Collyer Insulated Wire, A Gulf and Western Systems Co. *and* Local Union 1098, International Brotherhood of Electrical Workers, AFL–CIO. Case 1–CA–6916

August 20, 1971

DECISION AND ORDER

On September 9, 1970, Trial Examiner James M. Fitzpatrick issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that Respondent had not engaged in certain other unfair labor practices and recommended dismissal of those allegations of the complaint. Thereafter, the Respondent and the General Counsel each filed exceptions to the Trial Examiner's Decision and a supporting brief.

The National Labor Relations Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and finds merit in certain of Respondent's exceptions. Accordingly, we adopt the Trial Examiner's findings, conclusions, and recommendations only to the extent consistent with our Decision herein.

The complaint alleges and the General Counsel contends that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by making assertedly unilateral changes in certain wages and working conditions. Respondent contends that its authority to make those changes was sanctioned by the collective-bargaining contract between the parties and their course of dealing under that contract. Respondent further contends that any of its actions in excess of contractual authorization should properly have been remedied by grievance and arbitration proceeding, as provided in the contract. We agree with Respondent's contention that this dispute is essentially a dispute over the terms and meaning of the contract between the Union and the Respondent. For that reason, we find merit in Respondent's exceptions that the dispute should have been resolved pursuant to the contract and we shall dismiss the complaint.

I. THE ALLEGED UNILATERAL CHANGES

Respondent manufactures insulated electrical wiring at its plant in Lincoln, Rhode Island. The Union has represented Respondent's production and maintenance employees under successive contracts since 1937. The contract in effect when this dispute arose resulted from lengthy negotiations commencing in December 1968 and concluding with the execution of the contract of September 16, 1969. The contract was made effective from April 1, 1969, until July 2, 1971.

Respondent's production employees have historically been compensated on an incentive basis. The contract provides for a job evaluation plan and for the adjustment of rates, subject to the grievance procedure, during the term of the contract. Throughout the bargaining relationship, Respondent has routinely made adjustments in incentive rates to accommodate new or changed production methods. The contract establishes nonincentive rates for skilled maintenance tradesmen but provides for changes in those rates, also, pursuant to the job evaluation plan, upon changes in or additions to the duties of the classifications. The central issue here is whether these contract provisions permitted certain midcontract wage rate changes which Respondent made in November 1969.

A. *The Rate Increase for Skilled Maintenance Tradesmen*

Since early 1968, Respondent's wage rates for skilled tradesmen have not been sufficiently high to attract and retain the numbers of skilled maintenance mechanics and electricians required for the efficient operation of the plant. The record clearly establishes, and the Trial Examiner found, that other employers in the same region paid "substantially higher rates than those paid by Respondent." In consequence, the number of skilled maintenance workers had declined from about 40 in January 1968 to about 30 in mid-1969, and Respondent had been unable to attract employees to fill the resulting vacancies.

During negotiations, Respondent several times proposed wage raises for maintenance employees over and above those being negotiated for the production and maintenance unit generally. The Union rejected those proposals and the contract did not include any provision for such raises. It is clear, nevertheless, that the matter of the "skill factor" increase was left open, in *some* measure, for further negotiations after the execution of the agreement. The parties sharply dispute, however, the extent to which the matter remained open and the conditions which were to surround further discussions. The Union asserts, and the Trial Examiner found, that the Union was willing, and made known its willingness, to negotiate further wage adjustments only on a plantwide basis, consistent with the job evaluation system. Respondent insists that it understood the

Union's position to be that wage increases for maintenance employees only might still be agreed to by the Union after the signing of the contract, if such increases could be justified under the job evaluation system.

At monthly meetings following conclusion of the contract negotiations, Respondent and the Union continued to discuss the Respondent's desire to raise the rates for maintenance employees. Finally, on November 12, 1969, Respondent informed the Union that 5 days thence, on November 17, Respondent would institute an upward adjustment of 20 cents per hour. The Union protested and restated its desire for a reevaluation of all jobs in the plant. Respondent's representative agreed to consider such an evaluation on a plantwide basis, upon union agreement to the increase for the skilled tradesmen. The Trial Examiner found that the Union did not agree. The rate increase became effective November 17, 1969.

B. *Reassignment of Job Duties*

One of the production steps, the application of insulating material to conductor, is accomplished through the operation of extruder machines. The insulating material, in bulk, is forced to and through the extruder die by a large worm gear. Each change in the type of insulation used on an extruder requires that the worm gear be removed and cleaned of insulation remaining from the previous production run. The removal, cleaning, and replacement of the worm gear is performed approximately once each week and requires approximately 40 minutes to 1 hour for each operation. Prior to November 12, 1969, the worm gear removal and cleaning had been performed by a team of two maintenance machinists.[1] On November 12, Respondent directed that future worm gear removals would be performed by a single maintenance machinist with the assistance of the extruder machine operator and helper.

C. *Rate Increases for Extruder Operators*

Respondent's third change, also effective November 17, 1969, produced a rate increase for extruder operators. It had been Respondent's practice to adjust the straight time earnings of extruder operators by a factor representing the amount of time during an 8-hour shift when the extruder was in continuous operation. Under that system, for example, an operator who maintained his machine in continuous operation for 8 hours was paid for 10 hours' work. This incentive factor has never been fixed by the contract and Respondent had, in the past, changed the rate for various reasons. This system of compensation operated somewhat to the detriment of first- and third-shift employees in that third-shift employees incurred the nonproductive time required to shut down production at the end of each week, and the first-shift employees incurred that required for starting operations each Monday. That perceived inequity had stimulated numerous union requests for adjustment. Respondent sought to obviate this problem by computing the operating time on a weekly basis for each machine, determining the average incentive factor for all three shifts, and computing pay from that average. In making this change, Respondent gave the assurance that no operator would suffer any loss of pay by virtue of the revision. This was accomplished, in part, by raising the previous maximum 10.0 incentive factor to a range of from 10.3 to 10.6 hours' pay for continuous operation.

Another adjustment in computation related to a pair of extruder machines which were equipped with dual extruder heads so that each machine performed a dual insulation function. Respondent had previously paid a 5-percent premium to operators of these machines. On November 17, this premium was adjusted upward to 7-1/2 percent.

Finally, on February 16, 1970, in response to another complaint by the Union, Respondent restudied the rate on two extruders, pursuant to its contractual duty, and raised the incentive factor for those machines from 10.3 to 10.5 pay hours.

II. RELEVANT CONTRACT PROVISIONS

The contract now in effect between the parties makes provision for adjustment by Respondent in the wages of its employees during the contract term. Those provisions appear to contemplate changes in rates in both incentive and nonincentive jobs. Thus, article IX, section 2, provides:

> The Corporation agrees to establish rates and differentials of pay for all employees according to their skill, experience and hazards of employment, and to review rates and differentials from time to time. The Corporation agrees to pay all operators their average earnings for samples and unusual processes; untimed portions of already rated jobs will be paid for at an allowed pay hour of 8.8 and adjustment in pay will be made after the rate is fully established. It is agreed that untimed portions of already rated jobs will be studied within a maximum of one work week. In the event that this time limit is not met, the worker will receive his average hourly rate starting as of the first day. However, no change in the general scale of pay now in existence shall be

[1] The Respondent had reassigned this work from operators to machinists several years earlier without opposition from the Union.

made during the term of this Agreement. This Article IX is applicable to the general wage scale, but shall not be deemed to prevent adjustments in individual rates from time to time to remove inequalities or for other proper reasons.

Further evidence of the contractual intent to permit Respondent to modify job rates subject to review through the grievance and arbitration procedures is found in article XIII, section 3, paragraph b, covering new or changed jobs. That paragraph provides that the Union shall have 7 days to consider any new rating established by the Company and to submit objections. Thereafter, even absent Union agreement, it vests in the Company authority to institute a new pay rate. The Union, if dissatisfied, may then challenge the propriety of the rate by invoking the grievance procedure which culminates in arbitration.

Finally, the breadth of the arbitration provision makes clear that the parties intended to make the grievance and arbitration machinery the exclusive forum for resolving contract disputes. By article IV of the contract the parties agree that the grievance machinery "shall be adopted for any complaint or dispute . . . which may arise between any employee or group of employees and the Corporation. . . ." That intent is further evidenced by the no-strike, no-lockout provision, article XI, which declares, in part: "All questions, disputes or controversies under this Agreement shall be settled and determined solely and exclusively by the conciliation and arbitration procedures provided in this Agreement. . . ." A grievance is defined as any controversy between an employee and his supervisor or any controversy between the Union and the Respondent involving "the interpretation, application or violation of any provision of this agreement or supplement thereto." The arbitration clause, article V, provides that "any grievance" may be submitted to an impartial arbitrator for decision and that the decision of the arbitrator "shall be final and binding upon the parties" if not contrary to law.

The full text of articles IV, V, IX, XI, and XIII is contained in the Appendix.

III. THE TRIAL EXAMINER'S DECISION

The Decision of the Trial Examiner reviews in careful detail the Respondent's actions which gave rise to this proceeding. He finds that the subject of the skill factor increase for maintenance tradesmen was discussed at September and October meetings and that Respondent's decision to grant such an increase was announced on November 12. The Trial Examiner found that despite these discussions, the Union did not accede to the proposed change. He further found that the contract did not authorize Respondent to act unilaterally in the matter and that by so acting Respondent had sought to escape from the basic wage framework established in the contract. This, the Trial Examiner concluded, had been in violation of Section 8(a)(5).

In considering the reassignment of duties related to the worm gear removal, the Trial Examiner found that the Employer's actions were not sanctioned by the contract and had not been made the subject of bargaining between the Union and the Employer. Accordingly, he found that, in this respect also, Section 8(a)(5) had been violated.

Concerning changes in the computation of incentive rates of extruder operators, the Trial Examiner found that the matter had been discussed at two of the three meetings and concluded that the contract and practice under it sanctioned Respondent's action. He found, in addition, that the Union had available grievance mechanisms to compel further bargaining if desired or, alternatively, that bargaining had occurred in fact.

IV. DISCUSSION

We find merit in Respondent's exceptions that because this dispute in its entirety arises from the contract between the parties, and from the parties' relationship under the contract, it ought to be resolved in the manner which that contract prescribes. We conclude that the Board is vested with authority to withhold its processes in this case, and that the contract here made available a quick and fair means for the resolution of this dispute including, if appropriate, a fully effective remedy for any breach of contract which occurred. We conclude, in sum, that our obligation to advance the purposes of the Act is best discharged by the dismissal of this complaint.

In our view, disputes such as these can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application by this Board of a particular provision of our statute. The necessity for such special skill and expertise is apparent upon examination of the issues arising from Respondent's actions with respect to the operators' rates, the skill factor increase, and the reassignment of duties relating to the worm gear removal. Those issues include, specifically: (a) the extent to which these actions were intended to be reserved to the management, subject to later adjustment by grievance and arbitration; (b) the extent to which the skill factor increase should properly be construed, under article IX of the agreement, as a "change in the general scale of pay" or, conversely, as "adjustments

in individual rates . . . to remove inequalities or for other proper reason"; (c) the extent, if any, to which the procedures of article XIII governing new or changed jobs and job rates should have been made applicable to the skill factor increase here; and (d) the extent to which any of these issues may be affected by the long course of dealing between the parties. The determination of these issues, we think, is best left to discussions in the grievance procedure by the parties who negotiated the applicable provisions or, if such discussions do not resolve them, then to an arbitrator chosen under the agreement and authorized by it to resolve such issues.

The Board's authority, in its discretion, to defer to the arbitration process has never been questioned by the courts of appeals,[2] or by the Supreme Court.[3] Although Section 10(a) of the Act clearly vests the Board with jurisdiction over conduct which constitutes a violation of the provisions of Section 8, notwithstanding the existence of methods of "adjustment or prevention that might be established by agreement," nothing in the Act intimates that the Board must exercise jurisdiction where such methods exist. On the contrary in *Carey* v. *Westinghouse Electric Corporation,* 375 U.S. 261, 271 (1964), the Court indicated that it favors our deference to such agreed methods by quoting at length with obvious approval the following language from the Board's decision in *International Harvester Co.*:[4]

> There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. Section 10(a) of the Act expressly makes this plain, and the courts have uniformly so held. However, it is equally well established that *the Board has considerable discretion to respect an arbitration award and decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act.*
>
> The Act, as has repeatedly been stated, is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining. Experience has demonstrated that collective-bargaining agreements that provide for final and binding arbitration of grievance and disputes arising thereunder, "as a substitute for industrial strife," contribute significantly to the attainment of this statutory objective. [Emphasis supplied.]

In an earlier case, *Smith* v. *Evening News Assn.*[5] the Supreme Court had likewise observed that, "the Board has, on prior occasions, declined to exercise its jurisdiction to deal with unfair labor practices in circumstances where, in its judgment, federal labor policy would best be served by leaving the parties to other processes of law." As in *Carey* v. *Westinghouse,* the decision carries a clear implication that the Court approved the informed use of such discretion.

The policy favoring voluntary settlement of labor disputes through arbitral processes finds specific expression in Section 203(d) of the LMRA, in which Congress declared:

> 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.

And, of course, disputes under Section 301 of the LMRA called forth from the Supreme Court the celebrated affirmation of that national policy in the *Steelworkers* trilogy.[6]

Admittedly, neither Section 203 nor Section 301 applies specifically to the Board. However, labor law as administered by the Board does not operate in a vacuum isolated from other parts of the Act, or, indeed, from other acts of Congress.[7] In fact, the legislative history suggests that at the time the Taft-Hartley amendments were being considered, Congress anticipated that the Board would "develop by rules and regulations, a policy of entertaining under these provisions only such cases . . . as cannot be

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[2] Indeed, some courts have gone so far as to hold that the Board is required, in certain circumstances, to defer to the arbitration process. See, e.g., *Sinclair Refining Company* v. *N.L.R.B.,* 306 F.2d 569 (C.A. 5); *Timken Roller Bearing Co.* v. *N.L.R.B.,* 161 F.2d 949 (C.A. 6).

[3] Our dissenting colleague's reliance on *Amalgamated Assn. of Sheet, Electric Railway & Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, is misplaced. In the first place, that case, unlike this one, did not involve any issue of interpretation or application of a collective-bargaining contract. The dissent herein apparently overlooks that part of the opinion wherein the court specifically noted that the enforcement of collective-bargaining agreements was not an area preempted even by Federal law. Further, the Supreme Court also noted that a specific exemption from preemption might "arise where the Board affirmatively indicates that, in its view, pre-emption would not be appropriate." For the reasons stated herein, we view this as such a case.

[4] 138 NLRB 923, 925–926, enfd. *sub nom. Ramsey* v. *N.L.R.B.,* 327 F.2d 784 (C.A. 7), cert. denied 377 U.S. 1003. In enforcing the Board's decision, the Seventh Circuit stated at p. 787, "Thus, the Supreme Court has held that the Board has the discretion to defer to the decision of an arbitrator." As indicated, the Supreme Court denied certiorari.

[5] 373 U.S. 195, 198.

[6] *United Steelworkers of America* v. *American Manufacturing Co.,* 363 U.S. 564; *United Steelworkers of America* v. *Warrior & Gulf Navigation Company,* 363 U.S. 574; *United Steelworkers of America* v. *Enterprise Wheel & Car Corporation,* 363 U.S. 593 (1960).

[7] "[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." *Southern Steamship Company* v. *N.L.R.B.,* 316 U.S. 31, 47 (1942).

settled by resort to the machinery established by the contract itself, voluntary arbitration. . . ."[8]

The question whether the Board should withhold its process arises, of course, only when a set of facts may present not only an alleged violation of the Act but also an alleged breach of the collective-bargaining agreement subject to arbitration. Thus, this case like each such case compels an accommodation between, on the one hand, the statutory policy favoring the fullest use of collective bargaining and the arbitral process and, on the other, the statutory policy favoring the fullest use of collective bargaining and the arbitral process and, on the other, the statutory policy reflected by Congress' grant to the Board of exclusive jurisdiction to prevent unfair labor practices.

We address the accommodation required here with the benefit of the Board's full history of such accommodations in similar cases. From the start the Board has, case by case, both asserted jurisdiction and declined, as the balance was struck on particular facts and at various stages in the long ascent of collective bargaining to its present state of wide acceptance. Those cases reveal that the Board has honored the distinction between two broad but distinct classes of cases, those in which there has been an arbitral award, and those in which there has not.

