1963

Section 301 and the Primary Jurisdiction of the NLRB

Michael I. Sovern

Columbia Law School, msovern@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship

Part of the [Contracts Commons](#)

Recommended Citation

Michael I. Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 HARV. L. REV. 529 (1963).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/2190

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

SECTION 301 AND THE PRIMARY JURISDICTION OF THE NLRB

Michael I. Sovern *

Several labor cases recently decided by the Supreme Court have brought into issue a conflict between the NLRB's primary jurisdiction over matters subject to sections 7 and 8 of the NLRA and the doctrine that courts have jurisdiction to enforce collective agreements. Professor Sovern discusses these cases and argues that the Court properly decided that the principle of exclusive NLRB jurisdiction should yield in suits on collective agreements, but he criticizes the Court for not having articulated a satisfactory rationale in support of this result. After an analysis of the doctrine of preemption, he considers five types of labor-contract suits which involve overlap between NLRB competence and court jurisdiction, and concludes that in most instances courts should be permitted to exercise their contract-enforcing function.

I. THE PROBLEM

AT the October 1961 Term, two notable doctrines of contemporary labor law, long headed for a collision in the Supreme Court, finally met there.¹ One maintains that courts have jurisdiction to enforce collective agreements;² the other that, as stated in the second *Garmon* decision, "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the

* Professor of Law, Columbia University. A.B., Columbia, 1953, LL.B., 1955. This is an expanded version of an address delivered on October 20, 1962, at the Southwestern Legal Foundation's Ninth Annual Institute on Labor Law.

¹ See *Local 174, Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95, 101 n.9 (1962); *accord*, *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238 (1962); *Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

² Labor Management Relations Act § 301(a), 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958), provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), sustained the constitutionality of this grant of power to the federal courts, and *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), definitively established that § 301 did not deprive state courts of their concurrent jurisdiction over collective agreements.

National Labor Relations Board”³ Neither purports to decide what shall be done when enforcement of a collective agreement is resisted on the ground that the “courts must defer to the exclusive competence” of the NLRB because conduct involved in the contract dispute is also “arguably subject to § 7 or § 8 of the Act.”

That these two doctrines cannot stand side by side without major qualification has been painfully clear to the many courts upon which both have been simultaneously urged. Consider, for example, *Lodge 12, Int'l Ass'n of Machinists v. Cameron Iron Works, Inc.*⁴ The union, relying on section 301 of the Labor

³ *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). This decision and its forerunners have been the subject of extensive comment. See note 49 *infra*. The facts were simple enough: defendant unions picketed plaintiff employers and sought to persuade their customers and suppliers to stop dealing with them; the unions claimed that they picketed solely to persuade plaintiffs' employees to join them, but the trial court found that the purpose of the picketing was to compel plaintiffs to enter into a union-shop contract even though plaintiffs' employees had not selected defendant unions as their collective bargaining representatives; the trial court enjoined the picketing and other pressures and awarded damages for losses sustained as a result of the unions' activity. The Supreme Court of the United States, when the case first came before it, struck down the grant of injunctive relief: the NLRA preempted California's power to enjoin the conduct in question. However, the Court refrained from deciding whether California could award damages under the circumstances because it was in doubt as to whether the California courts had based the award of damages on state or federal law; instead, it remanded for consideration of that issue. On remand, the California supreme court stuck by its award of damages, resting it explicitly on state law, and was reversed once again. The Court started from the proposition that “When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.” *Id.* at 244. Doubts about whether an activity is governed by these sections, the Court proceeded, cannot be resolved by the courts, because the NLRB is the tribunal to which such determinations are initially entrusted. Accordingly, since the activity at issue in *Garmon* was arguably within the scope of section 7 or section 8, the California courts lacked power to deal with it. The rationale of this decision and of others like it is explored at length below. See section III *infra*.

