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Work Assignment Disputes Under Section 10(k): Putting the Substantive Cart Before the Procedural Horse

Mack A. Player*

The history of the American trade union movement is replete with examples of disruptive disputes between groups of working men over the right to perform particular jobs. Since the dividing line between many trades is not sharply defined, competing unions' claims of exclusive craft jurisdiction or "job ownership" often clash. The creation and elimination of jobs that accompany technology's impact on industry further exacerbates labor's fratricidal tendencies. In the flux and growth of the American economy some trade unions, following a natural survival instinct, strive to expand their influence by imperialistically asserting jurisdiction to the outermost limits. They claim as many jobs as possible irrespective of historical or craft lines. In this atmosphere even the least aggressive and most stable crafts must fight to protect their home ground against predatory or desperate encroachments.

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Since these disputes often trap innocent employers between the competing claims of different unions, the American people have always viewed the strike over work assignments as one of the best examples of the indefensible use of an economic weapon. Although the public has grudgingly accepted that overall good would result from the normal economic tug-of-war between employers and employees, it has found no economic or social justification for jurisdictional work stoppages. Despite this general condemnation, however, judicial and legislative regulation of this particular mode of union warfare was tardy. Labor injunctions, antitrust injunctions, and initial attempts to legislate the problem away all proved unsuccessful. Thus by the end

3. Even well known friends of labor such as President Truman and Senator Wayne Morse unreservedly condemned jurisdictional strikes and favored legislation to prohibit them. See 1 N.L.R.B., LEGISLATIVE HISTORY OF LMRA 480-81, S. REP. NO. 105, 80th CONG., 1ST SESS., PT. 2, 18-19 (1947); 93 CONG. REC. 136 (1947).

4. See K. STRAND, supra note 1, at 73, 78; SENATE COMM. ON LABOR & PUBLIC WELFARE, FEDERAL LABOR RELATIONS ACT OF 1947, S. REP. NO. 105, 80TH CONG., 1ST SESS. 8 (1947); HEARINGS ON BILLS TO AMEND AND REPEAL THE NATIONAL LABOR RELATIONS ACT BEFORE THE HOUSE COMM. ON EDUCATION AND LABOR, 80TH CONG., 1ST SESS. 3237-81 (1947). In his State of the Union Message for 1947 President Truman stated in part: "I consider jurisdictional strikes indefensible .... When rival unions are unable to settle such disputes themselves, provisions must be made for peaceful and binding determination of the issues." 93 CONG. REC. 136 (1947).


6. The Norris-LaGuardia Act, 29 U.S.C. §§ 101-15 (1970), largely eliminated nonstatutory injunctive relief as a means for dealing with jurisdictional disputes. See Green v. Oberfell, 121 F.2d 46 (D.C. Cir. 1941); Blankenship v. Kurfman, 96 F.2d 450, 453 (7TH Cir. 1938) (jurisdictional dispute held to be "labor dispute" even in absence of employer-employee relationship). In a last-ditch effort to secure protection for employers and the public, the Justice Department attempted to use the antitrust laws to regulate undesirable union conduct. The Supreme Court, however, reading the Clayton Act, 15 U.S.C. §§ 12-27 (1970), in light of the Norris-LaGuardia Act, held that a jurisdictional strike accompanied by secondary pressures did not subject the offending union to a Sherman Act action for damages or an injunction. United States v. Hutcheson, 312 U.S. 219 (1941).

7. The National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933), had provisions for settling work assignment disputes. The Supreme Court, however, struck down that Act as extending beyond congressional power. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The National Labor Relations Act of 1935, ch. 372, 49 Stat. 449, primarily concerned with protecting employee rights of organization, recognition, and collective activity, had no provisions regulating union conduct. The Railway Labor Act of 1926, ch. 347, 44 Stat. 577, as amended, ch. 691, 48 Stat. 1185 (1934), had no provision dealing specifically with jurisdictional disputes, although the provisions of § 2, Ninth, under which the National Mediation Board was to settle representation disputes, potentially provided machinery to encourage, though not compel, resolution of jurisdictional disputes. Locomotive Engineers v. Missouri K & T R.R., 320 U.S. 323, 336-37 (1943). During World War II the War Labor Board was established. Initially, it made no attempt to deal with jurisdictional disputes. By 1942, however, the Board announced that if labor was unable to settle a dispute, it would
of World War II the growth of union economic strength under the protective umbrellas of the Wagner and Norris-LaGuardia Acts made the problem intolerable. In response to the growing public outcry, union leaders merely asserted that the problem was one that should be resolved within the house of labor. Congress, however, reacted with sections 8(b)(4)(D) and 10(k) in the Labor Management Relations Act of 1947.

In its attempt to resolve jurisdictional strife effectively, Congress took two major steps. In section 8(b)(4)(D) it outlawed jurisdictional warfare by prohibiting a labor organization from using economic pressures to force a particular work assignment. The pre-Norris LaGuardia days of the labor injunction, however, indicated that prohibition alone was not enough. Realizing that unresolved grievances could build and eventually explode, Congress undertook to resolve the underlying dispute as well as its immediate manifestations. In section 10(k) it provided what it hoped would be a forum for peaceful resolution of conflicts. Whenever an employer asserts that a union is exerting pressure in violation of section 8(b)(4)(D), then section 10(k) commands the National Labor Relations Board to "hear and determine" the underlying dispute. The statute, however, actively encourages private settlement. If the parties either resolve the dispute or agree on methods for voluntary adjustment within ten days after notice of a 10(k) hearing, the Board at least tentatively lacks jurisdiction to make a 10(k) determination.

This unusual procedural formulation is consistent with Congress' general labor policy of allowing disputants to engage in economic self-determination within statutory limits. Moreover, the procedure has an extraordinary potential to implement a major goal of the administrative process—agency efficiency. By encouraging the combatants to seek their own settlement before the employer forces them to abide by an administrative declaration, the statute discourages frequent, time-consuming treks to the NLRB. Yet while the overworked Board should enthusiastically welcome any procedure that diverts costly family disputes to private arbiters, it has consistently discouraged pri-

appoint an arbitrator. The experience under this Act probably inspired the Labor-Management Relations Act's approach to the problem. Sussman, supra note 1, at 210-11.

8. See Hearings, supra note 4, at 1557.
10. Id. § 158(b)(4)(D).
11. Id. § 160(k).
vate resolution. Because of an apparent concern that private arbiters may reach the wrong substantive resolution of these disputes, the Board, with the aid of the Supreme Court, has substantially deprived this exceptional procedure of any practical usefulness.

I. The Interests Involved in a Jurisdictional Dispute

At first glance a jurisdictional dispute manifests only a bitter struggle for power between two or more greedy unions. Further analysis, however, reveals other important interests at stake. Both the employer and the NLRB, for example, have a substantial interest in the outcome of jurisdictional disputes and the methods that bring about their resolution. Furthermore, there are interests of both employees and their local unions that do not always coincide with those of the national and international unions.

The employer has an obvious interest in maintaining the efficiency of his operations. When he creates a new job he understandably prefers to assign it to the employee who is most likely to render the best performance at the least expense. To implement this interest, the employer must consider many economic variables. First, of course, he must balance the skills of his employees against the labor costs that accompany expertise. A highly skilled employee, for example, may yield prolific output of a high quality, but his skills will no doubt cost more in wages than would those of a less able craftsman. An employer, however, must also look beyond the individual's isolated performance to the efficiency of the operation as a whole. Assigning a new job to a particular group of employees may fragment or confuse overall plant operations. Additionally, an employer must attempt to eliminate idle time, unnecessary overtime, undue movement of employees, dual supervision, and other wasteful practices that detract from the overall efficiency of his production.

In addition to his interest in operational efficiency, however, the employer may also find motivation to deal with the collective repre-

13. Printing Pressmen Local 1, 202 N.L.R.B. No. 63 (Mar. 20, 1973) (unnecessary overtime); Teamsters Local 470, 194 N.L.R.B. 434 (1971) (undue employee movement); Printing Pressmen Local 39, 193 N.L.R.B. 577 (1971) (dual supervision); Laborers Local 1184, 192 N.L.R.B. 1078 (1971) (idle time). Other overall efficiency factors include the need to insure versatility in the work force, Carpenters District Council, 202 N.L.R.B. No. 29 (Mar. 7, 1973), the need to use the same workers for both installation and repair, Local 211, Plumbers & Pipe Fitters, 190 N.L.R.B. 90 (1971), and the need to insure an adequate supply of qualified workers, Carpenters Local 1229, 194 N.L.R.B. 640 (1972).
sentative of his employees that will cause him the least trouble. To the extent that strong and assertive unions are likely to demand higher wages for performing a newly created job, this interest is a component of his profit-maximization interest. But the master may have other reasons for favoring cooperative unions. He may wish to eliminate a highly organized craft union that has troubled other areas of his operations; he may award jobs to a union that is near death, hoping to inherit unrepresented employees; or he may just perversely dislike one of the unions vying for the job. These hidden employer interests, which certainly violate the spirit of the section 8(a)(3) ban on employer discrimination,14 are important to any method of resolving jurisdictional disputes that takes employer interest into account.

Individual employee and local union interests also play a part in jurisdictional disputes. An individual employee is obviously anxious to remain employed. As his employer implements technological changes, however, he may prefer one of the newer jobs, or the elimination of his old job may force him to seek a new area of expertise. Similarly, his union shares this interest in expanding into new job fields. A union's strength is directly proportional to the number of workers it represents. The union may thus fear obsolescence as much as the employees themselves, and it can enhance its prestige among other workers by placing its members in new jobs. The local union's interest, however, may not precisely correspond to the national or international union's objectives. For example, since the national will not feel the pinch of a single plant's job changes as acutely as the local, the national may be more inclined to avoid fratricidal warfare. Awards that are satisfactory to the international thus may be totally unacceptable to the individual employee and his local.

The NLRB has two important interests in jurisdictional battles. Congress has addressed the work assignment dispute, indicating a desire to end those fights with minimum harm to individual employers and national productivity. Congress believed that disputes could be more effectively resolved with permanence and a minimum of economic bloodshed if the parties themselves, rather than the Government, imposed the solution. Congress also presumably intended that jurisdictional problems consume the least possible administrative

14. Under this section it is an unfair labor practice for an employer to encourage or discourage membership in any labor organization "by discrimination in regard to hire or tenure of employment or any term or condition of employment . . . ." 29 U.S.C. § 158(a)(3) (1970).
time and energy. The NLRB thus has an interest in expediency as well as a duty to implement the statutory scheme. These two goals can, of course, conflict. Overly hasty action on the part of the Board can result in inadvertent violations of the policy underlying section 8(b)(4)(D). Undue deliberation and delay on the other hand can nullify the purpose of section 10(k).

All parties have an interest in rapid resolution of jurisdictional disputes. Long jurisdictional strikes can delay an employer's fulfillment of contract obligations or even cause him to cease operations altogether. These economic losses seem particularly harsh when an employer faces the certainty of a strike regardless of the union he picks to fill a new job. If an employer can procure an injunction against a strike, he may complete his work and eliminate the new job before the protracted NLRB procedure determines which union has a right to fill the position. Since undue delay can only result in the kind of industrial strife that the National Labor Relations Act meant to avoid, Congress provided a procedure for resolving work assignment disputes that encourages the conflicting parties to waive the burdensome administrative machinery and seek their own solutions to their own problems. In a time of overburdened courts and agencies, the Board and courts should do everything possible to implement this congressional policy of discouraging litigation.

II. Procedural Alternatives Under Section 10(k).

Under section 8(b)(4) a union does not commit an unfair labor practice unless it employs a proscribed means to reach a proscribed end. Sections 8(b)(4)(i) and (ii) set forth the proscribed means. Subsection (i) prohibits a labor organization from engaging in or inducing an individual to engage in a strike; subsection (ii) prohibits a union from threatening or coercing any person, including employers. Section 8(b)(4)(D) sets forth the proscribed end that is rele-

15. O'Donoghue recites a case arising from a dispute over building a dam in which notice of hearing was eventually quashed by the Board when it learned that the dam had been completed while the case was pending. O'Donoghue, supra note 1, at 330 n.107.

16. 29 U.S.C. §§ 158(b)(4)(i) & (ii) (1970). In 1959 subsection (ii) was added and the phrase "any employee of any employer" was replaced by the phrase "any individual" in what is now subsection (i). Act of Sept. 14, 1959, Pub. L. No. 86-257, § 704(a), 73 Stat. 541. Thus the section is no longer limited by the definitions of "employer" and "employee" in § 2(2) and § 2(3) of the Act, and the inducement of any individual to withhold services falls under the ban of subsection (i). The Supreme Court, however, has held that an inducement to exercise management discretion, as dis-
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vant to work assignment disputes. Subparagraph (D) makes it an unfair labor practice to use a proscribed means with the object of "forcing or requiring any employer to assign particular work to particular employees in a particular labor organization . . . rather than employees in another labor organization . . . unless such employer is failing to conform to an order or certification of the Board." Thus Congress has made it an unfair labor practice for a union to strike, induce individuals to strike, threaten to strike, or use coercion against an employer in an effort to secure a particular work assignment.

