-60's, which grew into the oaks destroying the typical management clause as a waiver of bargaining rights and slowing down the rate of productivity improvement by requiring advance consultation and bargaining, the Board planted another acorn that is growing into another oak to choke down the rate of productivity improvement.

This acorn was a new construction of Section 8(d) of the Act.[55] This section says that, where there is a collective agreement in effect, no party "shall terminate or modify" it unless a notice is served on the other party, an offer is made to negotiate, the Federal Mediation and Conciliation Service is notified, and the terms and conditions of the agreement are continued in full force until the expiration date of the agreement. Section 8(d) quite obviously established the procedures to be followed when one party was initiating the renegotiation of a labor contract.[56] The new construction was placed on Section 8(d) in an

55. 29 U.S.C. § 158(d) (1965).

56. NLRB v. American Nat. Ins. Co., 343 U.S. 395 (1952). *See* discussions of the purpose of this section in [Senate Report No. 105 on S. 1126 (80th Cong., 1st Sess.), Legislative History of the Labor Management Relations Act of 1947 (Gov. Printing Office, Washington, 1948), p. 430] SENATE COMM. ON LABOR AND PUBLIC WELFARE, C. REP. No. 105, 80th Cong., 1st Sess. (1947).

opinion by Trial Examiner Arnold Ordman (currently the General Counsel) in *Adams Dairy*.[57] Mr. Ordman stated:

> By thus eliminating both the work which was the subject-matter of the collective bargaining contract and the employees who performed that work, Respondent in the most real sense terminated that contract since there was no area left in which it could be operative. Without more, therefore, it appears that Respondent's failure to follow the procedure prescribed by Section 8(d) as a precondition to such termination constitutes a violation of Section 8(a)(5). I so find.

When an employer acts in a manner that is inconsistent with the agreement, he cannot be unilaterally changing the agreement. It is established law that one party to a bilateral contract cannot modify it by acting inconsistently with it; he can only breach it.[58] However, regardless of the soundness of the Board's interpretation of 8(d), by construing 8(d) to mean that an employer who acts inconsistently with an agreement violates that section of the statute, the Board has catapulted itself into the labor contract enforcement business.

An example of what the Board does with its new interpretation is found in the first *Long Lake Lumber* case.[59] Since maintenance men had never before been scheduled to work on Saturdays, the Board found an "unwritten term of the labor agreement" to the effect that maintenance men would not be scheduled on Saturday. Since a new machine was scheduled to operate continuously during the first five days, it could only be serviced on Saturday unless production was interrupted. In this case the company could not have the machine serviced on Saturday even if it bargained the needed change to an impasse, because under 8(d) the practice of having no machines serviced on Saturday was construed by the Board to be an unwritten term of the agreement. Because of political considerations, it is quite obvious that, after such a determination, the union representatives would not agree to change the unwritten term of the written agreement. Hence, the needed maintenance would have to be done during the first five days, causing a production loss when production was shut down during the servicing plus the high cost of a standby production crew which would be idle while the machine was being serviced—clearly a

57 137 N.L.R.B. 815 (1962).

58. Edmondston v. Drake & Mitchel, 32 U.S. (5 Pet.) 103 (1831); Ellman v. Lanni, 2 Ill. App. 2d 353, 157 N.E.2d 807 (1949); VI WILLISTON, CONTRACTS § 1826 (rev. ed. 1938).

59. 160 N.L.R.B. No. 123 (1966), *enforced in part*, International Woodworkers of Am. Local 3-10 v. NLRB, 380 F.2d 628 (D.C. Cir. 1967).

result inconsistent with the need for a high rate of plant productivity improvement.

Not only was the Board, by its construction of 8(d), becoming a rival to the hundreds of arbitrators in the U.S., but, to the extent it was saying that past practice becomes an unwritten term of an agreement, it was generating an even more serious retarding influence on the rate that management can introduce improvements in productivity than it did in *Fibreboard*.[60]

In connection with this new construction of 8(d) making management actions inconsistent with a term of the labor agreement an unfair labor practice, it should be recalled that in one of the early drafts of the National Labor Relations Act there was a Section 8(a)(6) which made a breach of a labor agreement an unfair labor practice. This section was excluded from the law before it was passed and the Joint Committee report explained the reason:[61]

> Once parties have made a collective bargaining contract, enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.

This meant that arbitrators or courts, and not the Board, should enforce agreements.[62]

But, again, all is not lost. This distorted construction of 8(d) appears to have lost its popularity with the Board. A strong glimmer suggesting that the Board may work its way out of the grievance arbitration business is found in *Jos. Schlitz Brewing Co.*[63] There, the Board stated that it would not exercise jurisdiction in a case in which the union was claiming that certain changes in relief periods were violations of the labor agreement and hence violation of the Board's new construction

60. The Board, if it converts custom and practice into labor agreement terms, would be placing into every labor agreement a provision similar to the famous 2B clause in steel agreements which continues in effect favorable customs and practices, and generated so much controversy that efforts to eliminate it prolonged the settlement of the steel strike in 1959 for many months.

61. House Conference Report No. 510 on H.R. 3020, in 1 LEGISLATIVE HISTORY, LMRA 545-46 (1947). H.R. CONG. RPT. NO. 510, 80th Cong., 1st Sess. (1947).

62. The Board's intervention in the labor agreement and enforcement area is contrary to the national policy to promote arbitration explained by the Supreme Court in the *Steelworker Trilogy* cases. United Steelworkers of Am. v. American Mfg. Co. 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

63. 175 N.L.R.B. No. 23 (1969). *See* Member Brown's concurring opinion in Union Carbide, 178 N.L.R.B. No. 81 (1969), to the effect that where subcontracting is unilaterally challenged and the employer defends on the basis that negotiation history demonstrates a waiver by the union, the union should seek its remedy through the grievance procedure.

of Section 8(d). The Board said the claim that the change in relief periods was a violation of the labor agreement should be resolved by submitting a grievance to arbitration under the procedure established between the parties. Significantly, the Board announced as a general principle that it would refer unilateral changes to arbitration where (1) the labor agreement establishes grievance and arbitration machinery, (2) the employer's unilateral action is not designed to undermine the union, (3) the employer's action is not patently erroneous, (4) the employer's action is based on a substantial claim of contractual privilege, and (5) an arbitration interpretation will resolve both the unfair labor practice issue and the contract interpretation issue.

It should be noted that the Board did not say in *Schlitz* "we want out" of the labor contract enforcement process; it only said it would defer to the arbitration procedure under certain circumstances. The Board still assumes it has jurisdiction of grievance claims under 8(d), which is the same as saying Section 8(a)(6) was not eliminated from the statute before it was passed by Congress. But at least the Board is moving back to a better balance between the role of the arbitrator and the role of the Board. If the Board develops and hardens its policy to defer to the contractually established arbitration procedure where the claim involves an allegation of a labor contract violation, as it announced in *Schlitz*, the conflict between the Board and arbitration in the labor contract enforcement area should end.

In summary, to develop the law in a manner compatible with the objectives of our national labor policy, the Board in its decisional process should,

(1) avoid shaping the law so as to arbitrarily increase union bargaining strength, thereby distorting the normal bargaining power relationship between unions and employers—as such decisions would merely speed up inflation and harden demands, first for controls and later for a substitute for the process of free collective bargaining, and

(2) avoid shaping the law so as to retard management's ability to rapidly initiate the many changes which must occur if productivity improvement is to be maintained at a rate high enough to cushion the effect on prices of the annual wage and benefit increases and thereby permit the standard of living of American workers to rise.