In the former class of cases the Board has long given hospitable acceptance to the arbitral process. In *Timken Roller Bearing Company,*[9] the Board refrained from exercising jurisdiction, in deference to an arbitrator's decision, despite the fact that the Board would otherwise have found that an unfair labor practice had been committed. The Board explained "[I]t would not comport with the sound exercise of our administrative discretion to permit the Union to seek redress under the Act after having initiated arbitration proceedings which, at the Union's request, resulted in a determination upon the merits." *Id.* at 501. The Board's policy was refined in *Spielberg Manufacturing Company,*[10] where the Board established the now settled rule that it would limit its inquiry, in the presence of an arbitrator's award, to whether the procedures were fair and the results not repugnant to the Act.

In those cases in which no award had issued, the Board's guidelines have been less clear. At times the Board has dealt with the unfair labor practice, and at other times it has left the parties to their contract remedies. In an early case, *Consolidated Aircraft Corporation,*[11] the Board, after pointing out that the charging party had failed to utilize the grievance procedures, stated:

> [I]t 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 this dispute has arisen.

The Board has continued to apply the doctrine enunciated in *Consolidated Aircraft,* although not consistently.[12]

Jos. Schlitz Brewing Company,[13] is the most significant recent case in which the Board has exercised its discretion to defer. The underlying dispute in *Schlitz* was strikingly similar to the one now before us. In *Schlitz* the respondent employer decided to halt its production line during employee breaks. That decision was a departure from an established practice of maintaining extra employees, relief men, to fill in for regular employees during breaktime. The change resulted in, among other things, elimination of the relief man job classification. The change elicited a union protest leading to an unfair labor practice proceeding in which the Board ruled that the case should be "left for resolution within the framework of the agreed upon settlement procedures." The majority there explained its decision in these words:

> Thus, we believe that where, as here, the contract clearly provides for grievance and arbitration machinery, where the unilateral action taken is not designed to undermine the Union and is not patently erroneous but rather is based on a substantial claim of contractual privilege, and it appears that the arbitral interpretation of the contract will resolve both the unfair labor

[8] S. Rep. No. 105, 80th Cong., 1st Sess. 23; Leg. Hist. of the LMRA 1947, p. 429.

[9] 70 NLRB 500.

[10] 112 NLRB 1080, 1082.

[11] 47 NLRB 694, enfd. in pertinent part 141 F.2d 785 (C.A. 9).

[12] See, e.g., *McDonnell Aircraft Corporation,* 109 NLRB 930; *Bemis Brothers Bag Company,* 143 NLRB 1311; *Flintkote Company,* 149 NLRB 1561. In the recent decision of *Dresser Industrial Valve & Instrument Division, Dresser Industries, Inc.,* 178 NLRB No. 51, fn. 1, the Board specifically disavowed a statement by the Trial Examiner that *Consolidated Aircraft* had in effect been overruled.

[13] 175 NLRB No. 23.

> practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act, then the Board should defer to the arbitration clause conceived by the parties. This particular case is indeed an appropriate one for just such deferral. The parties have an unusually long established and successful bargaining relationship; they have a dispute involving substantive contract interpretation almost classical in its form, each party asserting a reasonable claim in good faith in a situation wholly devoid of unlawful conduct or aggravated circumstances of any kind; they have a clearly defined grievance-arbitration procedure which Respondent has urged the Union to use for resolving their dispute; and, significantly, the Respondent, the party which in fact desires to abide by the terms of its contract, is the same party which, although it firmly believed in good faith in its right under the contract to take the action it did take, offered to discuss the entire matter with the Union prior to taking such action. Accordingly, under the principles above stated, and the persuasive facts in this case we believe that the policy of promoting industrial peace and stability through collective bargaining obliges us to defer the parties to the grievance-arbitration procedures they themselves have voluntarily established. [175 NLRB No. 23, sl. op. at 5–6. Footnotes omitted.]

The circumstances of this case, no less than those in *Schlitz,* weigh heavily in favor of deferral. Here, as in *Schlitz,* this dispute arises within the confines of a long and productive collective-bargaining relationship. The parties before us have, for 35 years, mutually and voluntarily resolved the conflicts which inhere in collective bargaining. Here, as there, no claim is made of enmity by Respondent to employees' exercise of protected rights. Respondent here has credibly asserted its willingness to resort to arbitration under a clause providing for arbitration in a very broad range of disputes and unquestionably broad enough to embrace this dispute.

Finally, here, as in *Schlitz,* the dispute is one eminently well suited to resolution by arbitration. The contract and its meaning in present circumstances lie at the center of this dispute. In contrast, the Act and its policies become involved only if it is determined that the agreement between the parties, examined in the light of its negotiating history and the practices of the parties thereunder, did not sanction Respondent's right to make the disputed changes, subject to review if sought by the Union, under the contractually prescribed procedure. That threshold determination is clearly within the expertise of a mutually agreed-upon arbitrator. In this regard we note especially that here, as in *Schlitz,* the dispute between these parties is the very stuff of labor contract arbitration. The competence of a mutually selected arbitrator to decide the issue and fashion an appropriate remedy, if needed, can no longer be gainsaid.[14]

We find no basis for the assertion of our dissenting colleagues that our decision here modifies the standards established in *Spielberg* for judging the acceptability of an arbitrator's award. *Spielberg, supra* at 1082, established that such awards would not be contravened by this Board where:

> [T]he proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act.

As already noted, the contract between Respondent and the Union unquestionably obligates each party to submit to arbitration any dispute arising under the contract and binds both parties to the result thereof. It is true, manifestly, that we cannot judge the regularity or statutory acceptability of the result in an arbitration proceeding which has not occurred. However, we are unwilling to adopt the presumption that such a proceeding will be invalid under *Spielberg* and to exercise our decisional authority at this juncture on the basis of a mere possibility that such a proceeding might be unacceptable under *Spielberg* standards. That risk is far better accommodated, we believe, by the result reached here of retaining jurisdiction against an event which years of experience with labor arbitration have now made clear is a remote hazard.

Member Fanning's dissenting opinion incorrectly characterizes this decision as instituting "compulsory arbitration" and as creating an opportunity for employers and unions to "strip parties of statutory rights."

We are not compelling any party to agree to arbitrate disputes arising during a contract term, but are merely giving full effect to their own voluntary agreements to submit all such disputes to arbitration, rather than permitting such agreements to be sidestepped and permitting the substitution of our processes, a forum not contemplated by their own agreement.

Nor are we "stripping" any party of "statutory rights." The courts have long recognized that an industrial relations dispute may involve conduct which, at least arguably, may contravene both the collective agreement and our statute. When the parties have contractually committed themselves to mutually agreeable procedures for resolving their

[14] See, e.g., *Atlanta Newspapers,* 43 LA 758 (1964); *American Welding,* 45 LA 812 (1965).

disputes during the period of the contract, we are of the view that those procedures should be afforded full opportunity to function. The long and successful functioning of grievance and arbitration procedures suggests to us that in the overwhelming majority of cases, the utilization of such means will resolve the underlying dispute and make it unnecessary for either party to follow the more formal, and sometimes lengthy, combination of administrative and judicial litigation provided for under our statute. At the same time, by our reservation of jurisdiction, *infra,* we guarantee that there will be no sacrifice of statutory rights if the parties' own processes fail to function in a manner consistent with the dictates of our law. This approach, we believe, effectuates the salutary policy announced in *Spielberg,* which the dissenting opinion correctly summarizes as one of not requiring the "serious machinery of the Board where the record indicates that the parties are in the process of resolving their dispute in a manner sufficient to effectuate the policies of the Act."

We are especially mindful, finally, that the policy of this Nation to avoid industrial strife through voluntary resolution of industrial disputes is not static, but is dynamic. The years since enactment of Section 203(d) have been vital ones, and the policy then expressed has helped to shape an industrial system in which the institution of contract arbitration has grown not only pervasive but, literally, indispensable.[15] The Board has both witnessed and participated in the growth, a complex interaction where the growth of arbitration in response to Congress' will has called forth and nurtured gradually broader conceptions of the basic policy. The Supreme Court which in *Lincoln Mills,*[16] first upheld the enforceability of agreements to arbitrate disputes has recently, in *Boys Markets, Inc.* v. *Retails Clerks,*[17] suggested that arbitration has become "the central institution in the administration of collective bargaining contracts."[18] After *Boys Market* it may truly be said that where a contract provides for arbitration, either party has at hand legal and effective means to ensure that the arbitration will occur. We believe it to be consistent with the fundamental objectives of Federal law to require the parties here to honor their contractual obligations rather than, by casting this dispute in statutory terms, to ignore their agreed-upon procedures.

V. REMEDY

Without prejudice to any party and without deciding the merits of the controversy, we shall order that the complaint herein be dismissed, but we shall retain jurisdiction for a limited purpose. Our decision represents a developmental step in the Board's treatment of these problems and the controversy here arose at a time when the Board decisions may have led the parties to conclude that the Board approved dual litigation of this controversy before the Board and before an arbitrator. We are also aware that the parties herein have not resolved their dispute by the contractual grievance and arbitration procedure and that, therefore, we cannot now inquire whether resolution of the dispute will comport with the standards set forth in *Spielberg, supra.* In order to eliminate the risk of prejudice to any party we shall retain jurisdiction over this dispute solely for the purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this decision, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.[19]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board orders that the complaint herein be, and it hereby is, dismissed; provided, however, that:

Jurisdiction of this proceeding is hereby retained for the limited purposes indicated in that portion of our Decision and Order herein entitled "Remedy."

MEMBER BROWN, concurring:

I agree that the Board should defer to the applicable grievance arbitration machinery of the parties' collective-bargaining agreement. Federal labor policy, as proclaimed by Congress and the Supreme Court, both encourages the voluntary

[15] "As labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes. This shift in emphasis was accomplished, however, without extensive revision of many of the older enactments . . . . Thus it became the task of the courts to accommodate, to reconcile the older statues with the more recent ones. *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770,* 398 U.S. 235, 251 (1970).

[16] *Textile Workers Union of America* v. *Lincoln Mills of Alabama,* 353 U.S. 448 (1957).

[17] 398 U.S. 235, 252 (1970).

[18] As Member Jenkins points out, the arbitral process, like any other, is not without its imperfections. But the fact that some 95 percent of collective agreements currently look to arbitration as the means of resolving disputes which the parties are unable to resolve in the course of their grievance discussions, demonstrates both the accuracy of the Supreme Court's characterization and the continuing vitality of arbitration. Its successes suggest that we are here respecting substance and not mere "mystique."

[19] See *Port Drum Company,* 170 NLRB No. 51, and 180 NLRB No. 90; cf. *Dubo Manufacturing Corporation,* 142 NLRB 431. Protection of the parties' interests in the manner herein avoids any problems that might otherwise arise under Section 10(b) of the Act. See *N.L.R.B.* v. *Central Power & Light Company,* 425 F.2d 1318, 1320 (C.A. 5). See also Section 102.48(d) of the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended.

resolution by parties of their disputes and requires that they resolve such differences through their own agreed-upon methods where, as in the instant case, their agreement provides that "All questions, disputes, or controversies under this Agreement shall be settled and determined solely and exclusively by the conciliation and arbitration procedures provided in this agreement." This is not the first time I have addressed this matter,[20] but I do so again because of the importance of the issue and because my own approach differs somewhat from that of my colleagues of the majority.

The widespread use of grievance-arbitration procedures shows that the labor industrial community views such procedures as an integral part of collective bargaining.[21] In fact, grievance procedures give meaning to the statement that collective bargaining is a continuous process. That this is so can be seen by even a cursory view of the role played by grievances. They are the foremost means for implementation, application, and interpretation of a collective-bargaining agreement on a day-to-day basis. Grievances concern questions of fact, of application of general rules to particular situations, and of resolution of conflicting sections of the agreement. Grievances serve such other diverse purposes as a device to save face, a channel of communication, and a means of defining and recording problems of the industrial environment.

The scope, both in function and utilization, of grievance arbitration is by itself sufficient reason to consider deferring to that process. The grievance-arbitration process is one of the most important tools of collective bargaining, and the *raison d'etre* of the National Labor Relations Act is to encourage collective bargaining.[22] As stated by the Supreme Court:

> The present federal policy is to promote industrial stabilization through the collective bargaining agreement. [Citation omitted.] A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.[23]

Certainly great damage could be done to the entire system of grievance arbitration, and to the process of collective bargaining, if parties believed they could ignore an agreed-upon method of settling disputes. Since in most cases deferring to arbitration will encourage collective bargaining, the Board, in carrying out the Act's purpose, should see that full play is given to the arbitral process. In my view, the Board's role is to determine those situations in which the cause of industrial peace through collective bargaining will be better served by deferring to the arbital process and thereby requiring the parties to resolve their differences by the machinery of their own agreement.

In *Elgin, Joliet & Eastern Railway Co.* v. *Burley*,[24] the Supreme Court explicated the traditional differences between those contract disputes which look to the acquisition of rights in the future and those which involve claims of rights accrued in the past. The Court at 723 said:

> The first relates to dispute over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement,

[20] See, e.g., my separate opinions in *Raytheon Company*, 140 NLRB 883, 888; *Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410, 1425; *Leroy Machine Co., Inc.*, 147 NLRB 1431, 1434; *Thor Power Tool Company*, 148 NLRB 1379, 1381; *Gravenslund Operating Company d/b/a Washington Hardware and Furniture Co.*, 168 NLRB 513, 515; *Univis, Inc.*, 169 NLRB 37; *McLean Trucking Company*, 175 NLRB No. 66; *Eastern Illinois Gas and Securities Company*, 175 NLRB No. 108; *Dayton Typographic Service, Inc.*, 176 NLRB No. 48; *Steves Sash and Door, Inc.*, 178 NLRB No. 27; *Dresser Industrial Valve & Instrument Division*, 178 NLRB No. 51; *Union Carbide Corporation*, 178 NLRB No. 81; *Iron Workers Local 229 (Bethlehem Steel Corp.)*, 183 NLRB No. 35; *Macy's California*, 183 NLRB No. 47; and *Consolidated Foods Corporation*, 183 NLRB No. 78.

[21] In a continuing comprehensive study of collective-bargaining agreements, the Bureau of Labor Statistics reports that all but 1 percent of the agreements studied included a procedure for handling grievances and that 94 percent of the agreements provided for arbitration. The BLS study points out that arbitration provisions have increased in prevalence from 74 percent in 1944, 83 percent in 1949, and 89 percent in 1952. U.S. Department of Labor, *Major Collective Bargaining Agreements; Grievance Procedures*, BLS Bulletin 1425–6 (1964); and *Arbitration Procedures*, BLS Bulletin 1425–6 (1966). These studies are based on 1,717 agreements, each covering 1,000 workers or more, representing nearly all agreements of this size, exclusive of railroad, airline, and government agreements. BLS has not included joint councils, which have no impartial party, in the arbitration statistics.

The Bureau of National Affairs substantiates the widespread use of grievance-arbitration procedures, stating, "Almost all contracts now contain provisions for arbitration." *Collective Bargaining—Negotiations and Contracts*, Sec. 51.26 (BNA, Washington, D.C.).

[22] See Sec. 1 of the Act, the last paragraph of which reads in part, "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining . . . ."

[23] *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578.

[24] 325 U.S. 711.

e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future. This distinction forms an integral part of my approach to arbitration and the Board.

In my view, arbitration properly serves the function of resolving differences about agreements previously reached, and not as a means for the "acquisition of future rights"; for I do not view arbitration as a substitute for collective bargaining. Thus, the Board should assure itself that the requested deferral to arbitration encompasses matters which have been subjected to collective bargaining. The Board should not defer where the dispute is not covered by the contract and, therefore, involves the acquisition of new rights.[25] I would reach a different result where the contract is ambiguous.[26] In such a case a party may be exercising an accrued right, and the party's action might be justified by the ultimate interpretation of the contract. Thus, I would defer where a good-faith dispute over the interpretation or application of a contract exists, because it is in such instances that deferral will encourage collective bargaining.

Under this concept, it makes no difference whether there has been an arbitration award or not. Deferral in either case will encourage collective bargaining. Where there has been an award, as in *Spielberg,* 112 NLRB 1080, deferral requires the parties to abide by their agreement that disputes shall be settled by grievance arbitration. If the Board were to decide such a case on the merits, it would permit the parties to ignore their agreement. This would ill serve the statutory purpose of encouraging collective bargaining, especially where that part of the agreement the parties could ignore is itself an integral part of the bargaining process. Likewise, failure to defer where there has been no award also would permit the parties to circumvent their arbitration agreement by coming to the Board before pursuing their grievance.