⁴ 257 F.2d 467 (5th Cir.), *cert. denied*, 358 U.S. 880 (1958). See also *Independent Petroleum Workers v. Esso Standard Oil Co.*, 235 F.2d 401 (3d Cir. 1956); *Modine Mfg. Co. v. Grand Lodge Int'l Ass'n of Machinists*, 216 F.2d 326 (6th Cir. 1954); *Local 774, Int'l Ass'n of Machinists v. Cessna Aircraft Co.*, 185 Kan. 183, 341 P.2d 989 (1959); *Post Publishing Co. v. Cort*, 334 Mass. 199, 134 N.E.2d 431 (1956); *Elisco v. Rockwell Mfg. Co.*, 387 Pa. 274, 128 A.2d 32 (1956). Additional cases are collected in Christensen, *Arbitration, Section 301, and the National Labor Relations Act*, 37 N.Y.U.L. REV. 411 (1962); Cummings, *NLRB Jurisdiction and Labor Arbitration: "Uniformity" vs. "Industrial Peace,"* 12 LAB. L.J. 425 (1961); Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems*, 57 COLUM. L. REV. 52 (1957); Note, 69 HARV. L. REV. 725 (1956).

Management Relations Act, invoked the doctrine that the courts have jurisdiction to enforce collective agreements. It claimed that the company had violated their agreement by refusing to reinstate fifteen employees upon the conclusion of a strike and by refusing to arbitrate the reinstatement issue. Accordingly, it asked the court to order the company to arbitrate. The company maintained, in effect, that since it had refused to reinstate the fifteen because of strike misconduct, a decision that it had erred in so doing would necessarily be a decision that it had interfered with legitimate union activity in violation of sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act.⁵ Accordingly, it invoked the doctrine that the NLRB has exclusive jurisdiction over conduct "arguably subject to § 7 or § 8 of the Act."

In this case, the principle of exclusive NLRB jurisdiction succumbed. After reminding its readers of the delays in NLRB proceedings, the Court of Appeals for the Fifth Circuit said: "Certainly, if an otherwise arbitrable controversy happens also to be an unfair labor practice, the parties should not be forced to abandon their contract right and be relegated 'to the slow and creaking procedure which, like a wounded snake, has dragged its slow length along, sans bargaining, sans labor peace, sans everything but pride of opinion, ill temper and frustration.'"⁶ However, as the Fifth Circuit recognized, it was not expressing a unanimous view. Some courts had found a place in contract actions for exclusive, or, as it is often called, primary NLRB jurisdiction.⁷ And that place had, of course, been made at the expense of judicial power to enforce collective agreements.

⁵ Section 8(a)(3), 61 Stat. 140 (1947), as amended, 73 Stat. 525 (1959), 29 U.S.C. § 158(a)(3) (Supp. III, 1962), 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 membership in any labor organization . . ." Section 8(a)(1), 49 Stat. 452 (1935), 29 U.S.C. § 158(a)(1) (1958), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 7, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958), provides that: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . ."

⁶ 257 F.2d at 474.

⁷ *E.g.*, *International Chem. Workers Union v. Olin Mathieson Chem. Corp.*, 202 F. Supp. 363 (S.D. Ill. 1962); *International Union of Doll & Toy Workers v. Metal Polishers Union*, 180 F. Supp. 280 (S.D. Cal. 1960); *Benedict v. Limited Editions Club, Inc.*, 265 App. Div. 518, 39 N.Y.S.2d 852 (1943); *Elisco v. Rockwell Mfg. Co.*, 387 Pa. 274, 128 A.2d 32 (1956).

To speak of judicial power to enforce collective agreements is in one sense misleading. Even before the Supreme Court's arbitration trilogy,⁸ most disputes over the meaning of contracts were going to arbitrators, not judges; the Supreme Court merely accentuated, or, as some would have it, aggravated the tendency. Consequently, the main practical effect of applying the principle of exclusive NLRB jurisdiction to the contract field would be diminution of arbitral, not judicial, power. Nevertheless, whether judges or arbitrators are wielding the power to enforce agreements does not materially influence the extent to which the NLRB's jurisdiction should affect that power. The conflict remains one between the NLRA-enforcing power and the contract-enforcing power, however the latter is divided between courts and arbitrators. Accordingly, I shall continue to speak of the courts as though they alone enforced agreements, with the understanding that I am doing so to avoid repetition of the cumbersome "courts and arbitrators."⁹