Any aggrieved party may file a charge with the Regional Director of the NLRB alleging an 8(b)(4)(D) violation. After the charge has been filed, the Regional Director must serve it on all interested parties. The Director then investigates to determine whether the claim has any foundation. Moreover, section 10(l) of the Act empowers him to seek a federal district court injunction against improper economic pressure if he deems it appropriate. If his investigation discloses reasonable grounds to believe that the 8(b)(4)(D) charge has merit, the Regional Director must activate section 10(k). In effect this step holds the unfair labor practice charge in abeyance pending the resolution of the underlying dispute via the procedures set forth in section 10(k). The Regional Director then sends the

tinglished from an inducement to withhold services, is not forbidden unless it is coercive or threatening within the meaning of subsection (ii). NLRB v. Servette, Inc., 377 U.S. 46, 50-54 (1964).


19. The contending employee groups may file a charge, but employers file the overwhelming majority. Of the 630 section 8(b)(4)(D) charges closed by the Board in 1972, employers filed 571. 37 NLRB ANN. REP. 223 (1972).

20. In contrast to other § 8(b)(4) violations, under § 8(b)(4)(D) the Regional Director is not required to seek injunctive relief. Section 10(l) of the Act provides that the Regional Director shall seek injunctive relief when an (A), (B), or (C) charge has been filed and lie has reasonable cause to believe that the charge is true and that a complaint should issue. Section 10(l) continues by providing that "[i]n situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D)." 29 U.S.C. § 160(l) (1970) (emphasis supplied). Arguably, injunctive relief is appropriate when a work stoppage is currently underway, but not when picketing or a strike is merely threatened at some indefinite future date. See Johns, Jurisdictional Disputes Under the N.L.R.A., LABOR LAW DEVELOPMENTS 1967, at 43-44 (13th Annual Institute, Southwestern Legal Foundation). Courts have avoided the question of when injunctive relief under § 8(b)(4)(D) is appropriate, looking instead to whether there was reasonable cause to believe a violation existed. See, e.g., Mitchell v. Moody, 256 F.2d 630 (5th Cir. 1958).

21. As the Board has explained:
interested parties notice of a hearing to be held within ten days along with a brief statement of the disputed issues.\footnote{22} This ten-day hiatus gives the parties an opportunity to resolve the dispute or agree on a method for its peaceful resolution. Congress specifically designed this limited hands-off period to permit and encourage private settlement in lieu of the less favored, Government-imposed solution.\footnote{23}

Section 10(k) encourages private settlements by empowering the Board to hear and determine disputes unless, within the ten-day period following notice of hearing, the parties submit satisfactory evidence that they have agreed on methods for adjusting the dispute, or that the dispute has actually been adjusted. If the agreement is simply on methods for adjusting the dispute, the Regional Director will quash the scheduled 10(k) hearing, but the 8(b)(4)(D) charge will remain in effect.\footnote{24} If the employee groups have \textit{actually resolved} the dispute among themselves, and all but one group have withdrawn their claims to the work, the Board will quash the 10(k) hearing and dismiss the 8(b)(4)(D) charge as well.\footnote{25} The remaining group may then use

\begin{footnotesize}

\item For an 8(b)(4)(D) charge, Section 10(k) interposes an intermediate formal step between the completion of investigation of the charge and the issuance of a complaint based thereon. It provides for a hearing and a declaratory ruling by the Board on the question of legal entitlement to force or require the work assignment involved in the underlying dispute, which is designed to facilitate settlement of the dispute and to obviate the need for further proceedings.

\item Local 595, Ironworkers, 112 N.L.R.B. 812, 814 (1955).

\item 22. 29 C.F.R. § 102.90 (1973).

\item 23. 93 CONg. REc. 4030-35 (1947). In addition to administrative efficiency, a number of other considerations probably influenced this design. First, organized labor claimed that the house of labor could resolve jurisdictional disputes without governmental coercion. Second, the War Labor Board had given disputing unions but not the employer an opportunity to resolve their disagreements without coercion. \textit{See} 93 CONg. REc. 1844-45 (1947) (remarks of Sen. Morse). Finally, the idea that the resolution of disputes by the parties themselves is more effective and lasting pervades American labor relations law. \textit{See} Hearings, supra note 4, at 1557 (Remarks of A.F. Whitney).

\item 24. Laborers Local 670, 189 N.L.R.B. 715 (1971). Although the Board is under no absolute obligation to permit evidence of an agreed method of settlement after the ten-day statutory delay period, NLRB v. Local 450, IUOE, 275 F.2d 420 (5th Cir. 1960), it nonetheless has done so in order to comply with the manifest purpose of the section to encourage voluntary and private resolution of those disputes. Ironworkers Local 708, 137 N.L.R.B. 1753, 1756-57 (1962); 29 C.F.R. § 102.93 (1973). The Board, however, will hear and determine the dispute when the agreement on methods for resolving the dispute is not binding on the employer, and the Supreme Court has upheld this practice, construing the term "parties" to include the employer. NLRB v. Plasterers' Local 79, 404 U.S. 116 (1971).

\item 25. When a § 8(b)(4)(D) charge arises, the statute simply denies the Board power to hear and determine the dispute behind the unfair labor practice if there is satisfactory evidence of adjustment or agreement on methods of adjustment. But it provides further that "upon compliance by the parties to the dispute with the decision of
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otherwise lawful economic pressure\textsuperscript{26} to force its work assignment demands upon the employer.\textsuperscript{27} The interunion settlement, however, must be clear and unequivocal; the Board will not accept disclaimers of the work when other evidence indicates that the dispute is continuing.\textsuperscript{28} Furthermore, the employees themselves must accept the settlement. If they continue to demand the work in spite of union disclaimers, the Board will retain jurisdiction over the dispute.\textsuperscript{29}

A. Board Resolution

When the competing employee groups cannot resolve their dispute or the parties, including the employer, cannot agree on a satisfactory method of settlement, an administrative law judge must hold a hearing at which the employer and the competing unions may appear as parties. The hearing is “non-adversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board.”\textsuperscript{30} At the end of the hearing the administrative law judge transmits the record to the Board along with a written summary of the evidence setting forth the basic contentions and his analysis of the problem. Unlike the normal adjudicatory hearing, the administrative law judge makes no decision or recommendation on the merits of the dispute.\textsuperscript{31} The Board will finally

the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.” 29 U.S.C. § 160(k) (1970). In contrast to an agreement only on methods for resolving the dispute, the employer need not be a party to an actual resolution of the dispute. If all but one union has renounced any claim to the work, the 10(k) hearing is useless and § 8(b)(4)(D) no longer applies. Plasterers’ Local 79, 404 U.S. 116, 134-35 (1971).

26. The union cannot apply forbidden secondary pressures in violation of § 8(b)(4)(B). Some commentators have argued that (B) and (D) should be mutually exclusive violations, pointing out that in the construction industry any strike can easily become secondary. Thus, even though it is a jurisdictional dispute that should be solved through 10(k) processes, the employer can sidestep the determination by filing a (B) charge. Furthermore, picketing to force acceptance of a 10(k) award would often, by necessity, be secondary and thus subject to injunction. Local 825, IUOE, 162 N.L.R.B. 1617 (1967); O’Donoghue, supra note 1, at 335-37. The Supreme Court has clearly held that subsections (B) and (D) of 8(b)(4) are not mutually exclusive. NLRB v. Local 825, IUOE, 400 U.S. 297, 305-06 (1971), rev’g 410 F.2d 5 (3rd Cir. 1969), modifying 162 N.L.R.B. 1617 (1967).

27. Corrugated Asbestos Contractors, Inc. v. NLRB, 458 F.2d 683 (5th Cir. 1972); Engineers Local 450, 186 N.L.R.B. 835 (1970).

28. NLRB v. Local 1291, ILA, 368 F.2d 107 (3d Cir. 1966); Carpenters Local 186, 196 N.L.R.B. No. 7 (Mar. 31, 1972).


31. Id. See also 29 C.F.R. § 102.90 (1973).
resolve the case on the basis of the briefs that the parties file, the record of the hearing, and the administrative law judge's summary. After the Board announces its decision the Regional Director ascertains whether the disputing labor groups intend to comply with the Board's work assignment award. If he determines that the losing group intends to relinquish its claim, he will dismiss the pending 8(b)(4)(D) charge. If the dispute continues, however, the Regional Director will issue an 8(b)(4)(D) complaint based on the original charge. The 8(b)(4)(D) complaint will then be tried like any other unfair labor practice suit.

This tortuous procedure is suffused with delay, and the inherent functional overlap can only cause administrative strain. First, the hearing before the administrative law judge is an essentially useless endeavor. The dispute must go to the Board for resolution. Without an opportunity to give his expert opinion on the merits of the case, the administrative law judge serves merely an information-gathering function. Unlike normal unfair labor practice cases, the hearing officer in 10(k) proceedings has no power to make recommendations that will be final unless the parties make exceptions to them. Second, while the interplay between 10(k) and 8(b)(4)(D) is consistent with the congressional policy of allowing economic strength to determine the outcome of nonjurisdictional labor battles, other procedural aspects of this interplay merely create delay. Since the Board will not relitigate the validity of its 10(k) order at the subsequent 8(b)(4)(D) unfair labor practice hearing, it makes no administrative sense to go through the motions of a second hearing. If, during the ten-day hiatus that 10(k) commands, the parties are unable to resolve the dispute or agree on private methods to do so, one hearing should suffice to determine both the underlying issues and the legitimacy of economic pressures that the labor unions have exercised. Moreover, the present two-step procedure gives the employer a substantial opportunity for delay. By filing an 8(b)(4)(D) charge against a union he may be able to convince the Regional Director to seek a

32. Id. § 101.35 (1973).
33. Thus, if the labor organization repudiating the settlement or the agreed-upon method attempts to use proscribed pressures to secure the desired work assignment, the threatened employer is still free to protect himself by resurrecting the dormant § 8(b)(4)(D) charge. NLRB v. Plasterers' Local 79, 404 U.S. 116 (1971).
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10(l) injunction. The time it takes to litigate even a spurious complaint may provide the employer with a breathing spell in his battle with the rightful claimant.

Judicial review of the 8(b)(4)(D)-10(k) process, though limited, creates additional delay-making potential. Courts have uniformly held that the 10(k) award itself lacks the finality necessary to make it reviewable.37 Moreover, an employer's refusal to abide by a 10(k) award does not constitute an unfair labor practice. The employer thus cannot force judicial review of the award via a refusal to comply.38 Similarly, the courts have long held that the General Counsel's decision to file or dismiss an unfair labor practice charge is an act of discretion not subject to judicial review.39 The General Counsel, of course, will invariably dismiss an 8(b)(4)(D) charge against the union that prevailed at the 10(k) hearing. Thus, if the losing union acquiesces in the 10(k) award, the employer who disagrees with that award and the resulting dismissal of the charge will have no opportunity to seek judicial review. The losing union, however, can force limited review of the 10(k) determination by refusing to comply with the award and then seeking review of the resulting 8(b)(4)(D) adjudication. Through an unfair labor practice order, the court of appeals can then review the 10(k) award, though the scope of review will be quite limited.40

This apparent anomaly—granting limited review to the union and withholding it from the employer—creates some difficulty. Under the theory that 8(b)(4)(D) and 10(k) are primarily shields for the neutral employer faced with competing claims for the same work, this result is not unjust. Having elected for economic reasons to continue the dispute with the prevailing union, the employer cannot fairly com-

37. Henderson v. ILWU Local 50, 457 F.2d 572 (9th Cir. 1972); see Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938). The Supreme Court has stated that “the § 10(k) decision standing alone, binds no one. No cease-and-desist order against either union or employer results from such a proceeding.” NLRB v. Plasterers' Local 79, 404 U.S. 116, 126 (1971).
38. To enforce its determination that a party is committing an unfair labor practice in the face of a party's refusal to comply, the Board must normally petition a court of appeals. 29 U.S.C. § 160(e) (1970).
39. The Supreme Court has held that “the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint.” Vaca v. Sipes, 386 U.S. 171, 182 (1967).
40. The Fifth Circuit, for example, has opined that Congress did not even intend the courts “to consider the relevant factors and to weigh and evaluate the evidence adduced with respect to each.” Typographical Union No. 17 v. NLRB, 368 F.2d 755, 765 (5th Cir. 1966), quoting NLRB v. Local 825, Operating Engineers, 326 F.2d 213, 218 (3d Cir. 1964).
plain when the union uses economic weapons against him. Moreover, if Congress designed the 10(k) hearing primarily to remove a besieged employer from the insoluble dilemma of mutually exclusive claims, the employer has no legally recognizable interest in selecting which union actually does the work. The Board and the Supreme Court, however, have rejected this legalistic view in favor of a more pragmatic approach that recognizes the employer's substantial interest in the efficiency of his operations. 41

The Ninth Circuit has apparently accepted the pragmatic view. In Waterways Terminal Co. v. NLRB 42 it recently held that the Board's decision to quash a 10(k) hearing was a final order subject to judicial review because it permitted picketing and precluded an 8(b)(4)(D) complaint. The court carefully distinguished its holding in Henderson v. Longshoremen's Local 43 that the General Counsel's refusal to issue an 8(b)(4)(D) complaint after an actual 10(k) hearing was unreviewable. It reasoned that denial of the "review of a refusal to proceed to award under a Section 10(k) proceeding [would] nullify the effectiveness of Section 8(b)(4)(D)," 44 but that denial of review of agency action after a full hearing presumably would have no such dire effects. Despite its superficial appeal, this distinction seems doubtful for several reasons. The court did not explain why a refusal to hold a hearing is a "final order" while the determination that flows from a completed hearing is not. As a practical matter, the result in both cases will often be the same: the Board refuses to process an unfair labor practice complaint. Indeed, in both cases the Board makes the same underlying determination that there is no viable 8(b)(4)(D) charge.