The deferral policy should be applied to disputes covered by the collective-bargaining agreement and subject to arbitration whether the disputes involve alleged violations of Section 8(a)(5), (3), or (1) or whether brought by the employer, the union, or an employee. It is inconsistent with the statutory policy favoring arbitration for the Board to resolve disputes which, while cast as unfair labor practices, essentially involve disputes with respect to the interpretation or application of the contract and which the arbitrator can put to rest. That the employer and union are bound by their agreement is fundamental to collective bargaining. I also believe that an employee is bound by the acts of his bargaining agent.[27] If an employee could initiate and repudiate the acts of his duly designated representative at his whim, the statutory objective of fostering voluntary settlements by parties to collective-bargaining agreements cannot be attained. This was not intended by Congress and is contrary to the fundamental purposes of the Act.[28]

In my opinion deferral would serve only a limited purpose in representation cases. I have serious reservations about applying the same standards to representation cases as I would apply to unfair labor practices cases. For this reason I did not sign the *Raley's* case,[29] in which the Board applied *Spielberg* principles to representation cases. Representation proceedings generally involve the very questions of whether there will be a collective-bargaining arrangement and, if so, to what extent. The standards for Board determinations of units are to assure employees the fullest freedom in exercising the rights guaranteed by the Act. Public interest considerations in the determination of the boundaries of the bargaining unit precludes, in my view, surrender of this function to private parties. This is not to say that Board election procedures should completely ignore the availability of arbitration. In *Pacific Tile and Porcelain Company,*[30] the Board deferred ruling on challenges to the voting eligibility of two individuals whose discharges were the subject of pending grievance action. This is an example of a situation in which an arbitrator's determination presents no conflict with the Board's essential role in representation cases. Deferring in representation cases in other circumstances, in my opinion, might frustrate the purpose of encouraging collective bargaining.

One other area in which I would not defer to arbitration is where there has been a repudiation of the collective-bargaining process. In such a situation the desirability of encouraging resort to arbitration must yield to the Board's duty to protect the bargaining process. Deferral, of course, would not encourage bargaining where the very process of

[25] See, e.g., my separate opinions in *Cloverleaf Division of Adams Dairy Co., supra;* and *Leroy Machine Co., supra.*

[26] See, e.g., *Bemis Brothers Bag Company,* 143 NLRB 1311 (1963; panel of Members Rodgers, Fanning and Brown), citing *United Telephone Company of the West and United Utilities, Incorporated,* 112 NLRB 779, and *Consolidated Aircraft Corporation,* 47 NLRB 694, 706; and *The Flintkote Company,* 149 NLRB 1561.

[27] Of course, an employee may oppose acts of his union which are violative of its duty to fair representation, as in *Miranda Fuel Company, Inc.,* 140 NLRB 181; *Hughes Tool Company,* 147 NLRB 1573. Cf. *Black-Clawson Company, Inc.* v. *International Association of Machinists, Lodge 355,* 313 F.2d 179, 184–186 (C.A. 2).

[28] Although Sec. 1 of the Act states that one of the Act's purposes is to protect workers, it is modified by language to the effect that the protection is for the purpose of permitting collective bargaining. And, of course, where there is arbitration there is an established and continuing collective-bargaining relationship, to which an employee's interest is subject.

[29] *Raley's Inc.,* 143 NLRB 256.

[30] 137 NLRB 1358.

bargaining, including grievance arbitration, has been repudiated and is, in effect, nonexistent.

Turning to the instant case, the issue of deferral is clearly presented. Although neither party instituted the contractual grievance procedure, Respondent at the hearing and in its exceptions has raised the issue. The record establishes, and the Trial Examiner found, that the collective-bargaining agreement contains provisions pertinent to the alleged unfair labor practice. In my opinion, the bargaining process here can best be protected by deferral. Accordingly, I would not consider the merits of this case but would defer to the applicable grievance machinery, that being the agreed upon method which the parties have voluntarily bound themselves to use in resolving such disputes. I would, therefore, dismiss the complaint but retain jurisdiction for the purposes set forth in the majority opinion.

MEMBER FANNING, dissenting:

As found by the Trial Examiner, Respondent's changes, alleged by the General Counsel to be violative of Section 8(a)(5) of the Act, fall into two categories: (1) changes in the incentive system as it related to extruder operators, instituted by Respondent on November 17, 1969, and February 16, 1970; (2) wage increases of 20 cents per hour for skilled employees in labor grades 3A, 4B, and 5C, instituted on November 17, 1969, and a related change, effective November 12, 1969, whereby an extruder operator and his helper substituted for a skilled mechanic in the change of the worm gear. With respect to (1), the Trial Examiner found that these changes were made in accordance with past practice, were not inconsistent with the collective-bargaining agreement, and, in any event, Respondent had fulfilled its bargaining obligations as to these matters. With respect to (2), the Trial Examiner found that such changes were unilateral rather than the result of collective bargaining and could not be justified in the context of this case. His conclusion was based upon the history of negotiations between the parties, the collective-bargaining agreement, and the scope of the substantial wage increase for a whole class of employees. He pointed out that again and again during negotiations for the September 1969 contract Respondent had attempted to secure from the Union an agreement to include in the contract a negotiated skill factor for the above skilled labor grades. The Union was adamant in refusing to negotiate for a special group of employees and took the firm position that any reevaluation of pay rates for skilled employees must be accompanied by a reevaluation of all jobs. Accordingly, while article IX, section 2, of the contract grants Respondent the right to make "adjustments in individual rates from time to time . . ." it further provides that ". . . no change in the general scale of pay now in existence shall be made during the term of this agreement." The Trial Examiner concluded that the 20-cent-per-hour increase for skilled employees was more general than individual and was not sanctioned by the contract in terms of a special skill factor.

Following execution of the contract the Respondent sought again, as it had during negotiations, to secure the right to treat skilled employees on a preferential basis. Again the Union refused to negotiate for a particular group, but indicated a willingness to agree to additional wage adjustments for all employees within the job evaluation system. While Respondent agreed to reevaluate all jobs, it insisted nevertheless on unilaterally establishing an immediate 20-cent-per-hour increase for labor grades 3A, 4B, and 5C without bargaining with the Union and in derogation of the pay scale the parties had established for this group of employees in the controlling collective-bargaining agreement. At about the same time Respondent ordered the extruder operator and his helper, who would not receive the added skill factor of the mechanics, to take the place of a mechanic in the job of changing the worm gear. In this manner, the Trial Examiner found that the Respondent attempted unilaterally to escape the basic frame of the wage bargain struck with the Union in their labor contract.

I agree with the Trial Examiner that the wage increases for skilled employees only and the related worm gear change were properly subjects for collective bargaining and that Respondent violated Section 8(a)(5) and (1) of the Act by instituting these changes unilaterally.

In a novel decision with far-reaching implications a majority of this Board in the instant case refuses even to consider the alleged unfair labor practices concluding merely that the Board's "obligation to advance the purposes of the Act is best discharged by the dismissal of this complaint." The majority's refusal to assert the authority granted to it by Congress under Section 10(a) of the Act is based solely on the ground that the collective-bargaining agreement between the Union and the Respondent contains a standard grievance arbitration procedure, culminating in binding arbitration.

Admittedly, the Union or any of its members had a contractual right to institute grievance with respect to the Respondent's changes and to secure the benefit of an eventual ruling by an arbitrator. No such grievances have been filed in this case and there is no indication that the charging party or its members voluntarily desire to do so. Contrary to the majority, the arbitration provision does not make it clear that the parties intended "to make the grievance and arbitration machinery the exclusive forum

for resolving contract disputes." Section 1, article IV, of the contract sets forth the procedure for "any complaint or dispute," as noted by the majority, but further provides that the grievance procedure is "subject to the rights of individual employees as provided for in the Labor-Management Act of 1947." Under article V (arbitration) the parties further agreed that "The arbitration shall be held under the Voluntary Labor Arbitration Rules of the American Arbitration Association and the parties agree that the decision of the arbitrator shall be final and binding upon the parties, *providing such award will not conflict with any rules or regulations or laws of the Federal Government.* . . ." (Emphasis supplied.) Moreover, section 3, article IV, of the contract specifically provides that grievances not presented or advanced within the time limits set forth in sections 1 and 2 "shall be deemed to be settled and shall not be reprocessed." The time limits for the resolution of grievances with respect to these unilateral changes have passed and, so far as the collective-bargaining agreement is concerned, those putative grievances must be deemed to be settled.

Clearly then the effect of the majority's decision is a direction to the parties to arbitrate a grievance which is no longer contractually arbitrable. The complaint is dismissed, but jurisdiction is retained, presumably to give the Union an opportunity to file a grievance under a time-expired contractual provision, with the implicit threat to the Respondent that the Board will assert jurisdiction, upon a proper motion, if Respondent is unwilling now to submit to arbitration. The majority's insistence that the parties' statutory rights cannot be adjudicated in this case except through the authority of an arbitrator verges on the practice of compulsory arbitration. Historically, in this country voluntarism has been the essence of private arbitration of labor disputes. Neither Congress nor the courts have attempted to coerce the parties in collective bargaining to resolve their grievances through arbitration. Compulsory arbitration has been regarded by some as contrary to a free, democratic society. Collective-bargaining agreements, such as the one in the instant case, give aggrieved parties the *right* to file grievances and to present their disputes to an arbitrator. The element of compulsion has been deliberately omitted. To establish the principle, as a matter of labor law, that the parties to a collective-bargaining agreement must, in part, surrender their protection under this statute as a consequence of agreeing to a provision for binding arbitration of grievances will, in my view, discourage rather then encourage the arbitral process in this country. Many may decide they cannot afford the luxury of such "voluntary" arbitration.

This is not the first time the Board has attempted to force the parties in collective bargaining to agree to terms thought desirable by the Board for policy reasons. In *Local 357, Teamsters* v. *N.L.R.B.*, 365 U.S. 667, the Board attempted to regulate hiring halls by prescribing nondiscriminatory standards for referral of employees. The Supreme Court reversed, holding that the Board did not have the power to compel the inclusion or exclusion of hiring halls in collective-bargaining agreements or to impose upon the parties more regulation than the Act affords. If so, the Court held, "Congress not the Board is the agency to do it." *Ibid,* 677. In *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99, the Court of Appeals for the District of Columbia had approved the Board's order compelling an employer to agree to the Union's proposed checkoff clause in a collective-bargaining agreement. Again the Supreme Court reversed, holding that the Act was based on the fundamental premise of "private bargaining under government supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *Ibid,* 108. The court concluded that it was "the job of Congress, not the Board or the courts . . ." to consider the desirability of remedial power for the Board, broader than the statute contemplated. *Ibid,* 109.

Similarly, I believe that the establishment of a policy designed to force employees to relinquish any portion of their statutory rights is a matter for Congress, not this Board, to decide. Nor has Congress been loath to express its legislative will in designating a specific forum other than the Board for the resolution of labor disputes. In Sections 8(b)(4)(D) and 10(k) Congress specifically provided that a "voluntary method" for the adjudication of jurisdictional disputes was preferable to Board intervention. No such preference has been indicated by Congress or the Supreme Court for alleged violations of Section 8(a).

I do not mean to suggest that the Board has no discretion to give weight and consideration to an arbitrator's award in an appropriate case. Even an unresolved minimal alleged unfair labor practice, involving the interpretation of specific contractural provisions, may not require the serious machinery of the Board where the record indicates that the parties are in the process of resolving their dispute in a manner sufficient to effectuate the policies of the Act. The *Spielberg* (*Spielberg Manufacturing Co.*, 112 NLRB 1080) line of cases, with some variation, has been settled Board law for the past 16 years. There the Board held that it would recognize an arbitrator's award where "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the

Act." Subsequent decisions of the Board in this area of labor law have relied primarily upon the above rationale. In *Dubo Manufacturing,* 142 NLRB 431, the parties had been ordered by a United States district court to utilize their grievance and arbitration procedure. The Board deferred action on the complaint pending completion of the arbitration proceeding and notification to the Board thereof. The meshing of the Board's processes with those of arbitration is, as the Supreme Court noted in *Carey* v. *Westinghouse Corporation,* 375 U.S. 261, 271, "at times closely brigaded." Where the parties have arbitration of a labor dispute available to them, the Board's encouragement of the use of that process does not begin in Washington after the case has been fully litigated before a Trial Examiner.

> In practice, the Regional Offices when a charge is pending and the grievance-arbitration procedure is being actively pursued will defer action on the charge pending completion of the grievance-arbitration procedure and will encourage active resort to the grievance-arbitration procedure if it appears that there is a substantial likelihood that the utilization of the procedure will set the dispute at rest.—Arnold Ordman, then General Counsel, NLRB, *Arbitration and the NLRB—A Second Look,* March 3, 1967, Speech before the National Academy of Arbitrators, Twentieth Annual Meeting, Fairmont Hotel, San Francisco, California, page 20, mimeographed version.

Thus, it would seem clear that under current Board law and practice every effort is being made by the General Counsel and the Board, consistent with the Congressional objective of eliminating unfair labor practices, to encourage the parties involved in a labor dispute *voluntarily* to resolve their differences without recourse to the Board.

The majority contends, however, that the Respondent's right to establish unilaterally a 20-cent-per-hour increase for its skilled employees is a dispute that "can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationship . . . ." As indicated above, during negotiations for the September 1969 contract the Respondent had sought aggressively to include in that agreement a special skill factor for these employees. The Union was adamant in its refusal to yield to this demand and the contract, as finally executed, makes no such provision, dropping a clause of this nature which had been included in the predecessor contract. In these circumstances I find it impossible to accept the majority's assertion that an arbitrator rather than the Board, with the help of its staff and Trial Examiner, has more expertise and is more competent to judge such a dispute in a manner to effectuate the policies of the Act. The law is perfectly clear that an employer's unilateral action in granting nonautomatic wage increases without prior discussion or bargaining with the Union is violative of Section 8(a)(5) of the Act. Such conduct, the Supreme Court has held, "must of necessity obstruct bargaining, contrary to the Congressional policy." *N.L.R.B.* v. *Katz,* 369 U.S. 736, 747.

None of the decisions cited in the majority's opinion warrants the ultimatum addressed to the parties in this and similar cases. As the Supreme Court pointed out in *N.L.R.B.* v. *Acme Industrial Company,* 385 U.S. 432, to construe the *Steelworkers* trilogy as a displacement of the Board's processes where the parties could have arbitrated a dispute under their contract is a misreading of those important decisions. In that case the Court of Appeals for the Seventh Circuit had ruled that the existence of a provision for binding arbitration of differences as to the meaning of a collective-bargaining agreement precluded the Board from finding a violation of Section 8(a)(5) in the Company's refusal to furnish the Union with relevant bargaining information. The Supreme Court reversed, holding that the lower court's reliance on the trilogy cases was misplaced because "those cases dealt with the relationship of courts to arbitrators when an arbitration award is under review or when the employer's agreement to arbitrate is in question. The weighing of the arbitrator's greater institutional competency, which was so vital to those decisions, must be evaluated in that context." *Ibid,* 436. The Court further held that the "relationship of the Board to the arbitration process is of a quite different order." The Court noted that Section 8(a)(5), as amplified by Section 8(d) and Section 10(a), empowering the Board to prevent unfair labor practices, gave the Board clear authority to rule upon the alleged unfair labor practice in that case, despite the availability to the parties of private arbitration. *Ibid,* 436–437. Notwithstanding the availability of arbitration, the "superior authority of the Board may be invoked at any time" and if the Board should disagree with the arbitrator "the Board's ruling would, of course, take precedence. . . ." *Carey* v. *Westinghouse Electric Corporation,* 375 U.S. 261, 272.

The majority cites two Board decisions as authority for deferring to the "arbitral process" before arbitration has occurred. The first is *Consolidated Aircraft Corporation,* 47 NLRB 694, and the second, *Joseph Schlitz Brewing Company,* 175 NLRB No. 23. In the former case, of the seven alleged unilateral actions five were amicably settled by the parties by the time the matter had reached the Board and the remaining two unsettled issues involved relatively minor matters. In dismissing the 8(5) allegation of the com-

plaint the Board carefully considered not only the availability of arbitration, but the specific nature and scope of the alleged unfair labor practices. The Respondent, the Board concluded, was not attempting to undermine the Union or to evade its obligation to recognize and deal with the Union as the employees' bargaining representative. It should be noted, moreover, that this decision is 28 years old and its over-broad rationale, cited by the majority, has remained buried in the Board's history until resurrected in the majority's opinion in this case. The recent decision of *Joseph Schlitz, supra,* has even less significance. The alleged unilateral conduct in that case involved a change in the relief man system requiring all employees to take a break at the same time rather than separately. A two-man majority of a Board panel found that this was merely a question of contract interpretation and the "situation was wholly devoid of unlawful conduct or aggravated circumstances of any kind." Member Jenkins concurred in the dismissal solely on the ground that Respondent had not committed an unfair labor practice.