In *Local 174, Teamsters Union v. Lucas Flour Co.*,¹⁰ the Supreme Court purported to settle once and for all the clash between exclusive NLRB jurisdiction and the jurisdiction of the courts to enforce collective agreements. This time an employer was invoking the power of the courts. The union had struck, allegedly in breach of contract, to compel the employer to rehire an employee who had been dismissed because of unsatisfactory work. The union might have argued that the exclusive jurisdiction of the NLRB made judicial determination inappropriate, for its strike was, without question, "arguably subject to § 7." A strong case could be made for the proposition that the strike was neither an unfair labor practice nor a breach of contract, and if it was neither, the protection of section 7 attached. Al-

⁸ See *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

⁹ This is not, of course, to deny the differences between the judicial and arbitral forums, nor is it to suggest that those differences have no bearing on the subject under discussion. For example, those who believe with the Supreme Court (see cases cited note 8 *supra*) that arbitrators are immeasurably wiser than judges in their handling of labor problems might be willing to allow arbitrators, but not courts, to invade the NLRB's province. On the other hand, if tribunals other than the Board are to interpret the NLRA, it is at least arguable that judges, trained in the law, are better equipped for the task than arbitrators, many of whom have no legal training. To some extent, then, the differences tend to cancel out. More important, as the text suggests and as will appear in detail below, the considerations that should control the accommodation between contract enforcement and NLRA administration cut across the differences between arbitration and the courts.

¹⁰ 369 U.S. 95 (1962).

though counsel for the union put the principle of exclusive NLRB jurisdiction to other uses, he chose not to argue that it limits the power of courts to enforce collective agreements.¹¹ He presumably would have fared no better had he made the argument, for the Court disposed of it summarily. The entire discussion of the point, relegated to a footnote, follows:

⁹ Since this was a suit for violation of a collective bargaining contract within the purview of § 301 (a) of the Labor Management Relations Act of 1947, the pre-emptive doctrine of cases such as *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, based upon the exclusive jurisdiction of the National Labor Relations Board, is not relevant. [Citations to lower-court cases omitted.] As pointed out in *Charles Dowd Box Co. v. Courtney*, 368 U.S., at 513, Congress "deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law.'" See also H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. p. 52. It is, of course, true that conduct which is a violation of a contractual obligation may also be conduct constituting an unfair labor practice, and what has been said is not to imply that enforcement by a court of a contract obligation affects the jurisdiction of the N.L.R.B. to remedy unfair labor practices, as such. See generally Dunau, Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems, 57 Col. L. Rev. 52.¹²

Those who sought to predict where the law of preemption was going in the years before *Garmon* might be forgiven a prayer of thanks on first sight of that footnote. They would not have to live all over again, this time in the contracts area, with what Mr. Justice Frankfurter, intending no irony, called "the process of litigating elucidation."¹³ Their contract actions at least would stay put. However, a sense of relief may be premature. One commentator has already characterized footnote 9 as "a cryptic aside,"¹⁴ in which, if the Court is to be taken literally, it "has come full circle and established in *Lucas Flour* what it condemned in *Garner*."¹⁵ He also questions the "necessity for such a pronouncement in that decision, the rationale upon which the 'ruling' was based and the reach of the ruling itself . . ."¹⁶ To judge by the literature antedating *Lucas Flour*¹⁷ and the

¹¹ Brief for Petitioner, p. 24.

¹² 369 U.S. at 101 n.9.

¹³ *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 619 (1958).

¹⁴ Christensen, *supra* note 4, at 428.

¹⁵ *Id.* at 446.

¹⁶ *Id.* at 415.

¹⁷ See, e.g., Cummings, *supra* note 4; Mendelsohn, *Enforceability of Arbitration*

importance of the issues involved, additional criticism will be forthcoming. If this criticism is well founded, it is most unlikely that we have heard the last of *Garmon* in suits on collective agreements, the apparent firmness of the Court's footnote to the contrary notwithstanding.

The Court's failure to offer a reasoned defense of the position taken in footnote 9 is troublesome. Although we may sympathize with Justices weary of being told that they reached the right result for the wrong reasons,¹⁸ much of the criticism on this score has been deserved. The response to be hoped for is better reasoning, not an abandonment of the effort. The failure to justify a decision that was hardly so obvious as to make justification unnecessary fairly invites doubts about whether the Court has thought the problem through. This, in turn, gives rise to uncertainty about the decision's reach and to skepticism about whether it will be followed in the future.