While the Ninth Circuit's distinction seems doubtful at best, its general thrust seems correct. Any person with a substantial stake in the outcome of agency action is entitled to judicial review. 45 Under

42. 467 F.2d 1011 (9th Cir. 1972).
43. 457 F.2d 572 (9th Cir. 1972).
44. 467 F.2d at 1016.
45. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). "[I]n our system of remedies, an individual whose interest is acutely and immediately affected by an administrative action presumptively has a right to secure at some point a judicial determination of its validity." L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 336 (1965). Even if the National Labor Relations Act provides no method for review, it would seem that § 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702 (1970), might permit review. That section provides that "[a] person suffering legal
the Supreme Court's new approach, the employer has the necessary stake in the outcome. In the future courts should examine the consequences rather than the appearances of a 10(k) ruling and recognize that as a practical matter it is a final order for the employer entitling him to some judicial review. Yet this seemingly fair solution may entail added delay. Although the trial court is free to dissolve the 10(l) injunction after the 10(k) hearing and presumably would do so if the winning union is the party bringing the pressure, the dissatisfied employer might be able to secure the shelter of an injunction or appellate court stay while he pursues a time-consuming appeal.

B. Private Settlement

Congress fortunately provided an alternative to the procedural morass accompanying NLRB resolution of work assignment disputes. The disputing groups of employees can find their own solution to their problem. Following the enactment of the Taft-Hartley Act, the NLRB encouraged organized labor to develop private institutional methods for settling these interunion disputes in order to save the Board from entering this unfamiliar thicket. After a number of false starts, in late 1949 the Building and Construction Trades Department of the AFL-CIO launched the National Joint Board for the Settlement of Jurisdictional Disputes. Although the commentators did not expect


46. Address by Paul M. Herzog, Chairman N.L.R.B., American Management Association, in 20 LAB. REL. REP. 97, 104 (1947); Address by Robert N. Denham, General Counsel N.L.R.B., Associated General Contractors, Dallas, Texas, in 21 LAB. REL. REP. 44 (1948).

47. K. STRAND, supra note 1, at 92. The AFL-CIO Internal Disputes Plan, 49 L.R.R.M. 64 (1962), is equipped to deal with jurisdictional problems, though it was not structured for that purpose. The plan is designed to prohibit one union's raiding of another union's established collective bargaining relationship. But since the line between work assignment and representation can be quite hazy, the plan potentially may be used to resolve work assignment disputes. The Plan empowers an umpire to initially determine whether one union has improperly raided another, and it gives a right of appeal to the Executive Council. The Executive Council uses internal sanctions to enforce decisions, and the parties are forbidden to resort to legal proceedings to enforce their claims. The Internal Disputes Plan does not provide for any employer participation. Since the Supreme Court has recently held that the employer is a "party" within the meaning of § 10(k), the Internal Disputes Plan will have no real impact on the law of work assignment disputes unless it is amended.
it to last long, the Joint Board and its successor, the Impartial Jurisdictional Disputes Board, have thrived with only one brief lapse in 1969.48

Under the old Joint Board the primary decisionmaking body consisted of an impartial chairman, four members representing the basic and special trades, and four members representing employers.49 In an attempt to emphasize the nonpartisan nature of the resolutions, the new plan provides for a Joint Administrative Committee of eight persons drawn equally from labor and employers. This committee in turn must appoint an Impartial Jurisdictional Disputes Board composed of three impartial members employed by neither the labor nor the management segments of the industry. This board has the primary dispute-resolving responsibility.50 A signatory employer, an employer association, or a member international union may refer work assignment disputes to the Impartial Board.51 The Joint Committee must also appoint an internal Appeals Board composed of three impartial members employed by neither labor nor management.52 The Joint Committee must finally select ad hoc Hearing Panels consisting of two disinterested union presidents, two disinterested employer representatives, and an impartial judge. The primary duty of the Hearings Panel is to resolve disputes that persist after the Impartial Board's awards. After attempting to mediate between the parties, the Hearings Panel hears the case and renders its own decision.53

The plan purports to bind all international unions affiliated with the Building and Construction Trades Department, and, of course, it binds any employer who specifically accedes to the plan.54 Until the latest revisions of the plan, the major enforcement weapon was denial to the nonconforming party of the benefit of any future awards.55 The current plan does not detail what remedy it will impose upon renegades; it merely indicates that the department has established internal

51. Id. at art. V, § 5.
52. Id. at art. IV, § 1.
53. Id. at art. X.
54. Id. at art. I.
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procedures for discipline.\textsuperscript{56} The plan reserves to the employer the right to seek judicial relief from unauthorized pressure, but it makes no provision for disciplining nonconforming employers.

Since the Impartial Board has no way to enforce its decision against the employer, he may attempt to avoid an award that does not satisfy him by assigning the work to the losing union. The beneficiary of the private award must then use economic pressure to force compliance. The employer may, however, try to relitigate the dispute before the NLRB by filing another 8(b)(4)(D) complaint. The question then becomes whether economic pressure from the party benefiting from a private award violates section 8(b)(4)(D). Since no statutory language provides immunity to the beneficiary of a private award, the literal language of the statute apparently gives the employer an easy opportunity to avoid compliance with one. Yet the NLRB has made it clear that it would decline to issue a complaint in favor of an employer who agreed to accept a private determination at which it was represented, but thereafter repudiated the award.\textsuperscript{57}

The employer, however, is not limited to NRLB remedies.\textsuperscript{58} He may elect to proceed judicially and sue for damages under section 303 of the Taft-Hartley Act.\textsuperscript{59} Then, the General Counsel's decision not to file a complaint is irrelevant.\textsuperscript{60} The court can independently determine whether the defendant union damaged the plaintiff employer by using proscribed pressure to secure a work assignment in violation of 8(b)(4)(D). The courts have given clear indications that they will not relitigate the NLRB's work assignment in the guise of a section 301 damages action.\textsuperscript{61} Nonetheless, they have signaled that they

\textsuperscript{56} Plan, supra note 50, at art. VIII, § 2(e).
\textsuperscript{57} 29 C.F.R. § 102.93 (1973); accord, id. § 101.33 (1973). See also NLRB v. District Council of Laborers, 443 F.2d 220, 223 (9th Cir. 1971); Brief for NLRB at 28, n.21, NLRB v. Plasterers' Local 79, 404 U.S. 116 (1971). Private awards should similarly bind labor organizations.
\textsuperscript{58} ILWU v. Juneau Spruce Corp., 342 U.S. 237, 244 (1952).
\textsuperscript{59} 29 U.S.C. § 187 (1970). Section 303 provides that any person injured by an 8(b)(4) unfair labor practice has an action for damages.
\textsuperscript{60} Not only may § 303 be invoked for illegal activities occurring after an NLRB order, this section can also be used wholly independent of NLRB orders, and a person may recover damages for activities of a union coming prior to any NLRB order. Construction Employers' Ass'n v. IUOE, 427 F.2d 230 (5th Cir. 1970).
\textsuperscript{61} A final NLRB determination of a jurisdictional dispute will control in a § 301 action that a union brings for breach of contract arising from the same dispute. Typographical Union No. 17 v. NLRB, 368 F.2d 755 (5th Cir. 1966); Ironworkers Local 395 v. Council of Carpenters, 347 F. Supp. 1377 (N.D. Ind. 1972). Logically, that determination would also control in an action by an employer, as well as in an action under § 303 of the Taft-Hartley Act.
might not recognize an award from a private body as a defense to a section 303 action based on a literal 8(b)(4)(D) violation by the beneficiary of the private award. The courts, however, should resist any inclinations to put themselves in the place of the congressionally authorized private settlement procedure. Should they establish a judicial right to recover under section 303 in the face of a private award, the employer could effectively control work assignments by ignoring the private award and filing suit against the prevailing union. The threat of damages would necessarily pressure the unions into compliance with the employer's assignment. This result, however, would undermine the Supreme Court's announced policy that employer preference should not be the sole factor in resolving work assignment disputes. Moreover, allowing an employer to repudiate his agreement to a private settlement that is enforceable under section 301 and to recover damages under section 303 in spite of that binding agreement would create an intolerable conflict between the two statutory policies. Finally, since the goal of a uniform national labor policy is inherent in the preemption doctrine, the courts and the NLRB should not treat the same issue in fundamentally different ways. In the interest of uniformity and administrative effectiveness the courts should adopt the NLRB's logical position that a valid private award is a defense to an 8(b)(4)(D) charge.

III. The Section 10(k) Decision

In providing the speedy private settlement alternative to the cumbersome NLRB resolution of the section 10(k) dispute, Congress meant to ease the labor Board's administrative burden and avoid undue industrial strife. Congress manifestly hoped that the parties would choose the private alternative, and a truly neutral employer will probably take the private route to end the interunion dispute as

62. IBCJ v. C.J. Montage & Sons, 335 F.2d 216 (9th Cir. 1964); Schinella v. Iron-workers Local 361, 149 F. Supp. 5 (E.D.N.Y. 1957). There are also indications that under § 303 the courts have not accepted the Board position that a prerequisite to a violation of 8(b)(4)(D) is two or more competing unions. Courts have indicated in dicta that a dispute between the employer and one union over the assignment of work can result in an 8(b)(4)(D) violation. NLRB v. Local 25, IBEW, 383 F.2d 449, 454 (2d Cir. 1967). But see Plasterers' Local 79 v. NLRB, 440 F.2d 174 (D.C. Cir. 1970), rev'd, 404 U.S. 116 (1971) (court of appeals held that picketing to enforce a private award was not a violation of § 8(b)(4)(D) when the Board, without jurisdiction, made a contrary award pursuant to 10(k)).


64. See NLRB v. Local 1291, ILA, 345 F.2d 4 (3rd Cir. 1965).

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quickly as possible. Employers, however, have interests other than the rapid settlement of disputes. An employer who prefers one of the disputing employee groups will naturally choose the forum that is most likely to confirm his choice. Whether by chance or design, the NLRB bases its decisions on factors that make the Board more likely than the institutionalized private machinery to agree with the employer. Thus, an employer who is interested in the outcome of a dispute may be willing to forgo the celerity of the private machinery to ensure that his choice will prevail.

A. NLRB Resolution in the Aftermath of CBS

Once the NLRB assumes jurisdiction under section 10(k), the statute obliges it to "hear and determine the dispute." For thirteen years after the Taft-Hartley Act, however, the NLRB entertained a very restrictive view of this obligation. It read section 8(b)(4)(D) literally as a limitation on its power. Consequently, the Board felt that it could not make affirmative awards contrary to employer assignments. The Board probably based this timid position on its underlying lack of confidence in its background and expertise to resolve jurisdictional disputes. Nevertheless, this attitude gave an employer the unlimited right to assign work as he pleased unless the assignment violated a prior Board order or certification, or unless a specific contract between the employer and the complaining union granted that union the disputed work.

The Board made several legal arguments in support of this position. It contended that an affirmative award in the face of the literal language of 8(b)(4)(D) created a potential inconsistency between sections 10(k) and 303. While a Board award might entitle a union to certain work, the union's use of economic pressure to enforce its award might make it liable for damages under 8(b)(4)(D). Furthermore, the Board argued that an affirmative award under 10(k) would discriminate or cause employer discrimination in violation of sections 8(a)(3) and 8(b)(2). Especially if one contending group was un-

66. Sussman, supra note 1, at 204. See also Local 675, IUOE, 116 N.L.R.B. 27, 38 n.10 (1956); ILWU, Local 16, 82 N.L.R.B. 650 (1949).
68. 29 U.S.C. §§ 158(a)(3), (b)(2) (1970). Section 158(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage mem-
organized, an affirmative Board award would cause the employer to encourage membership in the successful labor organization. Finally, the Board believed that if it acted as the ultimate arbiter of jurisdictional disputes, unions seeking to overrule their employers' assignments would strike more often to gain access to 10(k) proceedings, which would result in more industrial strife.

The Supreme Court finally resolved the matter in *NLRB v. Radio & Television Broadcast Engineers (CBS)*, a case involving a truly neutral employer. The contending unions both desired the task of providing lighting for a live nonstudio television broadcast. Each group was organized and had a contract with the employer. In the 10(k) hearing the Board, finding no contrary certification or contractual obligation, refused to change the employer's assignment. The contesting union refused to comply, and the Board processed the 8(b)(4)(D) complaint. The Second Circuit denied enforcement of the Board's order, reasoning that section 10(k) required the Board to make a positive determination and award. The court felt that the Board's failure to exercise properly its 10(k) jurisdiction prohibited it from prosecuting an 8(b)(4)(D) complaint. The Supreme Court unanimously affirmed the Second Circuit. In contrast to the Board, the Court directed its attention away from 8(b)(4)(D) and looked to the literal requirements of 10(k). Notwithstanding any prohibitions in 8(b)(4)(D), the Court concluded that section 10(k)'s "hear and determine" conferred a positive duty on the Board to decide each dispute on its merits. Ironically, while the NLRB argued that it was unqualified to resolve work assignment disputes on their merits, Justice Black heaped praise upon it and reassured the Board of its competence to make wise awards. The Court unfortunately did not set

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70. *See Local 173, Wood, Wire & Metal Lathers' Intl Union, 121 N.L.R.B. 1094, 1108-13 (1958).*
71. 364 U.S. 573 (1961), aff'g 272 F.2d 713 (2d Cir. 1959).
72. NLRB v. Radio & Television Broadcast Eng'rs, 272 F.2d 713 (2d Cir. 1959).
73. The Court explicitly held that "it is the Board's responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then specifically to award such tasks in accordance with its decision." 364 U.S. at 586.
74. Given the Board's current reluctance to relinquish its 10(k) jurisdiction or give any substantial weight to Joint Board awards, the Board has apparently shed its inferiority complex.