The effect of the majority's decision in the instant case is clearly a reversal of the established *Spielberg* line of cases. In the future applicable standards for review of arbitration awards will not be followed. Neither the existence of an actual award, the fairness of the arbitrator's opinion or its impingement upon the policies of the Act will be considered by the Board in dismissing complaints of this nature. Under the majority's accommodation theory even consideration of the nature and scope of the alleged unfair labor practices, as set forth in *Consolidated Aircraft* and *Joseph Schlitz, supra,* will not receive the Board's attention. The impact of the majority's decision may be said to go beyond compulsory arbitration. For it means that in the future the Board will not concern itself with the *fact* or the *regularity* of the arbitral process, but will strip the parties of statutory rights merely on the *availability* of such a procedure.

The majority does not frame the primary issue in this case in terms calculated to resolve a particular dispute in a particular case. Rather, a new standard for the nonassertion of jurisdiction is announced, embracing a whole class of employers who have entered into contracts with unions containing a grievance-arbitration clause. In the future, complaints based upon such disputes, without regard to the seriousness of the alleged unfair labor practices, may not be litigated before this Board. The majority rejects the Board's policy of approving "dual litigation of this controversy before the Board and before an arbitrator." As part, however, of the Board's new "developmental step" jurisdiction is retained in the instant case to require the parties to submit to arbitration. As indicated above, I believe the majority's policy is contrary to the intent of Congress and, indeed, beyond the power of the Board. Section 10(a) of the Act clearly states that the Board's power to prevent unfair labor practices "shall not be *affected* by other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." (Emphasis supplied.) Moreover, under Section 14(c)(1), Congress in the amended Act specifically limited the extent to which the Board may exercise its discretion to refuse jurisdiction over any "class or category of employers" by providing: "That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."

Assuming *arguendo* the power of the Board to refuse to entertain charges in cases of this type, the policy of embarking upon such a program is open to serious question. Arbitrators are employed to interpret and apply a specific collective-bargaining agreement. Generally, they are loath to intrude into the area of public rights or national labor policy. These questions historically have been the prime concern of the Board, which was established by Congress exclusively for this purpose. Understandably, an arbitrator, paid jointly by a union and an employer to adjudicate their private rights and obligations, may be unwilling to suggest that one of them is in violation of the National Labor Relations Act and to direct a remedy appropriate to such a finding. The function of good arbitration involves not only the resolution of a particular dispute, but the fostering of a harmonious relationship between the parties to collective bargaining. To endow the arbitrator's award in all cases involving contract interpretation with the prior *imprimatur* of Board approval is, in my opinion, a disservice to the arbitrator, the parties before him, and the effectuation of a sound national labor policy.

Congress has said that arbitration and the voluntary settlement of disputes are the preferred method of dealing with certain kinds of industrial unrest. Congress has also said that the power of this Board to dispose of unfair labor practices is not to be affected by any other method of adjustment. Whatever these two statements mean, they do not mean that this Board can abdicate its authority wholesale. Clearly there is an accommodation to be made. The majority is so anxious to accommodate arbitration that it forgets that the first duty of this Board is to provide a forum for the adjudication of unfair labor

practices. We have not been told that arbitration is the only method; it is one method.

We have recently been told by the Supreme Court that preemption in favor of this Board still exists.[31] It is therefore inappropriate, to say the least, for us to cede our jurisdiction in all cases involving arbitration to a tribunal that may, and often does, provide only a partial remedy.

MEMBER JENKINS, dissenting:

The majority, in a complete reversal of Board precedent, has declined to determine the merits of an alleged violation of this Act, not because an arbitration award of some type has been made (whether meeting *Spielberg* standards or not), but solely because the collective-bargaining agreement establishes arbitration as a method for settling disputes about that agreement if and when both parties to the agreement decide to pursue that course.[32] They are thus refusing to decide the statutory issue because of the existence of the arbitration process, not because the full litigation of the issue has terminated in an arbitration award.

I can see no warrant in the Act which will support refusal of the Board to decide these issues concerning unfair labor practices which Congress has committed to us. And even if the Act gave us discretion to refuse to decide, I can see no reason of policy to refuse, and substantial reason not to do so.

This principle of refusing to decide is directly contrary to the very recent decision of the Supreme Court in *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971). Lockridge was discharged because of an alleged arrearage in dues to the union, pursuant to a valid union-security clause. He denied the delinquency, asserted his dues were sufficiently current under union rules, and asserted further that the union procured his discharge because it erroneously regarded his dues to be delinquent or because he had revoked a checkoff. Either action by the union would be an unfair labor practice. Finally, Lockridge made a claim, which the Court described as "sounding squarely in contract," that his suspension from union membership and consequent discharge violated the constitution and general laws of the union which constituted a contract between him, as a member, and the union, and he demanded damages for breach of this contract. A state court awarded damages to Lockridge for the breach of contract.

The Supreme Court held that under the preemption doctrine which is designed to avoid conflicting regulation of conduct by various tribunals which might have some authority over the subject matter, this Board had exclusive jurisdiction to decide the case, and the state court was without jurisdiction. There it was urged, as it is by the majority here, that the complaint "was not subject to the exclusive jurisdiction of the NLRB because it charged a breach of contract rather than an unfair labor practice . . . ." The Court held this argument "is not tenable," because "[i]t is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern. Indeed, the notion that a relevant distinction exists for such purposes between particularized and generalized labor law was explicitly rejected in Garmon itself. 359 U.S. at 244." 403 U.S. at 292.

The Court also rejected an argument identical to the majority's reasoning that we should relinquish our jurisdiction to arbitrators here because "the dispute in its entirety arises from the contract and from the parties' relationship under that contract," "[t]he contract and its meaning lie at the center of this dispute," and "the Act is involved only if it is determined that the collective bargaining agreement did not sanction the employer's right to make the changes." As the Court held:

> The second argument, closely related to the first, is that the state courts, in resolving this controversy, did deal with different conduct, i.e., interpretation of contractual terms, than would the NLRB which would be required to decide whether the Union discriminated against Lockridge. At bottom, of course, the Union's action in procuring Lockridge's dismissal from employment is the conduct which Idaho courts have

[31] *Amalgamated Assn. of Street, Electric Railway & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, June 14, 1971.

[32] In the period 1960–70, the Board has often decided the merits in "unilateral change of contract" cases, despite the availability of arbitration: *See*, e.g., *Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410; *Leroy Machine Co., Inc.*, 147 NLRB 1431; *Smith Cabinet Manufacturing Co.*, 147 NLRB 1506; *Puerto Rico Telephone Co.*, 149 NLRB 950; *Huttig Sash & Door Co.*, 154 NLRB 811, enfd. 377 F.2d 964 (C.A. 8); *Century Papers Inc.*, 155 NLRB 358; *The Crescent Bed Company, Inc.*, 157 NLRB 296; *C & S Industries, Inc.*, 158 NLRB 454; *American Fire Apparatus Company*, 160 NLRB 1318; *The Scam Instrument Corp.*, 163 NLRB 284; *Adelson, Inc., d/b/a Food Fair Stores, Inc.*, 163 NLRB 365; *W. P. Ihrie & Sons*, 165 NLRB 167; *Gravenslund Operating Co.*, 168 NLRB 513; *PPG Industries, Inc.*, 172 NLRB No. 61; *Unit Drop Forge Division, Eaton Yale & Towne, Inc.*, 171 NLRB No. 73; *Wisconsin Southern Gas Co.*, 173 NLRB 480; *Combined Paper Mills, Inc.*, 174 NLRB No. 71; *Boston Edison Co.*, 176 NLRB No. 132; *Zenith Radio Corp.*, 177 NLRB No. 30. The average is less than two such cases per year.

Contrary to the majority's fn. 11, the early case of *Consolidated Aircraft Corporation*, 49 NLRB 694, has been overruled by disregard, if not by name. The three cases the majority cites as following *Consolidated Aircraft* do not do so, are readily distinguishable, and it was the distinguishing features the Board relied on for its decisions. Thus, in *McDonnell Aircraft Corporation*, 109 NLRB 930, there was a history of union condonation of the employer's action and the union had pursued the matter through all but the final step of the grievance-arbitration procedure. In *Bemis Brothers Bag Co.*, 143 NLRB 1311, the union had at one stage notified the employer that it wanted to arbitrate, and there was substantial indication that the union had assented to the employer's action. In *Flintkote Company*, 149 NLRB 1561, the issue had gone through four steps of the grievance-arbitration process and was ready for submission to the final step when the union filed the charge.

sought to regulate. Thus, this second point demonstrates at best that Idaho defines differently what sorts of such union conduct may permissibly be proscribed. This is to say either that the regulatory schemes, state and federal, conflict (in which case preemption is clearly called for) or that Idaho is dealing with conduct to which the federal Act does not speak. If the latter assertion was intended, it is not accurate. As pointed out in Part II A, supra, the relevant portions of the Act operate to prohibit a union from causing or attempting to cause an employer to discriminate against an employee because his membership in the union has been terminated "on some ground other than" his failure to pay those dues requisite to membership. This has led the Board routinely and frequently to inquire into the proper construction of union regulations in order to ascertain whether the union properly found an employee to have been derelict in his dues-paying responsibilities, where his discharge was procured on the asserted grounds of nonmembership in the union.

* * * * *

From the foregoing, then, it would seem that this case indeed represents one of the clearest instances where the Garmon principle, properly understood, should operate to oust state court jurisdiction. There being no doubt that the conduct here involved was arguably protected by § 7 or prohibited by § 8 of the Act, the full range of very substantial interests the preemption doctrine seeks to protect are directly implicated here. [403 U.S. at 292–293.]

Thus it is plain that the principal ground on which the majority rests its remission of this alleged violation of the Act to a different and private tribunal, namely, that an interpretation of the contract is or may be necessary in resolving the issue, is explicitly and conclusively rejected by Lockridge. Indeed, the substance and even some of the phrasing in Mr. Justice White's dissenting discussion of the role of arbitration under this Act are practically identical to the argument of the majority here. 403 U.S. at 309. But the Court rejected this argument, stating:

His position apparently is that Congress considered any state tribunal equally capable, with the Board, of assessing the appropriateness of a given remedy and was unconcerned about disparities in the reactions of the States to unlawful union behavior. This argument, too, seems incompatible with the simple fact that Congress committed enforcement of the federal law here involved to a centralized agency.

For these reasons, Mr. Justice White's analogies do not persuade us. [403 U.S. at 288–289, fn. 5.]

If the Supreme Court is unwilling to give to state courts jurisdiction to decide suits which "arguably" involve an unfair labor practice under the Act and at the same time involve a contract interpretation issue, this Board can hardly relinquish its paramount jurisdiction to a private tribunal or to an arbitrator whose decision by definition has no precedential value, whose determination may not decide or touch upon the statutory violation, and whose award may not remedy present statutory violations and cannot control future conduct, however unlawful the present conduct may have been. In yet another respect, *Lockridge* was a far stronger case than this for allowing the other tribunal to decide, for the state court there had rendered a decision, and the decision went only to the contract interpretation issue. Here, in contrast, the Board majority is remitting an unfair labor practice case to another tribunal which no interested party has sought to invoke, and it is doing so simply because of the existence under the contract of arbitration as a method of settling disagreements over contract terms. *Lockridge* is conclusive authority that the Board lacks the power to take even the first step toward relinquishing or undermining its jurisdiction.

Lockridge cannot be distinguished from the present case on any supposed greater concern of Congress with closer and more uniform regulation of the union-security clauses involved there than of the unilateral modifications of the contract which are involved here. If there is any difference discernible, it is that Congress was more concerned with empowering the Board to control and remedy unilateral changes, which strike at the heart of collective bargaining, than it was with union-security clauses. Section 8(a)(5) of the Act, proscribing refusals "to bargain collectively," would seem fairly plainly to include unilateral modification or termination of the collective-bargaining agreement,[33] yet so intent was

[33] Member Brown, whose separate concurrence creates the majority, argues that arbitration is an integral part of collective bargaining, and that in order to foster collective bargaining, the Board should allow it to work by compelling the parties to resort to the procedure they have themselves set up. This view, of course, ignores the fact that Section 8 of the Act, prohibiting unfair labor practices, does so, as stated in Section 1, in order to afford "protection *by law* of the right of employees to organize and bargain collectively." (Emphasis supplied.) That is, the collective bargaining must take place free of the distortions of unfair labor practices, or it is not the free collective bargaining which the statute contemplates.

Member Brown's distinction between disputes about agreements previously reached, which he would defer to arbitration, and actions related to "acquisition of future rights," which he would not defer, does not seem to me to be workable. In most of the cases which reach the Board, "it is sought

(Continued)

Congress on protecting agreements against unilateral action that it again spelled out specifically in Section 8(d) that "the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract . . . ." Union-security clauses, on the other hand, are authorized in specified circumstances as an exception to the prohibition of encouragement or discouragement of union membership in Section 8(a)(3). In importance to the statutory purpose and scheme, control and regulation of unilateral changes in or termination of agreements, which vitiate the agreement and the bargaining which preceded it, is, of course more central to the viability of the national policy of collective bargaining than is the item of union security. Consequently, the preemption rationale of *Lockridge* is *a fortiori* applicable to the present case.

But even prior to the teaching of *Lockridge,* it was clear that the Board is not free to refuse to decide cases of this type because of some "policy" favoring arbitration over our own decisions. An individual employee has the right, under Section 9(a) of the Act, to present his grievance individually to the employer and have it settled individually, without the intervention of the union. Consequently, he has the right to present to this Board, apart from and without being limited by any grievance-arbitration process, alleged violations of the Act which have impaired those rights of his which the Act protects.[34] This matter was settled by the Supreme Court in *N.L.R.B.* v. *Marine & Shipbuilding Workers of America, AFL–CIO,* 391 U.S. 418 (1968), in which the Court held unlawful a union's imposition of a fine on a member, in accordance with the union's constitution and bylaws, for filing with the Board a charge against the union. The Court rejected the views of the lower court that the union's right, under Section 8(b)(1)(A), "to prescribe its own rules with respect to the acquisition or retention of membership" permitted it to establish a valid rule which, by requiring exhaustion of remedies within the union, gives the union "a fair opportunity to correct its own wrong before the injured member should have recourse to the Board." The Court held that where unfair labor practices are alleged, "other considerations of public policy come into play," that "if the member becomes exhausted, instead of the remedies, the issues of public policy are never reached and an airing of the grievance never had," that a charge may implicate both the union and employer so that "comprehensive and coordinated remedies" become necessary and appropriate, that "[a]ny coercion used to discourage, retard or defeat [the individual member's] access [to the Board] is beyond the legitimate interests of a labor organizations," and that "overriding public interests makes unimpeded access to the Board the only healthy alternative, except and unless plainly internal affairs of the union are involved."

Thus, internal rules and discipline established by a union's constitution and bylaws cannot impede an employee's access to the Board for a determination of a violation of his statutory rights, despite the fact that the individual has "assented" to such rules and discipline upon becoming a member. *A fortiori,* a union's and employer's agreement to arbitrate violations of the individual's statutory rights, lacking even the ostensible justification of any substantive clause of the Act, and "assented to" by the individual only through his bargaining representation by the union instead of the more specific acquiescence in internal union rules which union membership implies, cannot impede the individual's access to the Board. If the union and employer cannot lawfully provide in the collective-bargaining agreement that the employee must resort to arbitration instead of coming to the Board to remedy a violation of the statute—and I understand my colleagues to agree that such a provision could be voided by the Board—then under *Marine & Shipbuilding Workers,* the Board cannot frustrate the "public interests" involved by itself closing the gate.

The Board majority is imposing a sort of "waiver" of statutory rights—the right of access to the Board—arising from a provision for arbitration. But the courts have long and plainly held that such statutory rights of the individual employee cannot be waived by agreement between the union and employer. For example, in *Lodge 743, IAM* v. *United Aircraft Corp.,* 337 F.2d 5 (C.A. 2), a panel of retired judges of a state supreme court made an arbitration award which, by its terms and by agreement of the union and employer, denied reinstatement to some 36 employees alleged to have been discriminated against in violation of Section 8(a)(3) of this Act, and further barred the filing with this Board of unfair labor practice charges seeking to remedy such violations. In deciding that the award could not bar access to the Board, the court held:

> The standard rule in cases such as this, enunciated in numerous decisions of the Supreme Court, this court, and the courts of other circuits, is that the right to resort to the Board for relief against

to change the terms of one [existing agreement]" and where such change is sought, this will confer or affect "acquisition of rights for the future." *Elgin, Joliet & Eastern Ry. Co.* v. *Burley,* 325 U.S. 711, 723.