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forth the criteria the Board should use. Rather, Justice Black merely mentioned in passing "standards generally used by arbitrators, unions, employers, joint boards and others in wrestling with this problem." 75

The CBS decision forced the Board to alter its proceedings abruptly and to make an introspective examination of the factors it should consider in resolving troublesome jurisdictional problems. After more than a year of self-evaluation and discussion with union leaders and employers, the Board issued its first 10(k) determinations and awards. These set the pattern and tone for all future 10(k) determinations. The Board announced that rather than formulate general rules, it would resolve each case upon its own facts after considering all the relevant factors. The Board then presented its list of relevant factors. These included, it said,

[t]he skills and work involved, certifications by the Board, company and industry practice, agreements between unions and between employers and unions, awards of arbitrators, joint boards and the AFL-CIO in the same or related cases, the assignment by the employer, and the efficient operation of the employer's business. 76

The Board finally stated that it would determine the appropriate weight for each factor on a case-by-case basis. True to its word, the Board pays little attention to its own precedents, and the relative weight it gives to each of the listed criteria runs the full gamut from outcome determinative to utter insignificance. 77 Yet throughout almost ten years of Board determinations, it has maintained consistency in results: it overwhelmingly upholds employer preference. 78

1. Board Certification.—Board certification is the only factor that the statute specifically requires the NLRB to recognize. If a Board certification covers particular work, the union that received the certification is entitled to the work. The mere fact of certification, however, is not enough: the certificate must specifically cover the work in question. Accordingly, since certifications are seldom suffi-

75. 364 U.S. at 583.
76. International Ass'n of Machinists, Lodge 1743, 135 N.L.R.B. 1402, 1410-11 (1962) (Jones Construction case). These general criteria were judicially approved in NLRB v. Local 825, IUOE, 326 F.2d 213 (3rd Cir. 1964).
77. O'Donoghue, supra note 1, at 321 & n.51.
78. Only five of the first 55 awards made following CBS went contrary to employer preference. O'Donoghue, supra note 1, at 322. Other writers have witnessed this phenomenon. See Johns, supra note 20, at 53; Sussman, supra note 1, at 225. A survey by the author of 10(k) awards from 1970 through June 1973 indicates that of 282 awards only 10 refused to uphold the employers' assignments.
ciently precise, this factor is rarely determinative.\textsuperscript{79}

2. \textit{Third Party Awards}.—Observers uniformly agree that the NLRB should rely heavily on past and current private awards.\textsuperscript{80} Yet while the Board ostensibly considers third party awards, it seldom gives them any substantive weight. In most cases in which the private award and the Board decision coincide, the Board mentions the private award in support of a conclusion based largely on other factors.\textsuperscript{81} On the other hand, when the Board disagrees with the private decision, it usually either refuses to follow the decision or ignores it altogether.\textsuperscript{82} Nevertheless, on very rare occasions the Board, without any apparent reason for its departure from the norm, gives heavy emphasis to a private award.\textsuperscript{83}

One reason for the Board's reluctance to follow third party awards is its hesitance to rely on a proceeding in which all the parties did not participate.\textsuperscript{84} Although the Board properly desires to ensure full employer participation in the dispute-resolving machinery, it should not discard private awards so hastily. The employer has an opportunity to present his observations at the 10(k) hearing, and the Board can weigh that viewpoint against the private body's conclusions. If the employer's arguments have merit, the Board can reject the private award. But if the employer has nothing more to add than a statement of his preference, then the Board has little reason for denying the private award the weight it is due. While the NLRB has no objective way to calculate the appropriate weight to give a private decision rendered in the employer's absence, it can use its common sense and its knowledge of the evidence to estimate how persuasive the employer's arguments would have been to the private body. Moreover,


\textsuperscript{80} Schmidt, \textit{supra} note 79, at 293; Sussman, \textit{supra} note 1, at 228-30; Note, 77 \textit{Yale L.J.} 1191, 1199 (1968); ABA SECTION ON LABOR RELATIONS LAW, 1965 COMMITTEE REPORTS 457 (1965).

\textsuperscript{81} \textit{See, e.g.}, Construction & Gen. Laborers, Local 452, 193 N.L.R.B. 375 (1971).

\textsuperscript{82} \textit{See, e.g.}, Ironworkers Local 272, 203 N.L.R.B. No. 178 (May 31, 1973). A survey by the author showed that the Board ignored or declined to follow past and current private awards in thirty-nine cases between January 1970 and July 1973.

\textsuperscript{83} \textit{See, e.g.}, Local 40, Ironworkers, 197 N.L.R.B. No. 112 (June 21, 1972).

\textsuperscript{84} Plumbers Local 55, 184 N.L.R.B. No. 105 (Aug. 17, 1970); St. Paul Bldg. Trades Council, 180 N.L.R.B. 1045 (1970). \textit{See also} Steamfitters Local 420, 198 N.L.R.B. No. 38 (July 17, 1972). If the employer did participate in the private arbitration, the Board does not even have jurisdiction. Hence, this rationale would deprive the private award of weight in all cases adjudicated by the Board.
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since the employer normally elected to forego the private proceedings, he knowingly ran the risk of an adverse private award. The Board need not show undue sympathy for a party who avoided a congressionally authorized, time-saving device.

The Board has also grounded its aversion to a third party award on its observation that the private body failed to state the reasons for its decision. The requirement that the private award prove itself, in reality, however, is a red herring. Since both sides in a work assignment dispute usually have cogent arguments in support of their positions, the announced factors may be immaterial to the particular dispute, or they may offset each other. The Board is somewhat shortsighted in ignoring a judgment from an expert body simply because it failed to recite fully a list of rather meaningless factors. The Supreme Court has willingly deferred to arbitration even though "[a]lbitrators have no obligation to the court to give their reasons for an award." The Joint Board published its criteria and the new Impartial Board will no doubt follow them. With the notable absence of employer preference, this list does not differ markedly from the NLRB's criteria. The Board should not assume that the Impartial Board is not applying its criteria simply because it fails to incant them with each award. Indeed, the Board might do well to examine some of its own rather uninformative opinions. After reciting its overworked list of factors, the labor Board usually concludes, without substantive analysis, that the facts render some factors "inconclusive." It then concludes that some other factors "not inconsistent with" employer assignments should prevail. The Impartial Board's quick resolution of disputes via its shortform decisions is preferable to the NLRB's involved opinions that do little to educate the litigants and apparently take weeks to draft.

3. Interunion Agreements.—If the disputing employee groups have in fact established their jurisdictional boundaries by private agreement and their dispute concerns only exact application of the agreement, the Board could appropriately recognize the agreement and interpret it to conform to the parties' original intent. The approach would be consistent with the Safeway doctrine that two disputing employee groups are necessary to make a jurisdictional dispute cognizable under the Act. The Board's early practice of giving

87. Local 107, Teamsters (Safeway Stores), 134 N.L.R.B. 1320 (1961).
heavy weight to interunion agreements,\textsuperscript{88} however, was philosophically inconsistent with its scanty attention to third party awards. The Board's insistence on employer participation at third party adjudications is difficult to square with its position of permitting two disputing unions to resolve the difficulty in advance without even considering the factors a third party would use and without employer participation. Perhaps because of this inconsistency, the Board in \textit{Carpenters' District Council}\textsuperscript{89} quickly retreated from its strong position favoring interunion agreements. In that case the Board held that interunion agreements purporting to control jurisdictional disputes would not be determinative and implied that it might ignore them in the face of counterbalancing factors. This unfortunate decision runs contrary to the established policy of encouraging labor organizations to agree in advance to avoid industrial strife. If the disputing unions have limited their own jurisdictional claims, the Board should not encourage any one of them to extend those limits unilaterally.

In practice the Board ignored the two most important factors for resolving work assignment disputes: third party awards and interunion agreements. This disregard probably stems from its firm belief that the employer should have a voice in jurisdictional disputes; accordingly, the Board is inherently suspicious of private procedures in which the employer did not participate. Thus, the NLRB's position on the merits of agreements and awards is incongruously dictated by its concern for the mechanics of dispute resolution. If it would relax its adherence to this procedural concept, possibly it could slide into a consistent analysis that would give proper weight to these two very important factors.

4. \textit{Collective Agreements Between Employer and Union}.—Although the Board has stated that it will not consider collective bargaining contracts unless they direct a work assignment in "clear and unambiguous terms,"\textsuperscript{90} it nonetheless pays a distressing amount of attention to them. It gives them controlling weight in many cases\textsuperscript{91} and substantial consideration even when they only colorably cover the disputed work.\textsuperscript{92} The Board is not reluctant to giving collective bargain-

\textsuperscript{89} 146 N.L.R.B. 1242, 1245 (1964); see Schmidt, \textit{supra} note 79, at 280.
\textsuperscript{90} Teamsters Local 470, 203 N.L.R.B. No. 99 (May 15, 1973); see O'Donoghue, \textit{supra} note 1, at 326.
\textsuperscript{91} \textit{E.g.}, IBEW Local 3, 198 N.L.R.B. No. 61 (July 24, 1972).
\textsuperscript{92} \textit{E.g.}, Printing Pressmen, Local 23, 186 N.L.R.B. 843 (1970).
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ing contracts preference over contrary area practice and inconsistent third party awards.\textsuperscript{93} Again, this stance puts the Board in a logically inconsistent position. It refuses to give substantial weight to third party awards or prior interunion contracts, reasoning that all interested parties should be present; yet it is willing to give effect to collective bargaining contracts that exclude the complaining party. Moreover, the Board's refusal to give substantial effect to arbitration awards based on the collective bargaining contract when all parties were not represented at the arbitration proceeding aggravates this inconsistency.\textsuperscript{94} If the contract is an important factor, it is no less important when an arbitrator renders a definitive interpretation of it regardless of what parties appeared at the arbitration.

The Board's error does not lie in denying private arbitration awards; it lies in giving substantial emphasis to bilateral collective bargaining agreements, whether or not they contain arbitration provisions. The Board, of course, should honor and enforce contracts that specifically disclaim work. Likewise, it should respect provisions that establish particular criteria for resolving disputes, unless they necessarily favor the contracting union.\textsuperscript{95} Moreover, it should always honor and give substantial weight to contracts that call for submission of disputes to a third party for resolution. But grave danger exists when an employer can, by contracting with his favorite union, exclude well-founded claims for the work by other labor groups. Unlike the employer, who is free to resort to economic opposition if he dislikes the unions' solution, the union ignored in a contract has no legal redress. If the Board follows its usual practice and awards the work according to the contract, section 8(b)(4)(D) bars the excluded union from any economic resistance. The Board can reduce the obvious potential for abuse inherent in this situation by disregarding self-serving jurisdictional clauses in collective bargaining contracts for work not being performed at the time of the contract.\textsuperscript{96}

5. Tradition.—Labor-management tradition, as a factor in re-


\textsuperscript{94} E.g., Machinists & Aerospace Workers, Dist. Lodge 27, 198 N.L.R.B. No. 64 (July 26, 1972).

\textsuperscript{95} See IBEW Local 122, 182 N.L.R.B. 538 (1970).

\textsuperscript{96} This should not result in any collision with courts that might be called upon to enforce the contractual work assignment under § 301 of the Act. When the Board has resolved disputes via § 10(k), the courts have deferred to that resolution and refused to relitigate the issues under § 301.
solving jurisdictional disputes, has two broad aspects. Its geographical aspect is best viewed as a series of concentric circles of practice, including within them shop practice, area practice, and industry practice. Established shop practice represents an accommodation between the employer and the competing labor groups. It resembles a tripartite agreement in that all parties find a particular division of the work acceptable. The Board, of course, should give heavy weight to the status quo in order to discourage union adventurism and restrain employer proclivities for union-busting. A general rule of giving great weight to the status quo, however, should be subject to two important exceptions. Since shop practice does not represent a silent accommodation between a transient employer and competing labor groups, the Board should not give great weight to the employer's practice at another locale. Additionally, when shop custom favors an unorganized group the dispute may take on the characteristics of a struggle for representation. If the Board decides the dispute under 10(k) and awards the work to the organized group, it may be forcing de facto recognition in derogation of the unorganized employees' organizational rights. Yet if the labor Board awards the work to the unorganized group, it may forestall valid organizational efforts. In these situations the Board should avoid the dilemma by adjudicating any pressures to change the status quo under section 8(b)(7),\(^{97}\) rather than under section 10(k) and 8(b)(4)(D).