[34] Moreover, the Board has the affirmative duty, under Section 10(m) of the Act, to process the individual's charge of discrimination expeditiously, assigning to it priority over other matters. Given this concern for the "individual deprived of a paycheck as the result of an unfair labor practice," there is, in my opinion, no ground to support the argument that the Board may stay its hand merely because arbitration is available. 105 Cong. Rec. 6044 (daily ed. Apr. 25, 1959), II Leg. Hist. (LMRDA 1959), 1253 (quoted remarks of Senator Mundt).

> unfair labor practices cannot be foreclosed by private contract. [Citations omitted; 337 F.2d at 8.]

and further,

> This public interest in preventing unfair labor practices cannot be entirely foreclosed by a purely private arrangement no matter how attractive the arrangement may appear to be to the individual participants. Moreover, as the court below pointed out, "The Board was designed to prevent any unfair economic pressure or expedient arrangements condoning unfair labor practices." 220 F.Supp. at 24. The aim of the act to give special protection to the economically vulnerable would be defeated if contracts entered into because of that very vulnerability were enough to preclude enforcement of the Act. [337 F.2d at 9.]

So far as Congress has expressed any view concerning the desirability of shutting off access to the Board where arbitration is available, apart from the enactment of statutory terms which prohibit it, the view of Congress has plainly been against denying access. In 1959, Congress amended Section 14(c)(1) of the Act, empowering the Board to decline jurisdiction over employers whose activities were economically and financially too small to have any substantial effect on commerce, so as to prevent the Board from declining jurisdiction over any labor dispute over which it previously would have asserted jurisdiction. Thus Congress has evinced a concern for the Board's protection of statutory rights, and the maintenance of access to the Board, wholly at odds with any "policy" which my colleagues may have in mind.[35] The Supreme Court has shown an equal concern that the Board actively protect those statutory rights committed to its care. In *Vaca* v. *Sipes,* 386 U.S. 171, 183, the Court commented on the Board's "tardy entrance" into the field of fair representation, and considered such reluctance to warrant, in part, the Court's refusal to apply the preemption rule in such cases. *Marine Shipbuilders* insured the inability of private arrangements to cut off access to the Board and *Lockridge* applied the preemption rule to cases involving both a breach of contract and an unfair labor practice. And the Court long ago corrected the Board's unwillingness to decide jurisdictional disputes. *N.L.R.B.* v. *Radio & Television Broadcast Engineers Union, Local 1212 (Columbia Broadcasting System),* 364 U.S. 573. Indeed, it was uncertainty about the Board's diligence in performing its statutory duties which largely caused the dissents in *Lockridge.* In the face of the Supreme Court's plain and repeated command that the Board *must* perform the duty of deciding unfair labor practice cases, the majority's refusal to do so approaches contumacy.

To defeat the preemption doctrine and justify their refusal to decide this case and remitting it to an arbitrator, the majority relies on *Carey* v. *Westinghouse Electric Corporation; Smith* v. *Evening News;* the *Steelworkers* Trilogy *(supra);* and *Boys Markets (supra).* The reliance is misplaced in every case. In none of these cases was an unfair labor practice involved. Both *Carey* and *Smith* were suits under Section 301 of the Act in which, as the Court held in *Lockridge,* "Congress authorized federal courts to exercise jurisdiction over suits brought to enforce collective bargaining agreements" and "individual union members may sue their employers—for breach of a promise embedded in the collective bargaining agreement," but "[p]lainly, however, [Lockridge's suit] is not such a lawsuit," and those cases have no bearing on the issue. 403 U.S. at 298–299. *Boys Markets* is equally irrelevant, for the same reasons; it added to *Carey* and *Smith* only the proposition that a mandatory arbitration clause enforceable under Section 301 plus a no-strike clause is sufficient ground for enjoining a strike which violated the no-strike clause.

The *Steelworkers* Trilogy is the primary source of the asserted "policy" of remitting this case to arbitration for decision instead of deciding it ourselves, but the Trilogy is as irrelevant as *Carey, Smith,* and *Boys Markets,* for substantially the same reasons. None of the Trilogy cases involved any alleged violation of rights protected under this Act. Rather, the first two of them were efforts by the union to compel the employer to arbitrate in accordance with the provisions of the contract, and the third was an effort to enforce an arbitration award already made without going into the merits a second time before the courts. In all three cases, the dispute was over whether the employer had the right, solely under the bargaining agreement and on the face of its provisions, to take the action he did

[35] The majority misreads the legislative history of the Taft-Hartley amendments in finding therein (fn. 8, *supra,* and accompanying text) a suggestion that Congress anticipated the Board would develop a policy of entertaining only those cases which cannot be settled by arbitration. The Senate Committee comments were directed to two proposed sections, 8(a)(6) and 8(b)(5), which would have made it an unfair labor practice to breach a contract or refuse to arbitrate pursuant to an arbitration clause. As the Committee acknowledged (S. Rept. 105, 80th Cong., 1st. Sess. 23, I Leg. Hist. LMRA 1947, 426–427), the new provisions would have given the Board jurisdiction over Section 301 suits. There was no mention made of deferring unfair labor practices to arbitration, the courts, or any other forum. Thus the distinction drawn in *Lockridge* between Section 301 suits (contract cases involving no breach of the statute, over which the Board has no jurisdiction) and unfair labor practice cases which may depend in part on an interpretation of the contract (over which the Board has preemptive jurisdiction) is reinforced by this history. Since the proposed sections were not enacted, this bit of legislative history is a further indication that Congress considered that the Board, not arbitrators, should decide unfair labor practice cases.

respecting individual employees, for whom the union then sought to pursue the grievance-arbitration route. Many, perhaps most, of such disputes cannot be brought to or determined by this Board,[36] and the manifest desirability of settling them by arbitration rather than by strikes or lockouts is hardly relevant here. The reasons the Supreme Court gave, most explicitly in *Warrior & Gulf*, for fostering and supporting arbitration in the labor-management field were several: (1) arbitration of disputes arising under collective-bargaining agreements which are in great part "only a generalized code" is "part and parcel of the collective bargaining process itself"; (2) the arbitrator is familiar with "the industrial common law—the practices of the industry and the shop;" and (3) his judgment will be informed by such factors as its effects on productivity or tensions in the shop. But these very reasons all demonstrate the differences in those cases and the one before us where a violation of the statute is alleged. These reasons are not generally pertinent to violations of the Act, and it is the Board, not an arbitrator, which possesses expertise in the areas protected by the Act. Indeed, the Court itself pointed out the difference, saying that in those cases "arbitration is the substitute for industrial strife" because no other remedy is available, and in contrast in commercial cases (where judicial fostering and support of arbitration is not the policy) as in this case, arbitration is merely the substitute for litigation before tribunals with "established" procedures or even special statutory safeguards.

The majority have also advanced a new standard of deference to an arbitrator's award under *Spielberg, supra,* in stating that the Board will limit its review of such an award "to whether the procedures were fair and regular and the results not repugnant to the Act." *Spielberg,* however, imposed two additional requirements for the Board's honoring of the award: all parties must have submitted to the arbitration, and the arbitrator must have decided the issue which arises under this Act, i.e., he must have made a determination of the unfair labor practice. *Spielberg* represents a sort of *res judicata* rule, designed to prevent relitigation of issues and is unrelated to any "policy" of favoring arbitration. *Lockridge,* with its preemption of a state court decision which on its face decided only a contract question, raises a serious question whether even the deference we have heretofore accorded arbitration under *Spielberg* can be continued; that deference certainly cannot be broadened, as the majority would do.

Among Board decisions which assertedly support their policy, my colleagues rely largely on *Schlitz Brewing Company, supra.* The two-member majority opinion therein, subscribed to by one of the present majority, Member Brown, does indeed provide such support. However, that opinion did not reflect the views of the Board. I did not subscribe to it because of my view that the Board should not defer to arbitration; rather, I considered the case on the merits, and having considered them, concluded to dismiss the case for lack of merit.[37] The other two members agreed with my position that the case should not be deferred to arbitration but should be decided on the merits. They were unwilling however to dismiss on the merits. Thus, on the issue of arbitration, the majority in *Schlitz* was opposed to deferral, and there was a majority only for the result of dismissal.

Even if I perceived any statutory grant of discretion to the Board to prevent access to it because the arbitration route is available, I can see no policy reason for doing so. To do so does not prevent dual litigation of the same issue, for *Spielberg* already accomplishes this. That to do so will result in any economy of time or money is hardly to be expected.

In 1970, arbitration required 164.2 days from filing of the grievance to issuance of the arbitrator's award,[38] and Board cases required 199 days from the filing of a charge to issuance of the Trial Examiner's decision.[39] Even this rather small time difference is narrowing, as comparison with earlier years discloses.[40] The expense of arbitration is heavy, averaging over $500 per day in 1970, even excluding attorneys' fees, stenographers, witnesses, and hearing room rental.[41] Because of this high cost, as a respected scholar pointed out to the National Academy of Arbitrators:

> Small unions or financially weak firms may be "arbitrated to death" and thus legitimate interests of individual workers or managers may be bargained away because of lack of funds to process cases. That this is happening, frequently by design of the financially stronger party, is

[36] The exception, of course, is a unilateral change in a contract which amounts to a refusal to bargain, and thus is a violation of the Act. But most contractual complaints arise because the bargaining agreement is ambiguous or silent on the issue, and the contentions of both sides have sufficient support in the facts or practices so as not to be frivolous; it is these, and only these, in which an arbitrator may be presumed to have greater expertise than the Board.

[37] See my dissent in *Terminal Transport Co., Inc.,* 185 NLRB No. 96.

[38] Kilberg, "The FMCS and Arbitration: Problems and Prospects," Monthly Labor Review, April 1971, p. 40, 41.

[39] Testimony by former Chairman McCulloch on the Thompson bill, 77 LRR 42.

[40] Kilberg, *op. cit.;* Annual Report of FMCS, 1966.

[41] Kilberg, *op. cit.,* sets the figure at $539.88. The total expense is obviously far greater; in 1971, the industrial relations director at a large plant of one of the nation's largest corporations estimated the cost of arbitration to be about $1,800 per day for the company and about $1,900 per day for the union, with the extra cost to the union resulting from the greater number of persons participating on the union side.

evident from the many sources in our profession.[42]

Both the time and expense may be increased by the necessity of filing a charge with the Board within 6 months of the alleged violation in order to prevent Section 10(b) from barring Board review of the award under *Spielberg*. To this must be added the time and expense of the Board proceeding if review of the award is sought. And a further suit to enforce the arbitration award is always a possibility.

The "voluntary resolution" characteristic of arbitration which my colleagues rely on to establish that the awards are effective and lasting solutions seems, at least in the cases which come to the Board, to be more appearance than reality. The case arrives here only because at least one party, and usually both of them (as in the present case), have not chosen the arbitration route and have chosen, or accepted, the Board process instead. Thus, the edge in "voluntarism," for whatever that is worth in assuring acceptance and durability of the determination, plainly lies with the Board. Indeed, in such circumstances to compel the parties to return to the arbitration route when they have chosen another seems to reduce the "voluntary" quality of the arbitration to zero. The majority is, in fact, compelling the parties to use their "voluntary methods" when the parties have voluntarily chosen not to do so, a force-them-to-be-free approach. This can be self-defeating, for the result will be to encourage the parties to eliminate arbitration and no-strike provisions from their agreements.[43] Indeed, responsible officials of the Steelworkers Union, whose espousal and support of arbitration led to the Trilogy, have publicly expressed their dissatisfaction with the high costs, delays, and massive "bogging-down" volume of arbitration, all of which led to its use as a weapon against the union.[44] Management dissatisfaction with arbitration is likewise substantial.[45]

Nor does arbitration provide an adequate remedy for violations of the Act. It disposes only of the individual case, rather than settling a principle. It cannot provide a "cease and desist" remedy, as the Board can. It cannot provide other means of effectuating the purposes of the Act, such as posting of notices, or other types of remedy. Unlike the Board's processes, it can be invoked only by the union, and not by an individual.[46] Thus arbitration cannot speak to or affect future conduct (which may account for its "bogging down" under sheer volume, as noted earlier), it cannot effectively protect the public interest by providing adequate remedies for violations, and it may sacrifice individual rights guaranteed by the Act because it is not available to aggrieved individuals.

The majority is reading out of our jurisdiction the statutory protection against all unfair labor practices which may involve in part, and perhaps distantly, the interpretation of a contract provision,[47] where the contract contains an arbitration clause. Most unfair labor practices can be connected somehow to contract terms or existing practices, by broad construction of general clauses, by the necessary inquiry into existing practices, by "waiver," or otherwise. This decision will, of course, encourage the creation of such clauses where they do not now exist. It will also permit unions and employers to contract themselves almost entirely out of the Act by writing into their agreements a provision that neither will violate any provision of the Act, and any alleged such violation will be arbitrated.[48] Under this

[42] National Academy of Arbitrators, Arbitration and Public Policy, 96, 98–99 (1961) (remarks of Professor Irvin Sobel).

[43] Such action was proposed by M. C. Weston, Jr., district director of the Steelworkers Union, in a speech delivered at the University of Tennessee November 20, 1970, Daily Labor Report, November 23, 1970 (BNA). See also a report, "Militant New Leaders of Steel Union Locals Challenge Old Policies," by John V. Conti, Wall Street Journal, March 2, 1971.

[44] At the Steelworkers 1970 convention, Ben Fisher, director of contracts administration of the union and one of the prime movers in the development of the grievance and arbitration system, stated that the current state of many private labor-managment grievance systems is "intolerable" because of sheer volume, an "absolute disgrace," and that because of interminable delays the system is not fulfilling its function. Union President Abel was critical of costs, and stated "There's quite a loss of faith in the arbitration process." 75 LRR 89, at which an extensive summary of the convention proceedings on arbitration is reported.

[45] Stieber, *Voluntary Arbitration of Contract Terms*, paper delivered to National Academy of Arbitrators, Montreal, April 8, 1970, Daily Labor Report, May 1, 1970, p. 7 (BNA):

> Management complaints against arbitration made by both those generally dissatisfied with the process and also by some who expressed satisfaction, singled out such faults as: a tendency to take the "middle road" and to render "split decisions" rather than given clearcut awards, which was mentioned most often; insufficient reliance on contract language by arbitrators; prolabor bias, cluttering up the opinion with inadmissible evidence; absence of effective review of decisions which "while not tainted by corruption, fraud, arbitrariness, caprice or abuse of arbitral authority, are just plain wrong."

[46] In this aspect of arbitration, the majority's decision conflicts in principle with the Board's long-settled position that the employer, as well as the disputing unions, must be a party to the arbitration process to satisfy the "agreed upon" requirement of Section 10(k) of the Act. This issue is now pending decision in the Supreme Court. *N.L.R.B.* v. *Plasterers' Local Union No. 79, Nos. 1184 and 1231.* 1971 Term, certiorari granted March 22, 1971.

[47] Not every breach of a contract term is sufficient in degree or scope to amount to a repudiation of the contract provision and thus to constitute a violation of Section 8(a)(5). The dispute here over rates and work assignment for the worm gear removal might, were we to reach the merits, perhaps be held to exemplify this point. The problem is merely the familiar one of drawing a line.

[48] This possibility is hardly farfetched, for Member Brown states that he would defer also in 8(a)(1) and 8(a)(3) cases, involving employer interference and coercion, and discriminatory discharge. There is no way to relate a discharge for union activity to a contract term except by a provision of the kind we have mentioned. A "discharge for just cause" could not justify deferral to arbitration, because "just cause" might exist though the true reason for the firing was union activity, which insofar as protected by the

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approach, what is left to protect the public interest in preventing retaliation against employees for giving testimony or otherwise assisting the Board in its processes, retaliation now forbidden by Section 8(a)(4)? What remains to protect the public interest or interest of third parties in employer-dominated union cases under Section 8(a)(2), in secondary boycott cases under Section 8(b)(4), or "hot cargo" cases under Section 8(e)? And if my colleagues would not apply their principle in such cases, why not? The result is that the Board here abdicates a major portion of its statutory responsibility. It is small wonder that one respected scholar has expressed concern that "the major problem in this area is the reluctance of the NLRB to prevent attenuation of its powers by a blind and placid acceptance of arbitration as an alternative, rather than subordinate, forum."[49]

Cases such as this are an insignificant part of the Board's workload, averaging only about two per year over the period 1960–70,[50] though the Board's willingness to entertain them up to now may have kept the number small by discouraging violations. Thus it may well eventuate that the Board's new policy, while reducing our workload a minuscule amount, will largely increase the number of disagreements and the work and expense of the parties in settling them.