Area practice manifests the tripartite agreement to a particular division of work on a larger scale than shop practice. Maintaining consistent area practice has the important social function of ensuring the mobility of work forces. For example, if a crane operating engineer loses his job, he will search for similar crane work in the area. But if machinists handle the same work elsewhere in the area, the unemployed crane operator must change occupations, change unions, or leave the area. Each of these alternatives imposes a substantial hardship on the individual. To avoid these hardships he may pressure his union to secure work for him on other jobs, and in response to this pressure his union may attempt to expand its jurisdiction. This spiraling process would ultimately shatter industrial peace. Thus, where shop custom conflicts with area practice, the Board would best serve long-range industrial peace by striving to secure a consistent area practice. Particularly in businesses characterized by worker mobility

and cyclical employment opportunities, such as construction, the need for uniformity is great.

Unfortunately, the NLRB has consistently given the heaviest weight to an individual employer's past practices. Even if an employer has followed a particular shop practice for as little as one year, the Board will show it substantial favor. Still, on rare occasions, the Board will allow area practice to overcome employer preference. Adding to the confusion, the Board seldom attempts to define the relevant area; it simply announces its conclusion that area practice favors one of the parties. In the rare cases in which it does attempt to draw geographical lines, it does not explain its rationale.

All of this turmoil results from the Board's failure to take an analytical approach to the problem. Rather than labeling area practice "inconclusive" and moving on to other factors, the Board should take a three-step approach in viewing the geographical aspect of the tradition factor. First, it should precisely define the relevant area by examining the nature of the trade and the mobility of the work force. Then, looking solely to the employees within that area, it should determine the dominant practice. Finally, it should decide how much weight to give to the prevailing practice. If the Board cannot find a clearly dominant practice in the relevant area, it should, of course, give shop practice greater weight. But whenever a dominant area practice exists, long-range labor policy dictates that it should prevail over shop practice. This emphasis on area practice will encourage the parties to disregard the status quo only when they are aware of a difference between their practice and area practice. If the employer elects to fight the established local tradition he is free to do so, and if his motivation is strong enough, presumably he can prevail. Other

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100. Teamsters Local 83, 191 N.L.R.B. 493 (1971). In Operating Eng'rs Local 4, 198 N.L.R.B. No. 124 (Aug. 15, 1972), however, the Board wisely allowed area practice to prevail over employer preference.
102. See, e.g., Longshoremen Local 8, 203 N.L.R.B. No. 126 (May 24, 1973) (single state area practice); Ironworkers Local 29, 199 N.L.R.B. No. 34 (Sept. 27, 1972) (two state area practice); Carpenters Local 1229, 194 N.L.R.B. 640 (1972) (single city area practice).
103. See, e.g., Plasterers Local 114, 201 N.L.R.B. No. 23 (Jan. 11, 1973).
employers, following his lead, may eventually develop a new area custom, which the Board should later recognize.

As the area under consideration grows larger, consistent practice becomes less important. Uniformity serves no useful purpose outside the area of worker mobility. A difference in longshoreman assignments between Seattle and Miami, for example, would probably not affect the workers involved. In industries with high worker mobility, however, like some heavy construction projects, the relevant area practice may include the entire nation. While deviations from distant practice usually do not encourage pressures that could cause individual hardship or interunion disputes, national or trade practice can always serve as a useful guide, demonstrating how other areas have resolved a particular problem. Using the analogy of judicial decisions from sister jurisdictions, the NLRB should view national practice as persuasive but not controlling authority.

The second broad aspect of the labor-management tradition factor is functional. It stresses the relationship between the generally accepted nature of a craft and the particular task. In one case, for example, the Board had to decide which of two unions should perform the solemn function of sugar tasting. Both longshoremen, who took the sugar from the dock to the ship, and the sugar refinery's employees, who placed the sugar on the dock, claimed the work. The Board felt that since this epicurean assignment was more closely related to sugar refining than to loading ships, the job should go to the refinery employees. This kind of analysis, however, necessarily entails a frustrating lack of precision. No functional distinction between men who haul bags to a dock and men who haul bags from a dock makes either group's taste buds more suited to pass judgment on the quality of sugar. When a union demands work that is far beyond its functional bailiwick, the Board should be able to recognize the irrationality of the claim. But in cases where none of the competing groups is inherently more qualified to perform a newly created function, the Board should avoid engaging in a futile and misleading functional analysis of the competing groups' work.

104. ILA, 137 N.L.R.B. 1458 (1962).
105. A factor that can occasionally aid the Board in making a functional decision is the historical declarations of the unions themselves in their charters, constitutions, and affiliations. When they do not conflict with another union's similarly well-established claims, long settled assertions give the Board a useful basis for what necessarily is an arbitrary decision.
6. Efficiency.—The NLRB frequently gives efficiency substantial weight in its work assignment determinations. The term encompasses so many variables, however, that it is unwieldy unless subdivided into more manageable units. The single most important component of efficiency is employee skill, because it determines the quality of work and the hourly output. The Board, of course, would undermine economic and social policy if it awarded work to a group that lacked the training and ability to perform the assigned task expeditiously. The Board, however, has not ignored employee skill in making its determinations; in fact it has overworked that subfactor. Once a group shows that it has the basic ability to perform the work, the Board should end its inquiry into employee skill. The Board is not equipped to make fine value judgments about which group has the greatest ability to perform the work. The employer, by contrast, is in a good position to evaluate his employees, and his assignment will undoubtedly take their skill into account.

Another component of efficiency is labor cost. At some point the cost per unit of output can be so great that the Board must necessarily consider the employer’s costs, and, as with basic skill, it should not make totally unreasonable awards. Unfortunately, the Board usually goes beyond threshold reasonableness and actually views wage rates as an independent factor in resolving work assignment disputes. In Teamsters Local 294 the employer had assigned the relevant work to his current nonunion employees. At that point, the Teamsters stepped in and demanded the work. Although the dispute obviously took on aspects of an organizational dispute, the Board nonetheless heard the case pursuant to section 10(k). In awarding the work to the nonunion employees the Board emphasized the lower wage scale for nonunion workers. The possibility that the Teamsters would be paid on a uniform scale at a higher rate than the employer presently paid plainly influenced the Board, and it even voiced concern that the employer could not afford the higher rate.

Teamsters Local 294 vividly illustrates the impropriety of the Board basing awards on the employer’s economic considerations. It

107. See Sussman, supra note 1, at 217.
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has no expertise to pass judgment on whether an employer should use a variable or a fixed wage scale; it is not qualified to hold an employer's wages to a minimum or to determine what wages he can afford.\textsuperscript{110} Since wages combine inseparably with employee skill as a single motivating factor behind an employer's assignment, holdings like \textit{Teamsters Local 294} will tend to drive down wages and favor minimally skilled workers over the established trades. Congress delegated the Board no authority to accomplish these social changes.

Assuming that the Board should give some consideration to cost efficiency, employer preference is the best vehicle for this recognition. The employer's good faith choice of employees is probably an exercise of his best business judgment based on a composite of all the economic factors, and the Board should not lightly attempt to second-guess his economic analysis. Nevertheless, the Board should not entirely forsake economic analysis. When the employer's choice is clearly unreasonable, the Board should alert itself to the possibility that non-economic factors have motivated the choice. It should carefully examine the facts to determine whether the employer's motive was to avoid a valid contract or eliminate a weak union, or whether the union had subjected him to undue pressures before he made the assignment.

7. \textit{Employer Preference}.—While the Board does make awards without specific reference to this supposedly independent factor,\textsuperscript{111} in practice it rarely deviates from the employer's choice. Critics point out that factors like relative union strength and cooperativeness, which should be foreign to national labor policy, can influence employer assignments.\textsuperscript{112} Additionally, if employer preference carries significant weight, unions will doubtless engage in \textit{sub rosa} pressures to gain the initial assignment. Finally, the Board's long-run ratification of employer assignments certainly violates the spirit of the \textit{CBS} doctrine that the Board should make an independent determination of work assignment disputes. Other commentators have asserted that employers can correctly evaluate the relevant factors without wasting the Board's time.\textsuperscript{113} While this position perhaps goes too far in applauding employer acumen, employer preference represents a simplified and relatively accurate evaluation of the numerous efficiency factors. When

\textsuperscript{110} \textit{See} Hyman and Jaffee, \textit{Jurisdictional Disputes}, N.Y.U. First Annual Conference on Labor Law 423, 454 (1948); O'Donoghue, \textit{supra} note 1, at 328.

\textsuperscript{111} Plumbers Local 420, 198 N.L.R.B. No. 38 (July 17, 1972).

\textsuperscript{112} Sussman, \textit{supra} note 1, at 215.

\textsuperscript{113} \textit{See} Johns, \textit{supra} note 20, at 53.
the Board rests its decision on unstated or inconclusive factors, an award contrary to employer assignment seems overly harsh. The employer is entitled to his choice at least when the Board can find no reasons for disallowing it. The Board, however, has allowed this equitable consideration to evolve into a de facto presumption in favor of the employer's choice. Currently the union challenging an employer's assignment must carry the burden of demonstrating why the assignment is improper. Thus, while the Board has not erred in considering employer preference, it has mistakenly neglected to view employer preference as a factor wholly dependent upon the numerous economic factors underlying it.

In reality employer preference, efficiency, and shop custom are not independent factors for the Board to add together and weigh in their totality. They are overlapping considerations springing from a common root, which, when added together, give an entirely distorted picture of the number and weight of the considerations favoring the incumbent employee group. Under the Board's current approach the incumbent union starts off with all three considerations plus, perhaps, a collective agreement in its favor. With this built-in disadvantage, challenging unions have rarely upset employer selection. Accordingly, when the Board compares a single award or an ambiguous agreement with all these opposing concerns, it almost always reaffirms the employer's initial choice.

If the Board insists on considering multiple factors in making work assignment decisions, it must at least reevaluate the weight it accords each factor. It should abandon its ad hoc determinations and frankly acknowledge that some factors are more persuasive than others. Furthermore, when the Board views employer preference, it should correspondingly discount the shop custom that flows naturally from that preference. Likewise, a collective agreement assigning the work is probably a reflection of employer preference, and the Board should appropriately discount it. Since interunion agreements and third party awards at least have some element of impartiality, the Board should give these factors priority over economic factors dominated by employer self-interest. Even if the Board rules for the contesting union despite an employer's economic interests, the employer still has a chance to protect his economic determination by refusing

to accept the award and facing the union's counterpressures. But when the Board bases its award upon an employer's economic motives, 8(b)(4)(D) prevents the losing union from asserting economic interest and the interunion agreement or third party award that supports that interest.

By refusing to give employer preference prima facie validity, the Board could also discourage mad scrambles for the initial assignment. In Glaziers Local 1029,116 for example, the incumbent union used economic pressures prohibited by 8(b)(4)(D) to secure a work assignment. The employer, capitulating to the pressure, also signed a collective bargaining agreement that assigned the work to the union. The Board properly disregarded both employer preference and the collective agreement as factors in resolving the dispute, and awarded the work to the employer's previous nonunion employees. Preassignment pressure destroys employer preference as an accurate guide to the underlying efficiency considerations, and to the extent that the Board can discover this pressure, it should reduce the weight it gives to employer preference. Cases like Glaziers force the Board to venture into an efficiency analysis in order finally to resolve the dispute.

8. Economic and Social Impact.—The Board has recently evinced a commendable concern for the economic impact that a particular award might have on employees.117 The Board has tried to soften the blow of automation by giving jobs on machines to the workers who were replaced by the machinery.118 When some loss of work is inevitable, the Board has attempted to ameliorate the loss by determining which group was more susceptible to training for the new jobs.119 In Seafarers Union120 the introduction of new machinery caused an area-wide loss of employment among workers who unloaded ships. The Seafarers and the Operating Engineers both claimed jurisdiction over the job of operating the new machinery. After a careful analysis of the facts, the Board noted the relative sizes of the unions and the employment possibilities in the area. It concluded that an award to the Operating Engineers would cause extreme hardship to the Seafarers Union and its members. While the small Seafarers Union had limited work opportunities elsewhere in the area, the giant

117. See, e.g., Stereotypers Union, 201 N.L.R.B. No. 126 (Feb. 15, 1973).
Operating Engineers Union had many contracts and could absorb the particular dislocation with less catastrophic effect. While the policy of resolving disputes on the basis of need may erode into an undesirable general presumption in favor of the weaker union, the Board in this case resolved the technological problem in a laudable fashion.

The Board's concern for employee well-being has been damned as an activity that involves an economic analysis of the wisdom of retaining certain job skills that the Board has no expertise to make. In some cases the Board may lack the data necessary to make the award that has the least harmful economic and social consequences to the workers. But if the data is available, the Board need not ignore it. Industrial flux necessarily affects employees, and while the employer will invariably resolve the work attrition problem according to his best economic interests, the Board can view the problem in community or national perspective.

B. Private Settlement and the Green Book Method

In contrast to the NLRB, the new Impartial Board, just as did the Joint Board before it, bases its decisions primarily on agreements between disputing unions and previous decisions of record, popularly called "Green Book" agreements and decisions. A Green Book decision or agreement that covers a dispute is conclusive. If the Green Book does not speak to the controversy, the Impartial Board will consider the established trade practice and the prevailing local practice. The plan also provides that since "efficiency, cost or continuity and good management are essential to the well-being of the industry, the Board shall not ignore the interests of the consumer in settling jurisdictional disputes." Thus, the Impartial Board at least theoretically considers all of the parties' relevant interests, except the employer's interest in dealing with a weaker union. The substantial

122. The Board, as it should, has also considered the racial practices of the claimants and has refused to award work to a racially discriminatory union. Longshoremen Local 440, 198 N.L.R.B. No. 116 (Aug. 8, 1972). It has also concerned itself with worker safety. Sheet Metal Workers Local 416, 203 N.L.R.B. No. 80 (May 3, 1973).
123. Plan, supra note 50, at art. VI, § 1(a). To control, the decision must be "of record." To be "of record," the agreement of decision must be recognized under the provisions of the constitution of the Building and Constructions Trades Department. Plan for Settling Jurisdictional Disputes, supra note 49, at art. III, §§ 1(a)-(e).
124. Plan, supra note 50, at art. VI, § 3.
125. Id.
employer representation in the Board selection process ensures that it will not ignore legitimate employer interests.

C. The Interplay of Substance and Procedure

While the NLRB's performance is not entirely inadequate, its unsophisticated substantive analysis has procedural repercussions that run counter to congressional intent. In almost form-book style the typical Board opinion gives the facts, the jurisdictional basis, a list of factors, a brief discussion of the factors in which many of them are labelled "inconclusive," and the conclusion. The Board's decisions, however, are consistent with its initial pronouncement that it would not feel bound by precedent. 126 In fact, it is nearly impossible to find even a thread of consistency in the Board's work assignment decisions. Although the Board need not be a slave to precedent, its rejection of stare decisis is apparently little more than a rationalization for its lack of coherent analysis. Employers and unions need to know how important the Board considers each of its listed factors in order to guide their future conduct. For example, they should be able to tell whether entering into jurisdiction-limiting contractual claims is worth their time and effort. The NLRB is not advancing the cause of industrial peace when, after twelve years, it cannot even decide whether a particular factor is important. Moreover, while the Impartial Board relies on factors closely resembling the NLRB's list, it cannot remain faithful to the NLRB's analysis because the labor Board never reveals how it weights each factor. If the NLRB would give increased weight to union and third party settlements and recognize that its many efficiency factors are redundant, amounting to no more than a single factor—employer preference—it's decisions might at least be more consistent with the Impartial Board's decisions.

Because of the obvious opportunity for forum shopping, consistency is very important. If the Board in practice almost always gives effect to employer preference, only a foolish employer would agree

126. Compare Laborers Local 712, 197 N.L.R.B. No. 13 (May 26, 1972) (Board rejects prior interunion jurisdictional agreement), with Brick Layers Local 15, 181 N.L.R.B. 1092, 1093-94 (1970) (Board emphasizes importance of interunion agreement). The Board has hastily dismissed prior agreements as ambiguous. Local 432, Teamsters, 171 N.L.R.B. 991 (1968) (clause in contract not "clear-cut"). Recently, it rejected an interunion agreement on the grounds that employer practice outweighed the interunion division. Local 150, Operating Eng'rs, 197 N.L.R.B. No. 83 (June 15, 1972).
to settle the dispute outside the administrative process. \(^{127}\) Moreover, unions who fare better before the NLRB than before the Impartial Board will tend to reduce their support for that body. Thus, the Board's substantive emphasis on employer preference may ultimately result in the elimination of a congressionally favored private path that was meant to save administrative time and effort. \(^{128}\) Conversely, if the Board gave very heavy weight to private awards regardless of the employer's or the defaulting union's current nonparticipation, the parties would probably find it in their best interest to participate fully in the private litigation. This increased participation would both strengthen the private machinery and help remove a time-consuming administrative process.

Another important procedural aspect of the NLRB's substantive policy is its almost unconscionable delay. \(^{129}\) In resolving jurisdictional disputes speed is essential. In rapidly moving businesses like the construction industry, a job can be completed in six months. Yet the Board often takes up to nine months to adjudicate a dispute, and if the losing party resists, Board resolution may take another year, and court review still another year. When delay can moot a dispute, precision should yield to rapidity. \(^{130}\) In stark contrast to the NLRB, the

\(^{127}\) Kelly, New National Joint Board, the First 100 Days, 47 CONSTRUCTOR, Sept. 1965, at 22, 23-24.

\(^{128}\) The Associated General Contractors, an early supporter of the National Joint Board, refused to renew the Plan when it expired in September 1969. AFL-CIO News, Oct. 11, 1969, at 19, col. 1. This refusal resulted in a temporary limbo with no substantial management support remaining for the Plan. Nonetheless, an Interim Joint Board continued to operate for the remainder of the year. In April 1970 some minimal employer support was discovered, and the new Joint Board was organized. In April 1971, the Joint Board was given new life when the National Constructors Association subscribed to the Plan and agreed to urge its thirty-four members to do likewise. Certain provisions were amended, particularly those providing for sanctions against offending unions. Washington Post, Feb. 15, 1971, § A, at 1, col. 4. On June 1, 1973, the Building and Construction Trades Department and numerous employer associations made substantial structural revisions in the settlement process and renamed the Joint Board the Impartial Jurisdictional Disputes Board. The Plan for the Impartial Jurisdictional Disputes Board requires, in light of the revisions, that employers who have signed stipulations agreeing to be bound by the Plan, but who "were not parties to the predecessor Plan for Settling Jurisdictional Disputes of April 3, 1970, must reaffirm their agreement in order to be accepted in this Plan." Plan, supra note 50, at art. I(a).


The median delay from charge to decision was:

<table>
<thead>
<tr>
<th>Year</th>
<th>Delay</th>
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<tbody>
<tr>
<td>1968</td>
<td>173 days</td>
</tr>
<tr>
<td>1969</td>
<td>206 days</td>
</tr>
<tr>
<td>1970</td>
<td>230 days</td>
</tr>
</tbody>
</table>

\(^{130}\) O'Donoghue, supra note 1, at 330-31.
Impartial Board shares with its predecessor, the Joint Board, a reputation for solving disputes with minimal delay. The Joint Board often rendered a decision within a week after hearing a case.\textsuperscript{131} By contrast, in 1970 the median NLRB delay from charge to decision was 230 days. As long as it remains consistent with the Administrative Procedure Act, the labor Board should emulate some of the streamlined practices of the Impartial Board.

IV. Jurisdictional Elements

The Board has jurisdiction to hold a section 10(k) hearing only if an employee dispute meets the jurisdictional prerequisites of probable cause to believe that 8(b)(4)(D) is being violated. The Board and courts have sought to inject meaning into the statutory words. Ultimately, the courts must define the outer limits of the Board’s jurisdiction, but since work assignment disputes involve a two-step enforcement procedure with a possibility for outside settlement, they have given the Board much discretion. Unfortunately, the courts in exercising their supervisory function have not curbed the Board’s tendency to assume jurisdiction over disputes, even though Congress has enunciated a clear policy in favor of encouraging parties to settle their disputes outside the Board’s jurisdiction.

A. Proscribed Object

The NLRB does not have section 10(k) jurisdiction over a dispute between two groups of employees unless there is a viable 8(b)(4)(D) charge, which means that the object of that dispute must be a particular work assignment.\textsuperscript{132} The Board has rejected the argument that it was bound by a district court’s finding that such was not the object and consequent denial of 10(l) injunction.\textsuperscript{133} The fact that a court with another goal in mind might in the exercise of its

\textsuperscript{131} ABA COMMITTEE REPORTS, supra note 80, at 452, 458.
\textsuperscript{132} For a number of years the Board held that it was not necessary that the group to which the work had been assigned in fact lay claim to the work. The assignment by the employer and a claim by a competing group was sufficient for a § 8(b)(4)(D) violation. \textit{See, e.g.}, Local 450, IUOE, 115 N.L.R.B. 964, 968 (1956). In \textit{CBS}, however, the Supreme Court described a jurisdictional dispute as one existing between “two or more groups of employees.” NLRB v. Radio & Television Broadcast Eng’rs, Local 1212, 364 U.S. 573, 579 (1961). Taking this as a cue, the Board reversed its policy and held that a dispute cognizable under the statute must involve two or more groups of employees demanding the work in question.
\textsuperscript{133} Pipe Trades Dist. Council No. 16, 198 N.L.R.B. No. 182 (Sept. 8, 1972).
broad equitable powers find reasonable grounds to believe that 8(b)(4)(D) had been violated has no binding impact on the Board.

To avoid section 10(k), a union will frequently assert that it pickets to inform the public, to enforce its contract rights, or to protest unfair labor practices. In those instances the Board must be alert to disguised work assignment pressure, since the distinction between work assignment disputes and representational disputes is particularly hazy. While work assignment disputes involve the practical question of which identifiable group of employees should perform a particular task, representational disputes traditionally turn on the question of which union has the statutory right to represent a particular group of employees. At the extremes these are quite different questions, but in many cases the "controversy between two unions can . . . be cast . . . in terms of who gets the men or who gets the work." While the statute regulates both kinds of dispute, the Board only has section 10(k) jurisdiction over work assignment disputes.

Prior to 1970 the Board appeared eager to find a motivation for a dispute other than work assignment. In *Transport Workers* an employer discharged a contractor and assigned the work formerly done by the contractor's employees to his own employees. The Board upheld the displaced union's picketing as pressure to continue the employment relationship, rather than pressure to force a particular work assignment. Under the principle enunciated in *Transport Workers*, any time an employer alters an historical work assignment he will receive no protection from picketing by the displaced employee

134. Sheet Metal Workers Local 420, 198 N.L.R.B. No. 173 (Sept. 6, 1972) (informational); Carpenters Local 1229, 194 N.L.R.B. 640 (1972) (unfair labor practices); District Council No. 9, Bhd. of Painters, 183 N.L.R.B. No. 9 (June 8, 1970) (enforcement of contract rights).
138. An assignment to the organized group has the awkward effect of granting de facto certification. To resist the assignment determined by 10(k), the employer must face an unrestricted strike and picketing. To assign the work according to the award might force unionization of the employees performing the work without testing their desires for representation. Perhaps when one group is unorganized, it would be best to abstain from exercising 10(k) jurisdiction and resolve the dispute under the representation procedures found in § 8(b)(7)(C) and § 9. 29 U.S.C. §§ 158(b)(7)(C) & 159 (1970).
group. While this policy might be socially and economically wise in the long run,\textsuperscript{140} it is hardly consistent with the statutory command that the Board "hear and determine" work assignment disputes. By holding that the incumbent union in \textit{Transport Workers} had a right to protect its work by economic pressure over employer objection, the Board violated the policy underlying section 8(b)(4)(D) and 10(k) that favors resolving disputes with strong jurisdictional overtones. In \textit{District Council No. 9, Brotherhood of Painters}\textsuperscript{141} the picketing union alleged that the employer had failed to make contributions to an industry insurance fund as required by the collective bargaining contract. When union members walked off the job to protest this contract violation the employer subcontracted their work to a relative's corporation that employed members of a different union. The complaining union asserted that its picketing sought to enforce compliance with the contract, not to dispute assignment of the work to another union. The Board held that this dispute did not come within its 10(k)-8(b)(4)(D) jurisdiction. Like \textit{Transport Workers}, this holding potentially could lead to Board avoidance of many true work-assignment disputes.

The Board has long indicated that a contractual claim to disputed work is a factor in resolving work assignment disputes,\textsuperscript{142} but this decision makes the contractual claim a determinative preliminary element. With a bit of jurisdictional boilerplate in the collective bargaining contract, a union could strike to enforce jurisdictional claims under the guise of a contractual dispute, thus avoiding the policies behind section 8(b)(4)(D) and 10(k).

Fortunately, since 1970 the Board has made a quiet but dramatic shift in its position. The Board now is much less willing to quash a 10(k) hearing on the ground that a nonproscribed object motivated the union pressure.\textsuperscript{143} It has recognized that the work assignment

\textsuperscript{140} Sussman suggests that tradition and preservation of the status quo are prime factors to be used in determining the proper assignment of work pursuant to a 10(k) hearing. Sussman, \textit{supra} note 1, at 223.

\textsuperscript{141} 183 N.L.R.B. No. 9 (June 8, 1970).

\textsuperscript{142} \textit{E.g.}, Glaziers' Local 1778, 137 N.L.R.B. 975 (1962).

\textsuperscript{143} The Board has indicated that a dispute precipitated by an employer removing work from one group of employees and assigning it to another has sufficient work assignment overtones for § 10(k) resolution. Newspaper Guild Local 1, 191 N.L.R.B. 236 (1971). It has rejected a dual allegation that picketing was to protect union pay scales or at most "to organize the employer" as grounds for quashing a § 10(k) hearing. Teamsters Local 294, 198 N.L.R.B. No. 14 (July 10, 1972). Similarly, the Board has not favorably viewed claims that the dispute is representational. Local 531, Printing Pressmen, 201 N.L.R.B. No. 39 (Jan. 15, 1973). In light of evidence indicating that the two bases of "dispute" concerned work assignment the Board has even rejected
need not necessarily be the sole motive for a union's pressure, and it has realized that it should not resolve difficult factual issues on union motivation prior to the 10(k) hearing. The Regional Director need only be reasonably satisfied that an object of the union pressure is work assignment.