In my view, the law does not permit us to close our door to violations of the Act which may be connected with contracts which contain an arbitration clause. Even were we free to do so, all the reasons of logic, policy, pragmatism, and fairness are against doing so. The only policy reason apparent to me in the majority's position is what a respected scholar, Professor Theodore St. Antoine, defined before the 1970 meeting of the Labor Law Section of the American Bar Association as the "mystique of arbitration."

For the foregoing reasons, I would decide this case on the merits.

reason for the firing was union activity, which insofar as protected by the Act, cannot be limited by the contract.

[49] Christensen, *Labor Arbitration and Judicial Oversight*, 19 Stan. L. Rev. 671, 683 (1967).

[50] See fn. 32, *supra*.

APPENDIX

ARTICLE IV
Grievance Procedure

Section 1:

Paragraph a. The following procedure shall be adopted for any complaint or dispute (hereinafter called grievance) which may arise between any employee or group of employees and the Corporation, all subject to the rights of individual employees as provided for in the Labor-Management Act of 1947. For the purpose of Grievance Procedure, a grievance is defined to be any controversy between any employee, or group of employees, covered by this Agreement, and his Foreman or immediate supervisor concerning his wages, hours, or working conditions, or between the Union and the Corporation, involving the interpretation, application, or violation of any provision of this Agreement or supplement thereto.

Paragraph b. Any individual employee or group of employees shall have the right, at any time, to present grievances to their employer, provided said grievances are discussed in the presence of the Steward for that department and further provided that any adjustment is not inconsistent with the terms of the contract or Agreement then in effect. In the absence of the Steward, the Business Manager shall act as the Steward for that division.

Paragraph c. If the grievance cannot be adjusted satisfactorily within twenty-four (24) hours by the Department Foreman and the Steward, the latter shall take it up with the Business Manager of the Union, who in turn, shall contact the Foreman involved, and attempt to come to an agreement within the next twenty-four (24) hours. At this step, the alleged grievance shall be reduced to writing on the forms provided for this matter.

Paragraph d. Then, if the grievance is still not settled within twenty-four (24) hours, the Business Manager, together with the Steward, will take the grievance up with the Personnel Director.

Paragraph e. When this procedure has been followed, and no agreement has been reached under Article IV, Paragraph d, within three (3) working days, the grievance, and the reply thereto, shall be submitted immediately in writing to the Adjustment Committee composed of the Personnel Director, and two other representatives of Management, one of whom shall be the General Manager, together with three (3) representatives of the Union, one of whom may be a representative of the International Brotherhood of Electrical Workers. It is understood that a meeting of this Committee shall be held not more than seven (7) days after a grievance has been submitted to it, except when expressly extended by either party in the event the Union Representative or the General Manager are not available and that every effort will be made by both parties to the Agreement to arrive at a satisfactory settlement without delay. At the option of either party, the aggrieved employee or the Foreman may be invited to attend this meeting.

Paragraph f. If any grievance involving a retimestudy reaches the final stage and there is no

agreement among the members of the Adjustment Committee, it is agreed that the Union may bring in an Industrial Engineer, for the purpose of obtaining facts and data relating to this particular re-timestudy before it goes to arbitration. The Union will confer with the Corporation before selecting an Industrial Engineer.

Section 2.

Paragraph a. Any discharge or suspension of an employee is to be reported promptly to the Business Manager; and the employee may request the presence of a Union representative upon notification of his discharge or suspension. Grievances involving the discharge of an employee shall be processed immediately, as provided for in Article IV, Section 1, Paragraphs b, c, d, and e, and shall be expedited in advance of, and in preference to, all pending grievances, and shall be reported in writing by the Business Manager of the Union to the Personnel Director within three (3) working days after notification to the Business Manager. If it is established that the discharge is not justified, such employee will be paid by the Corporation for any loss of wages, for the working days during his discharge, based on his average hourly earnings for the previous four (4) weeks of employment.

Paragraph b. In the event that a Union employee is deemed physically unfit by the Corporation doctor as a result of a physical examination after lay-off or illness, or when he wishes to claim another job, the Corporation will assume any additional medical expense should it be necessary to verify the opinion of the Corporation doctor with that of a dully qualified specialist. The Corporation will confer with the Union in the selection of a specialist.

Section 3.

Grievances not presented or advanced within the time limits set forth in Section 1, Paragraphs b, c, d, and e, and Section 2, Paragraph a, shall be deemed to be settled, and shall not be reprocessed.

Section 4.

Grievances are not to be considered if presented later than thirty (30) days after the cause thereof is alleged to have occurred. This shall not preclude a grievance if it is a continuing condition, but liability and retroactivity shall not apply beyond the date the grievance is processed.

Section 5.

The Business Manager may institute a Union Grievance on any difference between the Corporation and the Union concerning the interpretation or application of any of the provisions of This Agreement. In filing such a grievance, the Business Manager shall submit it in writing, and it shall be submitted directly to the Personnel Director in the third step of the Grievance Procedure.

ARTICLE V

Arbitration

Any grievance, as defined in Article IV, if not settled within ten (10) working days after submission to the Adjustment Committee, shall be referred to an arbitrator, who shall be designated by the American Arbitration Association from a list of names submitted to the parties by the American Arbitration Association in accordance with their rules. The arbitration shall be held under the Voluntary Labor Arbitration Rules of the American Arbitration Association and the parties agree that the decision of the arbitrator shall be final and binding upon the parties, providing such award will not conflict with any rules or regulations or laws of the Federal Government or of the State of Rhode Island. The designated arbitrator shall have no power or authority to alter, modify, subtract from or add to, the terms of this Agreement. The arbitrator shall merely render a decision applying to the grievance at hand according to the terms of this Agreement. Expenses of the arbitration shall be shared equally by the Union and the Corporation. The Business Manager and President, and the International Representative shall be present at all arbitration cases.

* * * * *

ARTICLE IX

Rates and Time Studies

Section 1.

The Management agrees to pay the same base or hourly rate to all persons on the same job competent to perform the same work, and it agrees that no special rates will be created for any employee on any job.

Section 2.

The Corporation agrees to establish rates and differentials of pay for all employees according to their skill, experience and hazards of employment, and to review rates and differentials from time to time. The Corporation agrees to pay all operators their average earnings for samples and unusual processes; untimed portions of already rated jobs will be paid for at an allowed pay hour of 8.8 and adjustment in pay will be made after the rate is fully established. It is agreed that untimed portions of already rated jobs will be studied within a maximum of one work week. In the event that this time limit is not met, the worker will receive his average hourly rate starting as of the first day. However, no change in the general scale of pay now in existence shall be made during the term of this Agreement. This Article IX is applicable to the general wage scale, but shall

not be deemed to prevent adjustments in individual rates from time to time to remove inequalities or for other proper reasons.

Section 3.

Paragraph a. The Corporation agrees to time-study its manufacturing operations, at any time, on the basis of fairness and equity consistent with the quality of workmanship and responsible working capacities of normal operators.

Paragraph b. It is further agreed that incentive rates shall be determined by time-study on the basis of a normal man working at a normal rate, and, when issued, are to be guaranteed as long as equipment, materials, process, and conditions remain unchanged.

Paragraph c. All incentive rates shall be kept on file in the Foreman's office, and readily available to the workers upon application to the Foreman, and notice to that effect will be posted in each department.

Paragraph d. An extra copy of all incentive rates will be given to the Business Manager, with the understanding that his copy will remain in the Plant at all times, for the purpose of making any rate changes, and when such changes are made, the Business Manager will be notified.

Paragraph e. Employees will be notified in advance of any changes in rates and on new processes or on processes on which incentive rates have not previously been set. Sheets will be posted showing how production is recorded and earnings computed.

Paragraph f. If the Corporation determines to re-time any job, the Business Manager and employees on such job shall be notified at the time, and the reason for such re-timing.

Paragraph g. Rates on new incentive paid jobs shall not go into effect until after the Business Manager and employee involved have been notified and then not until after twenty-four (24) hours, unless agreeable to employee to start sooner.

Paragraph h. The Corporation agrees that it will, through its own experienced Time Study Men, from time to time, re-study any particular operations upon the written request of the Business Manager of the Union after claim has been made to him that any particular rate is unfair. If any such claim is substantiated by such restudy, a fair adjustment in the time shall be made by the Corporation to apply on all operations after receipt of the request from the Business Manager.

Paragraph i. On production jobs that are untimed and on which no incentive rates have been set, a new operator shall be paid at a rate of 8.8 pay hours after he has worked for a period of six (6) weeks on the machine without the assistance of an instructor, and he shall be paid at a rate of 9.2 pay hours after an additional six (6) weeks.

* * * * *

ARTICLE XI

Strikes and Lockouts

During the term of this Agreement, the Union agrees that it will not authorize a strike or work stoppage and the Corporation agrees that it will not engage in a lockout because of any proposed changes in this Agreement or disputes over matters relating to this Agreement, or for any other reasons not provided for in this Agreement. The Union further agrees that it will take every reasonable means which are within its powers to induce employees engaged in a strike or work stoppage in violation of this Agreement to return to work. There shall be no responsibility on the part of the Union, its officers, representatives or affiliates, for any strike or other interruption of work unless specifically provided in this paragraph. All questions, disputes, or controversies under this Agreement shall be settled and determined solely and exclusively by the conciliation and arbitration procedures provided in this Agreement, except that the Corporation reserves the right to take such disciplinary action as it sees fit against participants in any unauthorized strike, stoppage or any other interference with production. However, nothing in this Agreement shall be interpreted as interfering in any way with the Corporation's right, for business reasons, to limit or curtail its operations or to shut down completely when, in its sole discretion, it may deem it advisable to do so. Whenever feasible, however, reasonable notice of any shut-down shall be given to the Union.

* * * *

ARTICLE XIII

Wages and Job Evaluation

Section 1.

Paragraph a. The Corporation shall evaluate jobs in accordance with Job Evaluation Plan as set forth in the booklet entitled "Job Rating," National Metal Trades Association, fourth edition, and in books entitled "Job Rating Survey," Collyer Insulated Wire Company, February, 1963, to be used as a guide only, and any changes added thereto by mutual agreement of both parties.

Section 2.

Paragraph a. Effective April 1, 1969, the Corporation will add twenty (20) cents per hour to the schedule of rates for non-incentive jobs and eighteen (18) cents per hour to the schedule of rates for incentive jobs.

Paragraph b. The schedule of rates for jobs in the

various labor grades shall be as follows, effective April 1, 1969.

Labor Grade	Non-Incentive Jobs	Incentive Jobs
*3A	2.88	
*4B	2.80	
*5C	2.73	
5	2.58	2.42
6	2.52	2.36
7	2.45	2.29
8	2.39	2.23
9	2.36	2.20
10	2.32	2.16
11	2.23	2.07

*Skilled trades; list in Memorandum of Understanding

Paragrach c. Effective April 1, 1970, the Corporation will add eighteen (18) cents per hour to the schedule of rates for non-incentive jobs and sixteen (16) cents per hour to the schedule of rates for incentive jobs.

Paragraph d. The schedule of rates in the various labor grades shall be as follows, effective April 1, 1970:

Labor Grade	Non-Incentive Jobs	Incentive Jobs
*3A	3.06	
*4B	2.98	
*5C	2.91	
5	2.76	2.58
6	2.70	2.52
7	2.63	2.45
8	2.57	2.39
9	2.54	2.36
10	2.50	2.32
11	2.41	2.23

*Skilled trades; list in Memorandum of Understanding

Section 3.

Paragraph a. Each employee whose hourly rate of pay is above that of the rate of pay established for his labor grade, will carry this rate as a personal rate until such time when he is transferred to another job, at which time he will receive the rate of the job to which he is transferred. Employees carrying personal rates above the rate of their job classification, will carry this rate only when they are performing this particular job.

Paragraph b. Additional or changed jobs will be rated or re-rated by the Corporation according to the said job rating plan. The Corporation shall give to the Union a copy of the new rating of said new or changed job. The Union, during a period of seven (7) days after receipt of the new rating will study and make known any objections during this period. If there are any objections submitted by the Union which are not acceptable to the Corporation, such differences shall be submitted to the Adjustment Committee in accordance with Article IV, Section 1, Paragraph e, for their consideration and settlement. In the event no settlement is reached, the matter shall be subject to Arbitration under Article V of the Agreement. In the event of a disagreement on a new rate as established by the Corporation in accordance with the said job rating plan, and the rating of the job becomes subject to arbitration under Article V of this Agreement, the Union will be permitted to introduce other factors than those in the N.M.T.A. Job Evaluation Plan to substantiate its case.

Paragraph c. Learners assigned to occupational classifications in which the established rate is greater than the hiring rate will receive wage increases periodically until the employee is able to meet the Corporation's standards of production, at which time the employee will receive the established rate for that occupational classification. Any new employee who has served the allotted time specified in the experience factor of the Job Rating for his particular job, shall receive the full amount in wages stipulated for the labor grade of that particular job.

Paragraph d. Any transfer or change in classification to a job in a higher labor grade will result in an increase of wages for the employee to the rate of that job, when he is able to meet the production standards of that job, but not later than the time allowance in the experience factor as written up in the official Job Evaluation book entitled "Job Rating Survey" Collyer Insulated Wire Company, February, 1963, and any changes added thereto by mutual agreement of both parties. Any transfer or change in classification to a job in a lower labor grade will result in a reduction of wages for the employee to the rate of that job. When there is work available for an employee in his own job classification and the Corporation requests that he perform a job in a lower labor grade, the employee shall carry the wage rate of his original classification.

Paragraph e. Employees who retain seniority and are re-hired after a lay-off will receive their personal rates when they are recalled to the job for which they were carrying a personal rate. In the event that no work is available on their particular job and they are rehired for another job, they will receive the prevailing rate of the labor grade in which their new job falls. Former employees without seniority will be treated as new employees and their rates for any job will be subject to Paragraph c of this section.

Paragraph f. The clause under Article IX, Section 1, of the original Agreement shall not apply in the cases of employees carrying personal rates above that of their job classification and labor grade; that is, new and transferred employees will receive the prevailing rate of their job classification and labor grade while other employees may be carrying a

higher personal rate for the same job classification and labor grade.

Section 4.

Minimum hourly pay after ninety (90) days trial period will be two dollars and twenty-three cents ($2.23) per hour.

Section 5.

Employees regularly assigned to work on the second and third shifts shall receive a bonus of five per cent (5%) of their regular earnings.

Section 6.

Minimum rates do not apply in cases of those handicapped by age or physical disability, only when such employees, because of their incapacity, are unable to accomplish as much as employees not so handicapped.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

JAMES M. FITZPATRICK, Trial Examiner: This proceeding under Section 10(b) of the National Labor Relations Act, as amended (the Act), was tried before me in Providence, Rhode Island on April 13 and 14, 1970, upon a complaint, supplemented by a bill of particulars, alleging, and an answer denying, that Collyer Insulated Wire, A Gulf and Western Systems Co. (herein Collyer or Respondent), had committed unfair labor practices in violation of Section 8(a)(5) and (1) of the Act by unilaterally changing certain wage rates and the method for computing certain others. The complaint was founded on charges filed November 19, 1969, by Local Union 1098, International Brotherhood of Electrical Workers, AFL–CIO (the Union).

Upon the entire record, my observation of the witnesses, and consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

Collyer is a Delaware corporation engaged at Lincoln, Rhode Island, in the manufacture and sale of insulated wire and cable. In the conduct of its business it annually receives at its Lincoln plant from points outside Rhode Island metals and other materials having a value in excess of $50,000 and annually ships from its Lincoln plant to points outside Rhode Island wire and cable products having a value in excess of $50,000.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization which admits to membership employees of Collyer and since 1937 has been the exclusive representative of Collyer's production and maintenance employees. There are now about 360 employees in that bargaining unit[1] out of a total employee complement of about 500 at the Lincoln plant. The Union and Collyer are parties to a current collective-bargaining agreement (the most recent of a long series of agreements) covering these employees, the basic terms of which were agreed upon May 9, 1969, and eventually signed on September 16, 1969, covering the period April 1, 1969, to July 2, 1971.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

It is undisputed that on November 17, 1969, Respondent installed new wage rates for certain skilled labor grades described as grades 3A, 4B, and 5C, and a new method of computing incentive wage rates for operators and helpers on extruder machines. It made an additional change with respect to incentive rates for operators and helpers on extruder machines on February 16, 1970. The General Counsel contends that these changes were unilateral and unlawful. Respondent contends it did not act unilaterally; that the changes were proper subjects which the Union could have taken through the grievance and arbitration procedure provided in the collective-bargaining agreement, but did not; that with respect to the changes in the rates for skilled labor grades it had economic justification for the increases, discussed the problem with the Union, and had reached an impasse on the matter before making the changes; and that with respect to the changes regarding the employees on the extruder machines, changes in the incentive rates historically had been made unilaterally by management, and in any case the Union did not really object to them.

It is also undisputed that in the autumn of 1969 Respondent altered the procedures for changing the worm gear in extruder machines. The General Counsel contends these changes were also unilateral and unlawful. Respondent apparently does not take issue with the contention that they were unilateral. Its position is that the changes were insignificant matters within the normal ambit of managerial discretion under the extant collective-bargaining agreement, and, further, were matters which, if objectionable to the Union, could have been processed under the grievance and arbitration provisions of the contract but were not.

B. *The Changes*

An important aspect of Respondent's operation is the application of insulating material, usually rubber or plastic, to wire. This involves the use of machines called extruders through which preformed wire is passed with the result that the insulating material is formed around the wire. Collyer has from 12 to 14 such extruder machines in operation. Each is manned by an operator and one helper (or in some cases one helper for two machines) and is in use through

[1] Respondent admits the bargaining unit is appropriate for purposes of Section 9(b) of the Act. The unit consists of all production and maintenance employees of Respondent employed at its Lincoln, Rhode Island plant, but excluding all office and clerical employees, timestudy engineers, chemists, engineers, draftsmen, and other technicians not engaged in production activities, professional employees, watchmen, guards, executives, superintendents, foremen, assistant foremen, and other supervisors as defined in Section 2(11) of the Act.

three work shifts. To maintain the machines in working order as well as to do other maintenance work in the plant Collyer employs maintenance mechanics, principally machinists and electricians, who are generally referred to as mechanics in the skilled trades.[2]

One part of the extruder, referred to as the worm gear, feeds the rubber or plastic insulating material into the head of the extruder by means of circular motions, thereby pushing the insulating material into the head so that it can be wrapped around the wire. From time to time, particularly when a change is made in the type of insulating material being used, it is necessary to remove the worm gear from the machine in order to clean it out. Several years ago the practice had been for the operator of the machine to perform this function. But because of the difficulty and risk in removing, handling, and reinstalling this heavy and expensive part, Collyer abandoned this procedure and adopted the practice of assigning two maintenance machinists to perform the job. More recently it has experienced a shortage of skilled craftsmen including maintenance machinists. In order to meet the problems posed by this shortage it now schedules extruder machine runs to allow for changing the worm gear less frequently, about once a week. Previously the change had typically been made several times a week. Starting November 12, 1969 only one maintenance machinist was assigned to the job of pulling the worm gear and the extruder operator and his helper were directed to assist when necessary.[3] The change in the procedure for worm pulls did not involve any change in pay for extruder operators or helpers.

Extruder operators are not paid just on the basis of straight time worked. They are paid for time their machines are producing (as distinguished from time during which the machines are not operating) according to a formula called an incentive rate. Under this formula if they keep the machine producing for certain minimum periods set out in the incentive rate formula, they receive credit for having run it for a longer period. Thus, if a machine runs for 8 straight hours of what is referred to as productive time, the operator is given credit for more than the 8 hours. The amount of time thus credited is called pay hours. Incentive rates are alluded to, but the incentive formula is not spelled out, in the collective-bargaining agreement. On November 17, 1969, Collyer changed the formula for incentive rates. For operators on two types of machines, the D-44 and D-45, the pay hours in the formula for an 8-hour run were increased from 10.0 to 10.6, and for operators of two other types of machines, the D-10 and D-11, the pay hours in the formula were increased from 10.0 to 10.3.

In addition, in some operations D-44 and D-45 extruder machines are equipped with an additional extruder head, thus performing a double function called the tandem operation. The operator and helper on such machines receive an added premium over and above their regular pay. On November 17, 1969, Collyer increased this premium from 5 percent to 7-1/2 percent of productive time.

Operators of extruder machines are paid weekly. Prior to November 17, 1969, their weekly pay was an average of their individual hourly rates for the week. Of the three shifts, however, the second fared best paywise because the third shift which terminated operations at the end of the week had to shut down and clean up, which was nonproductive time and payed for at the lesser nonincentive rate, and the first shift which had to set up and commence operations on Monday mornings likewise received the lesser nonincentive rate for that work. To meet this apparent inequity Collyer directed that as of November 17, 1969, the earnings for all three shifts on each machine be pooled on a weekly basis, and that each shift operator receive one third of such pooled weekly earnings. These November 17 changes, namely the changes in incentive rates, premium for the tandem operation, and the pooling, were instituted for a trial period of 12 weeks with a verbal guarantee from Collyer to the operators that they would thereby experience no loss in earnings.

In addition on November 17, 1969, Collyer put into effect a 20-cent-per-hour raise, called a skill factor, over and above the wage rate set out in the collective-bargaining agreement for mechanics in labor grades 3A, 4B, and 5C. It accompanied this raise with the offer to review together with the Union all jobs according to its job evaluation system and reevaluate jobs based on changes in job content, and to study the existing wage structure for the various labor grades with the purpose of realigning wage scales to provide for a more equitable wage structure for the next collective-bargaining agreement.

On February 16, 1970, because of union complaints that under the new incentive rates the operators on the D-10 and D-11 extruder machines were being disadvantaged by the pay hour formula which provided for a 10.3 pay hour incentive rate, Collyer raised that pay hour rate to 10.5.

C. *Pertinent Provisions of the Collective Bargaining Agreement*

The current collective-bargaining agreement contains some provisions pertinent to a consideration of the alleged unfair labor practices. Thus in article IX of the agreement, entitled "Rates and Time Studies," Collyer agrees to pay the same rate to all employees doing the same work and, "Agrees to establish rates and differentials of pay for all employees according to their skill, experience and hazards of employment, and to review rates and differentials from time to time." Another part of the same provision provides, "However, no change in the general scale of pay now in existence shall be made during the term of this agreement. This Article IX is applicable to the general wage scale, but shall not be deemed to prevent adjustment in the

[2] The skilled trades are those classified as labor grades 3A, 4B, and 5C. Included in labor grade 3A are electricians, and tool and die maker; included in labor grade 4B are electricians, machinists maintenance, maintenance-men building, maintenance mechanics, pipe and steamfitters, sheetmetal workers, and die maker; included in labor grade 5C are machinists maintenance, arc welders, maintenancemen building, and pipe and steamfitters. Carpenters are also included but the record does not indicate in which labor grade.

[3] Company directions to extruder operators in this connection were: "1. Hold pipe for mechanic as pipe is being sledged. 2. Guide worm and head in for hookup with chain-hoist and lower to truck. 3. After worm is cleaned assist mechanic to hook up worm. Guide worm into cylinder, hold in any way possible. 4. Guide cooling pipe into screw. 5. If hopper has to be removed help there also.

individual rates from time to time to remove inequalities or for other proper reasons."

In other sections of the same article IX Collyer agrees with respect to its manufacturing operations to conduct time studies at any time on the basis of "fairness and equity," and incentive rates are to be determined by time studies. Employees must be "notified in advance" of any changes in rates and if Collyer determines to retime a job, the Union and the employees on such job must "be notified at the time" together with the reason for such retiming. In addition Collyer agrees to restudy any particular operation upon a written request from the Union that the rate is unfair and to adjust the rate if the unfairness is substantiated by such restudy.

Article XIII, entitled "Wages and Job Evaluation," requires Collyer to evaluate all jobs in accordance with an established job evaluation plan. A schedule of hourly rates is set out for the various types of jobs. With regard to the skilled trades (labor grades 3A, 4B, and 5C), which are classed as nonincentive jobs, a nonincentive rate is provided. There is, however, a provision in article XIII applicable to all jobs including the skilled trades which allows for alteration in their pay scale. This provides that additional or changed jobs will be rated or rerated according to the job evaluation plan. Collyer must give the Union a copy of any such new rating. If the Union has objections which are not acceptable to Collyer, they must be submitted through the grievance and arbitration procedures established by the agreement.

Grievance and arbitration procedures are set out in articles IV and V, respectively. Article IV defines a grievance as "Any controversy between any employee, or group of employees, covered by this agreement and his foreman or immediate supervisor concerning his wages, hours, or working conditions or between the Union and the Corporation, involving the interpretation, application, or violation of any provision of this agreement or supplement thereto." Article XI, to the effect that there shall be no strikes and no lockouts, also provides, "All questions, disputes or controversies under this agreement shall be settled and determined solely and exclusively by the conciliation and arbitration procedures provided in this agreement . . . ."

In addition article VIII of the agreement which deals with subject of discrimination provides in part as follows, "Subject to the provisions of this agreement, it is agreed that nothing herein shall affect the right of the Corporation to plan, control and direct plant operations . . . ."

D. *Background to the Changes*

1. Skilled trades

a. *Skill factor in past agreement*

For several years the Union and Collyer have concerned themselves with the need for additional compensation for the skilled mechanics. As early as 1965 the Union asked Collyer to reevaluate their jobs in order to take account of their special skills. At that time Collyer refused to do so. In 1966, however, when negotiating the collective-bargaining agreement which preceded the one now in effect, the Union bargained for an increase in wages for skilled mechanics to bring them up to the level of other employees with similar jobs in other industries in the area. As finalized that agreement included what the parties now refer to as a skill factor wage increase for mechanics.

b. *The shortage in the skilled trades*

As of January 1, 1968, Respondent employed about 40 skilled tradesmen, including 30 maintenance machinists, 7 electricians, and 3 carpenters. During 1968 it lost 13 of the machinists, but was able to hire 7 new ones, resulting in a net loss of 6. During the first 6 months of 1969, which was prior to Respondent's 20-cent increase for the skilled trades, it lost three more machinists. After the raise however it was able to hire three new ones. During 1968 seven electricians left and four new ones were hired, leaving a net loss of three. During early 1969 two more electricians left but after the 20-cent increase was put into effect Respondent was able to hire two. Although Respondent advertised extensively to obtain replacements in the skilled trades, sought the assistance of the Rhode Island Department of Employment Security, and recruited in various trade schools, its efforts had little success. In sum, during 1968 and much of 1969 its staff of skilled tradesmen, particularly maintenance machinists and electricians, continued to diminish, its efforts to replace those who left were not successful, and even after it instituted the 20-cent increase on November 17, 1969, the number of new skilled tradesmen it was able to hire was too small to make up for the loss. During 1969 Respondent contracted out to independent contractors some 5,000 hours of piping and maintenance work in its plant and some 30 to 100 hours of electrical maintenance work. I find that at least part of this subcontracting was required by Collyer's lack of in-house mechanical capability resulting from the shortage of skilled mechanics on its staff.

The evidence, including an area wage survey of the Bureau of Labor Statistics, U. S. Department of Labor, as well as other data obtained directly and indirectly by Respondent, shows that prior to the increase granted such skilled trades by Respondent on November 17, 1969, other manufacturing concerns in the area which compete with Respondent in the labor market for employees in skilled trades, and including some engaged in the same type of manufacturing as Respondent, paid such mechanics, particularly maintenance machinists and electricians, substantially higher rates than those paid by Respondent. The evidence further shows that the 20-cent increase given the skilled trades by Respondent on November 17 was insufficient to overcome this differential.

2. Incentive rates—past practice

Historically Collyer has maintained a system of incentive rates for operators of extruders. The system, however, has not been spelled out in past collective-bargaining agreements nor is it spelled in the current one. As pointed out earlier the incentive system is one whereby an operator, if he keeps his machine in operation for a certain number of productive hours, is given credit for operating it for a greater number of hours as an incentive. The size of this

fictitious time override is referred to as the incentive rate. From time to time in the past it has been changed for various reasons including the introduction of new material, or a change in the size of the wire reel or type of reel. In some instances such changes were arrived at by agreement between the Union and Collyer. Ordinarily, however, they followed as the result of a management timestudy showing the need for a revised formula, and were generally established on a trial basis by management posting the new formula in the plant for the information of the operators in addition to advising the Union of the change. Agreement of the Union to such a change was not obtained in advance. Respondent's personnel director, Harold Stanzler, credibly testified without contradiction that the incentive changes involved in the present matter were carried out in the same manner as in the past except that management carried on more discussions about them with the Union than it usually did. The testimony of John R. Donahue, Union president, also indicates that historically Collyer put such changes into effect unilaterally, and if the Union objected to them, it did so after the fact. I so find.

3. Contract negotiations

In December 1968 the Union and Collyer began negotiating for a collective-bargaining agreement to succeed the one then in effect which was due to expire April 1, 1969. These negotiations continued through the balance of the term of the old contract and for some time thereafter. With the expiration of the old agreement the employees on April 2, 1969, went on strike in support of the Union's bargaining demands. In the meantime negotiations for a new agreement continued and on May 9 the parties agreed in principle on economic terms for a new contract subject to final agreement on wording. On May 12 the employees ended their strike. Divergent views on the wording eventually were resolved and on September 16, 1969, a formal 3-year collective-bargaining agreement was executed retroactive to April 1, 1969, and to remain in effect until July 2, 1971.

In January early in the negotiations the Union complained to Collyer that the existing incentive formula for compensating extruder operators was inadequate and unfair. More particularly the Union complaints were: first, that the then existing formula of 5 percent extra pay for operators of tandem extruders was unsatisfactory; second, that the basis for compensating third shift operators who were required to clean up the machine at the end of their shift on Saturday was unfair in that they were not credited with productive time for such cleanup period and were therefore penalized; and, third, that the first shift operators who started up on Monday morning were similarly penalized because they were losing productive time during the startup. The Union again raised these complaints in May around the time Collyer and the Union agreed upon economic terms for the new collective bargaining. The Union at that time wanted management to reevaluate the jobs to show the inequities, and Personnel Director Stanzler agreed to study the matter for the purpose of eliminating unfairness. The contract terms which were then agreed upon, however, did not take account of these union complaints regarding the incentive pay system. A short time later Collyer's chief industrial engineer retired and a replacement was hired who was unfamiliar with the incentive system, and, according to Stanzler, was unable to immediately carry out the promised reevaluation. Stanzler advised the Union that they would need more time to carry out the studies.

During negotiations the parties also talked about a skill factor for the skilled trades. Thus during the earlier negotiations prior to the strike in the course of making a wage proposal of an across-the-board increase for everyone in the plant, Collyer also proposed an additional skill factor for the skilled trades. Management thereafter raised the skill factor proposal several times, giving its economic justification therefore. The reasons for offering the separate skill factor was to encourage new help to accept employment with Respondent. After submitting the proposal to its membership, the Union notified Collyer in early April that the members had rejected it and that from thereon the Union would only bargain for the entire plant with no special increases for any particular group.

The new collective-bargaining agreement did not provide for the additional compensation as a skill factor for the skilled craftsmen proposed by Collyer. However, the subject in a sense remained open in that the Union indicated its willingness to approve additional wage adjustments if such could be arranged in accordance with the job evaluation system. The precise position of the Union in this regard is a matter of dispute. Stanzler's understanding of the Union's position as recapitulated in a company letter to the Union of November 13, 1969, was that the Union would agree to an additional wage adjustment for craftsmen if such could be arranged in accordance with the job evaluation system. According to Union President Donahue, the union position was that it would agree to an additional wage adjustment for everybody if it could be arranged in accordance with the job evaluation system. The testimony of Union Business Representative Joyce tends to corroborate that of Donahue. Also Donahue's version is consistent with the Union's position that it would not bargain for a special group but only for the employees as a whole. On the other hand, until the hearing herein no one from the Union ever indicated that the recapitulation in Stanzler's letter of November 13 was inaccurate. Also, cross-examination of Donahue showed him to be in many respects a confused witness. On the other hand Personnel Director Stanzler, who authored the November 13 letter, was not present at two of the negotiating sessions in Boston on May 6 and 7 during which the problem of a skill factor for the skilled trades according to Donahue was discussed in the context of a general job evaluation for all employees. In the circumstances I find there were differing understandings of what the union position was. I also find, however, because Stanzler was not present at the Boston meetings, that Donahue's version more accurately reflects the position taken by the Union.

4. Autumn 1969 discussions

In mid-September, during the procedure for signing the collective-bargaining agreement as finally settled upon, Collyer raised with the Union the matter of increasing the

rates for the skilled trades. Again on September 29 when they met for the first of a series of monthly meetings to discuss mutual problems, management brought up its problem regarding the skilled trades. It claimed it was unable to recruit maintenance machinists or electricians because of its unfavorable wage rates, and that although pursuant to the Union's suggestion it had attempted to reevaluate the skilled jobs under its reevaluation system, the established wage structure was such that any increase which could be worked out for them would be too small to alleviate the problem.