At this first stage of the two-step work assignment procedure the Board should err on the side of overinclusion. After it makes its 10(k) award the losing organization can continue to exert pressure and defend an 8(b)(4)(D) complaint. In the context of an unfair labor practice proceeding the union can once again present its evidence of motivation. If, after the hearing and findings of the administrative law judge, the Board finds that the union sought ends other than work assignment, it can dismiss the complaint and allow the union to continue its economic battle. Critics of the Board's new approach may argue that in the interest of administrative efficiency the Board should try to avoid bifurcating the procedure and decide as many issues as possible with a single order. Although this policy is sound, by prematurely narrowing its jurisdiction the Board may deprive employers or competing employees of their administrative day in court. The premature dismissal also discourages the parties from settling their disputes privately.

B. Parties to the Dispute

Section 10(k) provides that the NLRB lacks jurisdiction to hear and determine a dispute giving rise to an 8(b)(4)(D) unfair labor practice claim if there is satisfactory evidence that the "parties to such dispute" have either adjusted their dispute or agreed on a method for its voluntary adjustment. While the competing employee groups are always parties to the dispute, some controversy has arisen over whether and when the phrase refers to employers. If the competing employee groups actually settle their dispute, and one group renounces its claim to the work, then the employer can no longer be considered a party for the simple reason that there is no longer a jurisdictional dispute. Under those circumstances the Board must quash the 10(k) hearing and dismiss the 8(b)(4)(D) charge regardless of employer participation in or acceptance of settlement. When the com-

the argument that picketing was motivated by the employer's alleged unfair labor practices. Carpenters Local 1229, 194 N.L.R.B. 640 (1972).

peting employees have merely agreed on a method of settlement, how-
ever, the Board interprets the term "parties" to include the employer
as well as the employee groups. It will not quash the 10(k) hear-
ing, therefore, unless the employer has agreed to the private settle-
ment method. The Board argues that the phrase "such disputes" in
section 10(k) refers to the 8(b)(4)(D) unfair labor practice dispute,
to which the employer is a party, and not merely to the underlying
jurisdictional dispute between the competing labor groups. Since
the facts that give rise to an 8(b)(4)(D) unfair labor practice dispute
are invariably the same facts on which the Board bases its section
10(k) resolution, the Board argues that the employer must be a party
to that hearing as well. Moreover, the Board claims that the employer's
substantial economic interest in the outcome of a section 10(k) hear-
ing will make him less likely to accept jurisdictional resolutions to
which he was not a party.

Recently the D.C. Circuit had an opportunity to consider the
Board's reasoning. In Plasterers' Local 79 v. NLRB two unions, the
Plasterers and the Tile Setters, claimed jurisdiction over the task of
applying cement to the walls of a building under construction. Both
unions but not the employer agreed to submit the dispute to the Joint
Board, which rendered a decision in favor of the Plasterers. When
the Tile Setters refused to relinquish the work, and the employer
refused to assign the job to the Plasterers, the Plasterers went on strike.
Shortly thereafter the employer filed an 8(b)(4)(D) unfair labor
practice charge. In the ensuing 10(k) hearing the Board determined
that the disputed work should go to the Tile Setters. Asserting that
the disputing employee groups had agreed to a method of private settle-
ment under section 10(k), the Plasterers refused to accept the NLRB's
determination and continued their strike. The employer then pressed
its 8(b)(4)(D) complaint and the Board determined that the Plaster-
ers' actions constituted an unfair labor practice.

On review, the D.C. Circuit reversed the Board, holding that the

145. See, e.g., Typographical Union No. 17 v. NLRB, 368 F.2d 755, 763 (5th Cir.
1966) (employer did not voluntarily submit to arbitration); NLRB v. Local 825,
IUOE, 326 F.2d 213, 216 (3d Cir. 1964) (employer did not agree to be bound by
the Joint Board's decision); Local 450, IUOE v. Elliot, 256 F.2d 630, 636 (5th Cir.
1958) (employer manifested only a desire to settle the dispute).


Voluntary Settlement of Work Assignment Disputes Under Section 10(k) of the
employee groups' agreement to submit their jurisdictional dispute to binding arbitration deprived the NLRB of authority to settle the matter under section 10(k). The court's position was thus exactly the opposite of the Board's. It felt that 10(k)'s use of the term "dispute" referred only to the underlying jurisdictional dispute, not to the dispute between the employer and the striking union. Accordingly, it interpreted the phrase "parties to such dispute" to refer only to the employee parties and thus found their agreement to methods of settlement sufficient to oust the Board of jurisdiction, notwithstanding the employer's failure to agree.

In reaching its decision the court relied on dictum in CBS to the effect that disputes under section 8(b)(4)(D) arise "between two or more groups of employees" and that employers are "helpless victims of quarrels that do not concern them at all." It also found persuasive evidence in the legislative history that section 10(k)'s real goal was the resolution of disputes between competing unions. The court felt that Congress was concerned primarily with the insoluble dilemma of the employer who faced a strike no matter which work assignment he made. Thus, only if the unions themselves had no method for privately resolving the dispute did Congress intend for the Government to intervene and rescue the besieged neutral employer. Furthermore, the court's opinion clearly indicated that an employer who refuses to accept a private settlement between competing unions would do so only for economic reasons. Thus, rather than a besieged neutral in a jurisdictional dispute, the employer who refuses to accept a private settlement becomes a party to an economic dispute, and section 10(k) and 8(b)(4)(D) are not vehicles for the resolution of economic disputes.

The D.C. Circuit also noted the incongruity of the Board's argument that an actual settlement of the dispute by the competing unions, without employer consent, disposed of the 8(b)(4)(D) complaint, but that an agreement to arbitrate the dispute required employer consent. The court could find little conceptual basis for the distinction that would eliminate the need for employer participation in the first situation but require it in the second. Indeed, only bad timing or bad faith on the part of the losing union could keep the agreed-upon method from producing an actual settlement. Finally, the court stressed that

148. 440 F.2d at 180.
the purported distinction could not contribute to industrial stability. To allow a union that has lost in the private determination ready access to a second chance before the Board is at best wasteful and time-consuming; at worst, it is a breeding ground for prolonged and intense litigation. The court thus held that, since the disputing unions had agreed on a method of settlement, the Board had no section 10(k) jurisdiction to resolve the dispute independently. Accordingly, the court held that the Plasterers' picketing did not violate 8(b)(4)(D).

In *NLRB v. Plasterers' Local 79* the Supreme Court unanimously reversed the D.C. Circuit. Asserting that section 10(k)'s language and legislative history were inconclusive, the Court adopted the Board's reasoning virtually in its entirety. The Court, however, failed to respond satisfactorily to some of the basic premises of the lower court's decision. First, the Supreme Court relied heavily on the employer's substantial economic interest in the outcome of the jurisdictional dispute, thus supporting rather than undercutting the circuit court's rationale. Since, by the terms of the Court's own argument, the employer's interest is economic, his dispute with the union that prevailed at the private determination would almost necessarily be economic as well, and thus, as the lower court argued, beyond the reach of 10(k) and 8(b)(4)(D). Moreover, since the beneficiary of a private award is the only party who can present a valid demand for the work, the D.C. Circuit's approach fully protects the employer from the dilemma of two competing claims from two potentially valid claimants. If the employer follows the private award he will receive full 8(b)(4)(D) protection against pressure from the losing union. If in pursuing his economic self-interest he elects to reject the private award, he should not be in a position to insist that the NLRB resolve for a second time a dispute that the unions themselves have legally if not factually resolved already. Therefore, the Supreme Court's approach is unnecessary for satisfactorily protecting an employer whose interest is not economic. Moreover, under the Supreme Court's analysis a union that dishonors its contractual obligation to follow a private settlement may well benefit from its illegal conduct—a strange policy for the Court to promote.

The Court never satisfactorily explained why the employer's economic interest in the outcome of a jurisdictional dispute justifies requiring

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151. For a discussion of the nature of the employer's economic interests see Comment, *supra* note 147, at 440-41.
his assent to an agreement on methods of settlement, but does not justify employer input into the labor parties' actual settlement. The Court responded that actual settlement removes the necessity for 10(k) resolution. Yet if the employer's economic interest in the dispute makes him a necessary party to the procedures for resolving it, that interest should also require his representation in any final settlement. In reality, the Court simply disagreed with Congress' policy of encouraging competing employee groups to resolve their own disputes. By refusing to demand the employer's presence at any actual settlement, Congress was implementing its general policy of allowing labor and management to use limited economic force to resolve their economic disputes. By demanding that the employer participate in a settlement procedure that one of the unions subsequently ignores, the Court indicated its disagreement with the congressional policy.

The Board and the Court were justifiably concerned that the unions might exclude the employer from private dispute-resolving machinery and thereby ignore valid employer interests. But that problem does not necessarily dictate the Supreme Court's result. When the private machinery gives the employer access and considers his valid interests, actual employer participation should not be necessary to a binding private award. If the unions establish procedures that affirmatively exclude employers or patently disregard valid employer interests, the NLRB should hold that the parties have not agreed to a private settlement method and should resolve the dispute pursuant to section 10(k). But if the employer elects to forego participation in a private settlement procedure that promises to weigh his interests, then its results should be as binding on him as they are on the participating employee groups.

Read narrowly, Plasterers need not preclude the Board from adopting this course of action. Plasterers decided only that the NLRB may hold a 10(k) hearing to determine a jurisdictional dispute when the competing unions but not the employer agree on a settlement method; the Court did not decide that it must hold one. Given

152. The Court reasoned that "an employer may be a third party to disputes over work assignments, but when the other two parties settle their differences and one union declines the work assigned to it, the inter-union conflict that §§ 8(b)(4)(D) and 10(k) were designed to eliminate disappears." 404 U.S. at 134-35.

153. One commentator suggested that the resolution of the employer's important economic interest in the outcome of the work assignment dispute without guaranteeing his right to full participation would violate his constitutional right to procedural due process. Comment, supra note 147, at 401.

154. The Court stated that "the LMRA requires that the Board defer only when
the Court’s obvious concern for the employer’s interests, it would probably be an unreasonable exercise of discretion for the Board to defer to private machinery that affirmatively excluded the employer or failed to weigh his interests appropriately. The Board, however, could still defer to impartial private settlement procedures that recognize the employer’s stake and allow him to present his case.

This policy would be beneficial in three respects. First, it would prevent unions that agree to arbitration from later contending that employer nonparticipation invalidated their agreement and attempting to use the Board as a second forum in which to relitigate an undesirable private decision. Second, by deferring to private machinery, the Board would both relieve itself of an unnecessary part of its caseload and prevent employers from using 8(b)(4)(D) to settle essentially economic disputes. Finally, if the NLRB will defer to private resolution, employers would necessarily participate in that process, strengthening both the machinery and the decision.

C. “Agreed”

Even when the definition of “parties” is not in dispute, the Board generally appears unwilling to find that the parties have agreed on a method of settlement. The party relying on an agreed settlement method must carry the burden of proving the existence of an agreement, and the Board will resolve any vagueness or ambiguity against agreement. Long ago the Board wisely held that when the parties had contractually bound themselves to a settlement method, the Board lost its 10(k) jurisdiction. Moreover, the Board held that it would not give effect to a union’s unilateral renunciation of a private settlement by independently resolving the dispute under section 10(k). Yet under its rule that the employer is a necessary party

all of the parties have agreed on a method of settlement . . . .” 404 U.S. at 137. While the Court did hold that an employer is a party to the dispute and must be a party to an agreement on settlement methods, it remains arguable that Plasterers does not prevent the Board from adopting a doctrine of constructive employer agreement when settlement methods both recognize his interest and allow him to participate. If under those circumstances the employer elects not to participate in the private arbitration, the Board could treat him as having tacitly agreed to the result reached without his participation.

155. The Court specifically objected to forcing employer agreement to private methods on the ground that those private methods might disregard his interests. 404 U.S. at 132.
158. Millwrights Local 1102, 121 N.L.R.B. 101, 106-07 (1958). Contra, Mill-
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to the settlement procedure, the Board has been distressingly reluctant to find employer agreement to private settlement methods. In *Operating Engineers Local 701* the parent company had agreed to submit work-assignment disputes to the Joint Board. The Board held that since its subsidiary had made no such agreement, the private determination would not bind the subsidiary. The corporate parent's agreement was insufficient to deprive the Board of its superseding 10(k) power to resolve the dispute. In *Laborers Local 663* the Board went one step further and distinguished between two arms of the same corporation. The Board has held that a prime contractor's agreement does not bind a subcontractor on the same project, and an agreement between an employer and a union at one job does not bind the same parties at another job. To the extent that Congress desired private dispute settlement, this strict attitude defeats that policy. The Board should adopt the flexible approach it uses under the statute's secondary boycott provisions or the policies that bind subcontractors to affirmative action minority hiring under government contracts. The Board should concern itself with the purposes behind the statute rather than its literal language, disregard corporate entities, and apply the statute to reach the goals that Congress envisioned. Under this analogy the Board could reasonably interpret a primary contractor's contract to bind all his subcontractors who are aware of

wrights Local 1862, 184 N.L.R.B. No. 58 (July 15, 1970). The Board has also held that the parties to the dispute do not have to agree personally to the private method of settlement to be bound thereby. On the union side, when an international accepts the private dispute-resolving machinery, even though the disputing local never expressly agreed to the method, the local is nonetheless bound because of the international's constitutional authority to bind it. Laborers Local 670, 189 N.L.R.B. 715 (1971). On the employer side, even absent consent of the individual members, an association, multi-employer bargaining unit, or other horizontal amalgamation may bind its members to the private machinery. Operating Eng'rs Local 571, 203 N.L.R.B. No. 182 (June 6, 1973).