Pursuant to the Union's earlier complaints regarding inequities in the extruder operations, the new timestudy engineer had eventually completed his study and made his recommendation for changes in the incentive system. At the September meeting management suggested these changes to the Union. These were, as noted hereinabove, ultimately put into effect on November 17. There is no evidence that at the September meeting the Union objected to the proposed incentive changes.

About October 21 the second monthly meeting was held. Management again brought up the matter of the rates for the skilled trades and asked the Union for its comments and cooperation in attempting to work out some method of alleviating the problem. The Union, however, was unwilling to negotiate the matter unless Respondent undertook a complete reevaluation of all jobs.

At this meeting Respondent also explained that it was going to put into effect the new incentive system for extruder operators which it believed would bring up the earnings of both operators and helpers and benefit all concerned. The Union then suggested that the operators and helpers be brought together in a meeting so the new plan could be explained to them. The record does not establish that the Union then objected to these proposed changes.

There is also evidence that by the time of this second monthly meeting extruder operators had already been asked to partially assist in the changing of the worm gears. There is evidence to indicate, and I find, that Respondent and the Union discussed this at their second monthly meeting. The Union did not at that time object to the added duties because all that was involved was assisting in taking out the worm and putting it down. However, when the operators were later directed as of November 12 to hold the pipe, help the maintenance men disassemble the machine, and clean the gear and then return it to the machine, they complained to the Union. The record does not establish if or when, the Union conveyed such complaints to Respondent.

In accordance with the Union's suggestion management called the extruder operators and helpers together for a meeting on November 12 to explain to them and to the union officials who were also present the planned changes in the incentive system. The Union at that time indicated it was not in accord with the planned changes, but there is no evidence that it particularized its objection.

On November 12 after explaining the incentive system change to the extruder employees, management and union officials continued their meeting without the employees. At this time management informed the Union it was going to put into effect a special skill factor for the skilled trades of 20 cents per hour effective November 17. The Union protested and asked that Respondent put its position in writing. Stanzler agreed to do so and in a letter to the Union dated November 13 (G.C. Exh. 9) stated Collyer's position.[4] The Union wanted a reevaluation of all jobs in the shop, not just the skilled trades. Stanzler agreed to consider reevaluating all jobs on the condition that the Union agree to the increase for the skilled trades. I infer from the circumstances that he sought union agreement to an immediate raise for the skilled trades. The Union did not agree.

5. Discussions after the changes

Two days later on November 19 the Union filed the charges herein. On January 22, 1970, at a meeting sought by management in an effort to settle the charges, the Union restated its position that it wanted a complete job reevaluation and that if Respondent was willing, they would open the contract for the purpose of renegotiating wages generally. This portion of their discussion apparently related only to the problem of the skill factor instituted on November 17. With respect to the changes put into effect in the incentive system for extruder operators, the Union indicated only that the operators were not satisfied with the pooling system, and in accordance with the Union's suggestion Respondent agreed to meet again with the operators in order to learn more particularly how they felt about the pooling. There is no evidence that the Union at this time protested any other aspect of the changed

[4] The text of the letter is as follows:

During the past month, at several of the meetings between the Company and the Union Executive Board, we have discussed the situation of the inequitable rates for skilled craftsmen in Labor Grades 5C, 4B and 3A. We have repeatedly pointed out that unless some adjustments were made, we would lose some of these men to other industries paying higher rates and that we would be unable to hire craftsmen to replace them. The loss of any of our craftsmen at this time would seriously affect our machine maintenance program and would result in a curtailment of production and business, and a reduction in working hours for the rest of the employees in the shop.

During the recent negotiations of our new contract, the Board indicated that it would agree to an additional wage adjustment for craftsmen, if it could be arranged in accordance with our current job evaluation system. Since the present system cannot provide for this adequately, the Company is taking the initiative to adjust these rates now as a temporary measure, and designating it a special skill factor. At the same time, we are offering to carry out, with representatives of the Union, a complete review of the Job Evaluation System, together with the wage structure for the various labor grades, as provided for in our present agreement.

Accordingly, as indicated in the discussion held with the Executive Board on Wednesday, Nov. 12, 1969, we will proceed with the following measures:

1. Effective Monday, Nov. 17, 1969, all craftsmen in labor Grades 5C, 4B, and 3A will receive an increase of 20 cents an hour as a special skill factor added to these labor grades.

2. Review all jobs according to our present job evaluation system, with the aid of an engineering consultant, and re-evaluate jobs based on changes in job content since our last review.

3. Undertake to study our present wage structure with the purpose of re-aligning the wage scale of the various labor grades to provide for a more equitable wage structure for our next contract. We propose this as a joint venture for a committee of four, two to be selected by the Executive Board and two to be selected by the Company.

incentive system or that anything was said regarding the added duties in changing the worm gears.

In early February 1970 the Union objected to the incentive plan for extruder operators on the D-10 and D-11 machines on the grounds that their pay hours under the formula were too low compared with those for the other extruder machines. Management's information from its 12-week trial period with the new incentive system bore out this contention.

Pursuant to the Union's suggestion Respondent called a meeting of extruder operators and helpers, as well as union officials, for February 16 for the purpose of discussing the incentive system. Management announced that it was adjusting the formula for extruder operators on the D-10, and D-11 machines by raising the pay hour figure from 10.3 to 10.5. The Union voiced no objection to this. The evidence indicates that the increased earnings for extruder operators under the new incentive system were not an issue between the parties. According to Union President Donahue the Union continued to object to the pooling but in other regards did not complain about the incentive system. He also testified, and I find, there was no discussion about the increase for the skilled trades. There was, however, according to Business Representative Joyce, whom I credit, discussion about the increased amount of work for extruder operators involved in their assisting in the pulling of the worm gear.

In March Collyer and the Union met twice. At the first of these meetings on March 10, according to Business Representative Joyce, the skill factor question was discussed. Stanzler offered to abolish the 20-cent skill factor instituted on November 17 if the Union would agree in writing to an immediate special job evaluation for the skilled trades in a manner which would justify immediately reestablishing the 20-cent skill factor. The record does not indicate specifically what if any response the Union made to this proposition but I infer from the absence of any evidence that it was accepted as well as from other evidence in the record that the union position regarding the skill factor has remained substantially unchanged, namely, that it would not negotiate for a special group but was amenable to a general reevaluation of all jobs and was willing to open the contract for renegotiation of all wages, and that it did not accept Respondent's proposition.

On March 31 the parties met again and discussed the pooling aspect of the incentive plan to which the Union continued to object. Stanzler indicated willingness to drop pooling if the Union so desired. But the Union deferred taking any definitive position because it had a membership meeting coming up on April 5 and desired to place the issue of pooling before its members. The Union also indicated that the extruder operators were dissatisfied with the requirement that they perform maintenance work (assisting in pulling the worm gear) while not receiving additional compensation in the form of a skill factor as did the mechanics, and also that they were not adequately compensated for working the tandem operation. The Union expressed willingness to bargain about a skill factor for extruder operators.

At its April 5 meeting the union membership rejected pooling. The next day the Union advised management of the membership's rejection, but it refused to state whether a return to the prepooling system would be agreeable.

E. *Conclusions*

1. Incentive system

With respect to the incentive system I find that historically Collyer management from time to time has made changes on its own without negotiations and with only notice thereof to the Union and the employees involved. The existing collective-bargaining agreement does not specifically prohibit changes in the incentive system. In fact it provides in article IX that incentive rates are to be determined by timestudies which may be conducted at any time with the requirement that the Union and the employees involved be notified. If the Union requests restudy of a particular operation because of unfairness, management must restudy it, and if the allegation of unfairness is substantiated, must adjust the rate. In January and again in May 1969 the Union complained about incentive system inequities and Stanzler agreed to restudy the matter in order to eliminate the unfairness. Such a study was made and the incentive system changes of November 17, 1969, were a direct product of the union complaint followed by the company study. The further changes on February 16, 1970, were similarly the result of further union complaint of inequity and further reevaluation by management. With respect to both the November 17 and the February 16 incentive changes the Union and employees involved were timely advised of the changes. Thus the incentive system changes were in accordance with past practice, were not inconsistent with the current collective-bargaining agreement, and did not require further negotiation with the Union before they were put into effect. I conclude, therefore, that Respondent did not engage in an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act when it made the incentive system changes. See *American Busline, Inc.*, 164 NLRB 1055. In any case the discussions between management and the Union in advance of the November 17 changes and those at the time of the February 16 changes were broad enough to allow of bargaining if such were required or desired by the Union. According to the testimony of Personnel Director Stanzler, which I credit, much more discussion accompanied these incentive system changes than was usually the case in the past. Accordingly I conclude that even if Collyer was obligated to bargain about the incentive system changes, it fulfilled its obligation in this matter. Moreover, with regard to the specifics of the incentive changes, the Union has had no objection to the change in the pay hours nor to the idea of an increase in the premium for the tandem operation. As to the tandem premium, the union position was that the increase was too small. With regard to the pooling of weekly earnings, which management offered as the solution to specific union complaints, Respondent was willing to revoke the pooling and return to the individual pay basis if the Union would indicate its willingness, but the Union refused to take a position on a return to the prepooling system. The Union cannot have it both ways. In

the circumstances I conclude that in effect it has acquiesced in the incentive system changes.

2. The skill factor

In the current collective-bargaining agreement Collyer agrees to establish rates and differentials of pay for all employees according to skill, experience, and hazards, and to review rates and differentials from time to time. However, no change in the existing general pay scale can be made during the term of the agreement with the exception of adjustments in individual rates for the purpose of removing inequalities or "for other proper reasons." The agreement thus allows of changes in individual pay scale but forbids change in the general pay scale. The skill factor change for the skilled trades in labor grades 3A, 4B, and 5C altered the pay scale for a whole class of employees and was more general than it was individual. I find it was not a change in individual rates as contemplated in article IX of the collective-bargaining agreement.

The predecessor collective-bargaining agreement between the parties included a negotiated skill factor for these labor grades. During the extended negotiations which resulted in the now current collective-bargaining agreement, Collyer again and again sought to incorporate a new and enlarged skill factor, a proposition which the Union categorically rejected on the basis that it would not negotiate for a special group but only for the employees as a whole. It was the Union's position that there should be a general reevaluation of all jobs, not just those in the skilled trades. Considered in the light of precontract negotiations as well as postcontract efforts of Stanzler in regard to a skill factor, the conclusion is inescapable that the rates set out in the contract for labor grades 3A, 4B, and 5C do not include a skill factor. Although the collective-bargaining agreement as finalized did not include the skill factor, the matter was not completely foreclosed by the Union. When management again raised the skill factor question in the discussions during the autumn of 1969, the Union indicated that it would agree to additional wage adjustments for all employees if such could be arranged in accordance with the job evaluation system. Collyer agreed to do this. On November 12 it advised the Union it would review all jobs and reevaluate them. Further, it proposed a study of the wage structure of the various labor grades for the purpose of providing a more equitable wage structure for the next collective-bargaining agreement. These steps would have satisfied the Union's requirements. However, Respondent did not stop there; it stated in addition it would inaugurate a 20-cent-an-hour special skill factor for the skilled trades effective November 17. This skill factor, therefore, was limited to labor grades 3A, 4B, and 5C, was to be in advance of a general job reevaluation rather than the result thereof, and was determined unilaterally by management rather than as the product of agreement with the Union. Thus management in making the skill factor change altered the pay scale of the skilled trades which formed part of the bargain it had struck with the Union in the collective-bargaining agreement. Its economic problems to the contrary notwithstanding, Collyer was obligated to that bargain even as the Union was entitled to what it construed as the benefits of that bargain. See Section 8(d) of the Act; *The Standard Oil Company (Ohio)*, 174 NLRB No. 33.

In later discussions after the skill factor was instituted the Union indicated willingness to reopen the contract for renegotiation of all wage scales. There is no evidence, however, that management was willing to do this during the term of the present contract. Respondent, having instituted the skill factor without the agreement of the Union, did so unilaterally, an action which, even if an impasse existed between it and the Union on this topic, it was not entitled to take because there was an outstanding collective-bargaining agreement which controlled the subject. *The Standard Oil Company (Ohio), supra.* I find, therefore that this unilateral change was a refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

3. The worm gear

Collyer admittedly acted unilaterally when on November 12, 1969, it directed extruder operators and helpers to assist in changing the worm gear. It defends that this change in duties was insignificant and in any event was within the legitimate rights of management to make. Considering that duties of extruder operators are not spelled out in the collective-bargaining agreement and that past practice supports and the agreement permits the exercise of some managerial discretion, one might be inclined to agree with Respondent's position. However, an employee's duties are a bargainable matter. Factually the worm gear question here is part of the skill factor question. This is so because the immediate past practice had been to assign the work of changing the worm gear to two mechanics (skilled craftsmen) who were not assisted by the extruder operator or his helper. During the worm gear change the operator and helper performed other duties. Faced with an increasing shortage of skilled mechanics because of its low wage scale, Respondent proposed, and eventually unilaterally instituted, the skill factor wage raise for such mechanics. A few days earlier, and almost coincidently, it commenced assigning only one skilled mechanic to the job of changing the worm gear and directed the extruder operator and helper to assist. Thus the extruder operators, who would not receive the added skill factor of the mechanics, were required to perform part of the duties previously performed by mechanics. Collyer continues to impose these added duties, giving no indication of willingness to renegotiate wage scales generally, although the Union is willing to do so, and at the same time, in the face of union objection, paying an added skill factor to its mechanics. The worm gear change, therefore, is an added aspect of the skill factor problem. Like the skill factor raise, it is another way in which Respondent is unilaterally escaping the basic frame of the wage bargain struck in the collective-bargaining agreement. I find, therefore, that in the particular circumstances here present, the unilateral worm gear change, like the skill factor change, constituted a refusal to bargain by Respondent in violation of Section 8(a)(5) and (1) of the Act.

4. Additional defense

Respondent urges that the Union could have and should have used the grievance and arbitration procedures provided in the collective-bargaining agreement to resolve any objections it had to any of the changes made. However, the existence of contractural rights and obligations to use grievance and arbitration procedures do not divest parties of their rights and duties under the Act nor oust the Board of jurisdiction to determine whether unfair labor practices have occurred and to remedy them if they have. This is particularly so where, as here, the issues involved are not primarily ones of interpretation and where no grievance and arbitration proceeding has even been started. See Section 10(a) of the Act; *Zenith Radio Corporation,* 177 NLRB No. 30; *Thor Power Tool Company,* 148 NLRB 1379, enfd. 351 F.2d 584 (C.A. 7); *C & S Industries, Inc.,* 158 NLRB 454. Accordingly Respondent's defense in this regard is without merit.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and those found to be unfair labor practices tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. All production and maintenance employees of Respondent employed at its Lincoln, Rhode Island plant, excluding all office and clerical employees, timestudy engineers, chemists, engineers, draftsmen, and other technicians not engaged in production activities, professional employees, watchmen, guards, executives, superintendents, foremen, assistant foremen, and other supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. The Union is the exclusive bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.
5. By the unilateral changes set forth in section III, above, and found to be unfair labor practices, Respondent has refused to bargain collectively with the Union as the exclusive representative of the employees in the aforesaid appropriate unit, has interfered with, restrained, and coerced its employer in the exercise of rights guaranteed them by Section 7 of the Act, and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.
6. Such unfair labor practices effect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, it should cease and desist therefrom, or from any like or related conduct, and should take affirmative action designed to effectuate the policies of the Act. Because of the long-established bargaining relationship between the parties and because Respondent has not questioned its duty to recognize and bargain with the Union, an order requiring Respondent to generally recognize and bargain with the Union is not warranted. *The Standard Oil Company (Ohio), supra.* However, Respondent should be required to forbear from unilaterally, without agreement with the Union, altering wage scales set by the collective-bargaining agreement for skilled trades or in conjunction therewith assigning worm gear change duties to extruder operators and helpers, and should be required to bargain about these matters if the Union so requests. In order to avoid Respondent having the benefit of its unfair labor practices, I will require that it reinstate the wage scales for labor grades 3A, 4B, and 5C as set out in the collective-bargaining agreement, provided the Union so requests in writing. *Manor Research Inc.,* 165 NLRB 909; *Montgomery Ward & Co.,* 162 NLRB 369. However, nothing in such order is to be construed as requiring Respondent to recoup from employees wages already paid them.

[Recommended Order omitted from publication.]