162. Ironworkers Local 563, 183 N.L.R.B. No. 112 (June 25, 1970). An employer may also have separate contracts with the competing labor groups, and each of these contracts may provide for submission of the dispute to private resolution. Nonetheless, the Board has indicated that separate and distinguishable agreements with competing groups is not sufficient. Apparently, there must be a single tripartite agreement, or the agreements must be so similar in their requirements that they can be viewed in *pari materia*. Stereotypers Union, 301 N.L.R.B. No. 126 (Jan. 15, 1973).
his settlement agreements. The Board should encourage congressionally favored private settlement by refusing artificially to limit an employer's settlement agreement to a particular job, operating arm, or corporate entity.

In addition to its strict stance on multiple entities, the Board has not been liberal in finding that an individual employer had acquiesced in a particular private settlement. When an employer accepts the working conditions or benefits of a previously existing contract, the Board has held that he is not bound to a clause in the older contract requiring submission of disputes to private settlement.\footnote{165} Moreover, the employer's informing the Joint Board of the facts of an interunion dispute does not bind him to the Joint Board's resolution.\footnote{166} The Board has even held that when an employer requests the disputing unions to utilize the private machinery, he does not thereby agree to accept the outcome of the private procedure.\footnote{167} This hard-line stance combined with the Supreme Court's \textit{Plasterers} requirement that the employer agree to the private method of settlement means that a union that prevails at the private settlement has virtually no way of enforcing that award.

Until recently, the Board could reply that this result is not inequitable, since a union with enough economic strength can compel the employer to accept a third party settlement provision in their collective bargaining agreement. Consistent with this position, the Board has held that a union may insist to impasse that the employer agree to the clause and then strike to enforce the demand.\footnote{168} The Seventh Circuit in \textit{Associated General Contractors v. NLRB},\footnote{169} however, has undercut this position. The court held that a union's insistence to impasse on a clause requiring an employer to submit disputes to the National Joint Board was coercion of the employer in the selection of his representatives, which violated section 8(b)(1)(B).\footnote{170} The court insisted that work assignment disputes were grievances, and it

\footnote{165} Cf. Ironworkers Local 6, 196 N.L.R.B. No. 178 (May 22, 1972).
\footnote{166} Ironworkers Local 272, 203 N.L.R.B. No. 178 (May 31, 1973).
\footnote{167} Plumbers Local 149, 198 N.L.R.B. No. 140 (Aug. 18, 1972) (employer stated he would abide by the two unions' decision).
\footnote{168} Ironworkers Local 103, 190 N.L.R.B. 741, 742 (1971) (provided the union enter negotiations with an open mind).
\footnote{169} 465 F.2d 327, 331 (7th Cir. 1972).
\footnote{170} 29 U.S.C. § 158(b)(1)(B) (1970). This section provides in part: "It shall be an unfair labor practice for a labor organization . . . (1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances . . . ."
rejected the Board's arguments that the Joint Board was not a representative of the employer. The court also noted that the Joint Board's neutrality did not prevent application of the literal provisions of 8(b)(1)(B). The Board also argued to no avail that negotiating for a settlement clause is little different from bargaining for a more typical grievance arbitration clause. Although the court vaguely hinted that negotiation for a settlement provision is not a mandatory subject for bargaining, it expressly refused to reach the issue. Thus, section 8(b)(1)(B) apparently does not prohibit mere negotiation between the parties for a settlement clause. Since the court was primarily concerned with a union's forcing an employer to accept dispute resolutions of a body that the employer had no role in selecting, the decision should not be held to prohibit a union's use of economic pressure against an employer in an effort to compel him to accept a work assignment settlement clause that provides for employer participation in the selection of the settling body. 171

D. Method of Settlement

Even when all the parties have agreed to procedures for resolving their work assignment disputes, the Board has indicated that it will examine the method of settlement to determine whether it can effectively resolve the dispute. If the Board concludes that the private machinery will not end the dispute, it will continue to exercise its 10(k) jurisdiction. In Millwrights Local 1862 172 all the parties, including the employer, had agreed to submit work assignment disputes to the Joint Board. One of the unions, however, indicated that it did not intend to be bound by a Joint Board award and refused to participate in the proceedings. Notwithstanding the Joint Board proceedings, the NLRB heard the dispute and awarded the work to the repudiating party. Over the dissent of Member Fanning, the Board distinguished this situation from past cases holding that a party could not repudiate a

171. The revised Plan for the Impartial Jurisdictional Disputes Board has similar prohibitions against use of coercion. Although negotiation for acceptance is encouraged, the Plan provides:

The essence of this Plan assumes voluntary participation . . . . [No} contractor stipulation or agreement shall be recognized by the Impartial Jurisdictional Disputes Board if it is shown to the satisfaction of this Board that it is the result of unlawful strikes, work stoppages or other coercive activity or any activity which is contrary to the voluntary nature of this Plan

. . . .

Plan, supra note 50, at art. I(a).

Joint Board award if it had actually participated in the proceedings. Yet once a party has contractually bound itself to accept a private procedure, the Board should not allow him to withdraw from that obligation. His agreement to submit the dispute is probably subject to judicial enforcement, and the Board should not give it any less importance than a court. His conduct is no less a breach of an agreement because he repudiated it before rather than after the Joint Board decision. Fortunately, recent cases indicate that the Board has abandoned its illogical distinction.

The Board also rested its Millwrights Local holding on the Joint Board's lack of enforcement power. It indicated that after the initial award the Joint Board was in a temporary hiatus, because the withdrawing party had no opportunity for appellate review with the private proceedings. Because of this hiatus the Joint Board lacked its normal enforcement powers. The Joint Board's inability to compel compliance made it an unacceptable method of settlement in the eyes of the NLRB. The recent case of Boilermakers Local reflects this theme. In that case an agreement provided for employer-union discussion of grievances with a "goal" of resolution. The Board held that negotiation with a goal was not a method of settlement within the meaning of section 10(k). Yet Boilermakers Local is clearly distinguishable from Millwrights Local. In Millwrights the Joint Board made an award, but lacked independent enforcement power; in Boilermakers there was no award and no assurance that the proscribed procedure would have resulted in an award. In Teamsters Local the Board may have retreated from its Boilermakers stand. The Board there examined an agreement between an employer and a union, stating that the parties would discuss any problems. If they were unable to resolve the dispute, the agreement provided that they would submit it to the parent unions who, with the employer, would settle the dispute. Since the agreement did not provide for a binding third party resolution, apparently the parties were to resolve their dis-

174. See Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957). Although there is authority that the courts will not entertain § 301 suits contrary to a 10(k) award by the Board, there is little indication that the courts would not entertain a § 301 suit to force a party to arbitration when the contract so required. Cf. New York Mailers' Union 6 v. New York Times Co., 32 Misc. 2d 60, 222 N.Y.S. 2d 1000 (1961).
175. See, e.g., Laborers Local 670, 189 N.L.R.B. 715 (1971).
176. The new Impartial Board procedure eliminates the lack of appeal problem.
178. 195 N.L.R.B. 93, 94 (1972).
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... through tripartite negotiations. Although this method was nothing more than "negotiations with a goal," the NLRB held that it was a method of settlement within section 10(k)'s scope.

The Board in Laborers Local 423\(^{179}\) has indicated a possible solution to the proper method of settlement problem. According to Joint Board procedures, a union that does not comply with Joint Board rules or orders cannot obtain a favorable Joint Board award in future cases. Member Kennedy argued that when a union that has not complied with a past Joint Board order contracts to be bound by Joint Board procedures, it has not agreed to a method of settlement, because the Joint Board cannot effectively settle its future disputes. A majority of the Board, however, emphasizing that the parties had all agreed to the Joint Board procedures, held that the NLRB did have jurisdiction to resolve the dispute. The Board was correct in emphasizing the agreement aspect of the statute. If the parties have only agreed to nonbinding discussion of a dispute that may never actually reach a definitive award, they have in reality agreed to nothing. But if the parties have agreed to a procedure that will produce a judicially enforceable award, the Board should not exercise its 10(k) jurisdiction. Since no arbitrator or court has the personal power to enforce sanctions or compel compliance with its decisions, the private machinery's lack of enforcement power should be irrelevant. Since the Board under section 8(b)(4)(D) or the courts under section 301 can enforce private awards, the Millwrights Local decision was clearly wrong in requiring internal enforcement methods. The Board in Laborers Local 423, however, was correct in holding that the binding nature of the private award is not fatally deficient simply because the resolution machinery refuses to award work to a party that is in contempt of that machinery. The parties have agreed in advance to accept that sanction. They should not be allowed to profit from contumacious disregard of their contractual obligations. As long as the agreement authorizes a binding award, the Board should require no more than that the method afford fundamentally fair procedures and accord with the basic policies of the Act.\(^{180}\)

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179. 199 N.L.R.B. No. 48 (Sept. 29, 1972); see Operating Eng'rs Local 571, 203 N.L.R.B. No. 182 (June 6, 1973) (Kennedy, dissenting).

180. See Spellberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955). The Board might well demand that employers as well as competing unions be allowed to participate, and that the decisionmaker be fundamentally neutral. The Board might also demand that all relevant factors be considered by the private tribunal.
V. Conclusion

In section 10(k) Congress implemented its laudable policy of keeping government out of labor disputes as much as possible. That section encourages the parties to agree in advance on ways to resolve work assignment disputes. Only when the private methods fail did Congress intend for the Government to step in and resolve the dispute. Labor has responded to section 10(k) by establishing a fair and speedy process that represents the interests of all the parties who agree to be bound. The NLRB, on the other hand, provides a cumbersome procedure that almost invariably results in an award that conforms to employer preference. The Board's substantive stance, of course, encourages employers to seek out the Board whenever possible. The Board, supported by the Supreme Court's decision in Plasterers, accommodates the employer's urge to forum shop by vigorously asserting its 10(k) jurisdiction whenever the employer has not agreed to a private method of settlement. Moreover, it is quite reluctant to find employer agreement even where evidence indicates that the employer has in fact tacitly agreed to the private settlement; the Board analyzes employer acceptance with the strictness of common law pleadings in search of personally binding commitments. This current trend runs counter to the congressional policy of encouraging private settlement and discouraging delay. The Board should be more willing to find employer agreement to the private method. Moreover, it

181. Cf. Collyer Insulated Wire, 192 N.L.R.B. 837 (1971); Teamsters Local 70, 198 N.L.R.B. No. 4 (July 31, 1972); Radioear Corp., 199 N.L.R.B. No. 137 (Oct. 30, 1972). These cases of Board deferral involved allegations of a refusal to bargain in violation of § 8(a)(5) or § 8(b)(3) of the Act. Their resolution would, of necessity, require interpretation of existing contract provisions between the parties. The Board believed that those disputes could best be resolved by the grievance arbitration provisions of these contracts and thus deferred to that process without itself interpreting the contracts and resolving the complaints under the statute. The courts have also favored a policy of deferral to private processes. See, e.g., Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964).

Some cases illustrate a Board predilection to defer to grievance arbitration even when interpretation of the collective bargaining contract is not a prerequisite to a determination of statutory rights. E.g., National Radio Co., 198 N.L.R.B. No. 1 (July 31, 1972). The Board will defer to grievance arbitration machinery when an employee alleges that he has been the victim of discrimination proscribed by § 8(a)(3) of the Act, and the contract proscribes discriminatory discharges. This policy is a step beyond Collyer Wire, 192 N.L.R.B. 837 (1971). In Collyer Wire only group interests were involved. Here, an individual's statutory rights were being resolved by a private tribunal, rights the Board could have easily resolved without interpreting the collective bargaining contract. The arbitrator will thus not only interpret, perhaps indirectly, statutory terms, but will necessarily have to resolve the technical, difficult, and highly charged issue of motivation. See also Beaird & Player, Whither the Nixon Board?, 7 Georgia L. Rev. 607, 627-39 (1973).
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should realign itself with congressional intent by exercising its option to defer to private settlement procedures that allow employer participation, maintain neutrality in their composition, apply standards that recognize employer interests and are not inconsistent with fundamental labor policy.

If the Board refuses to act, Congress could remedy the situation by allowing the administrative law judge actually to resolve disputes. These judges are men with experience and ability who can view the working place, observe the workers, determine credibility, and ask important questions. They are in a better position to decide disputes accurately than the distant Board. Giving the administrative law judge the power of resolution would be an ideal compromise between a purely private arbitrator and the Board. The Board could periodically decide important cases to provide the administrative law judges with the relevant factors and analysis. The Board, of course, should exercise certiorari-type review in extraordinary cases when it desires to make major policy pronouncements. A more drastic solution would be for Congress to repeal section 10(k). This change would mean that 8(b)(4)(D) standing unadorned would prohibit any union pressure against an employer assignment. While this prohibition would run against the current congressional policy of providing a forum for settling jurisdictional disputes, the result would not differ substantially from the current Board practice of affirming employer awards in 10(k) proceedings.

If the Board can modify its procedures to provide rapid settlement of work assignment disputes with a minimum cost in agency time and effort, private settlement machinery will perhaps become unnecessary. But if the Board continues its time-consuming course, which discourages employers from supporting private awards, the private machinery ironically will disappear when the need for it is greatest.