The remainder of this paper attempts to do what the Court should have done. It undertakes to sketch in some detail the lines the Court will probably follow in future contract actions when *Garmon* is urged upon it, for I believe that those lines are now largely discernible, and it seeks to explain why the direction in which the Court appears to be moving is, for the most part, not only defensible, but virtually unavoidable. Where the lines are not clear, the relevant considerations are stated and tentative suggestions offered.

II. THE SUPREME COURT'S ANSWERS

In *Lucas Flour*, the Court obviously did not have before it all of the possible varieties of overlap between section 301 and the NLRA.¹⁹ It was not, for example, called upon to decide what

Agreements Under Taft-Hartley Section 301, 66 YALE L.J. 167 (1956); Note, 59 COLUM. L. REV. 153, 168 (1959); 74 HARV. L. REV. 622 (1961).

¹⁸ This has been a major theme in three out of the last four annual reviews of the Supreme Court's labor law decisions before the ABA Labor Relations Law Section. See Cox, *The Major Labor Decisions of the Supreme Court October Term 1958*, A.B.A. LABOR RELATIONS LAW PROCEEDINGS 23 (1959); Hays, *The Major Labor Decisions of the Supreme Court, October Term 1959*, A.B.A. LABOR RELATIONS LAW PROCEEDINGS 74 (1960); Summers, *Analysis of Supreme Court's Labor-Law Decisions*, 50 L.R.R.M. 94 (1962) (to be published in more complete form in A.B.A. LABOR RELATIONS LAW PROCEEDINGS (1962)).

¹⁹ The preemption issue arises in labor contract actions in many different contexts. Frequently, the conduct which is said to be in violation of the contract may also arguably constitute an unfair labor practice. See, e.g., *Cuneo Press, Inc. v. Kokomo Paper Handlers' Union*, 235 F.2d 108 (7th Cir.), cert. denied, 352 U.S. 912 (1956) (plaintiff alleged that union struck in violation of no-strike clause

shall be done when enforcement of a contract would arguably compel the commission of an unfair labor practice. The obvious illustration is a suit to enforce a union security agreement which arguably exceeds the limits permitted by sections 8(a)(3) and 8(b)(2).²⁰

Since different kinds of overlap may call for different solutions, it becomes important to know the precise nature of the overlap that did call forth footnote 9. The problem actually before the Court required it to decide whether arguably protected activity is subject to judicial restraint in contract actions. That question arises in virtually every suit in which a union meets a claim that it struck in breach of contract with a denial that its work stoppage was prohibited by the contract sued upon. Since, if the stoppage was not prohibited by the contract, workers participating in it would normally be protected from reprisal by section 7, the union's claim of no contractual prohibition is also a claim of statutory protection. If a court finds that the contract did apply and assesses damages against the union, it may be penalizing activity that the NLRB would hold protected,²¹ exactly the sort of judicial "error" *Garmon* is supposed to guard against.

because of a work assignment dispute with another union, arguably an 8(b)(4) violation); *United Ass'n of Journeymen v. Marchese*, 81 Ariz. 162, 302 P.2d 930 (1956), *clarified*, 82 Ariz. 30, 307 P.2d 1038 (1957) (union demanded modification of the agreement without complying with the provisions of 8(d), arguably an 8(b)(3) violation); *McAmis v. Panhandle Eastern Pipe Line Co.*, 273 S.W.2d 789 (Mo. Ct. App. 1954) (discharge of employees because of union activity arguably an 8(a)(3) violation); *Elisco v. Rockwell Mfg. Co.*, 387 Pa. 274, 128 A.2d 32 (1956) (relocation of plant arguably an 8(a)(3) violation). Or the union may assert as a defense to a suit on a no-strike clause an antecedent unfair labor practice by the employer. *Cf. Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). Sometimes defendant maintains that the contract provision sued upon is illegal under the NLRA. See, e.g., *Local 1898, Int'l Ass'n of Machinists v. Brake & Elec. Sales Corp.*, 279 F.2d 590 (1st Cir. 1960) (defense that compliance with the agreement would violate section 8(a)(3)); *Plumbers & Steamfitters Union v. Dillion*, 255 F.2d 820 (9th Cir. 1958) (suit for violation of implied condition to furnish labor; defense that the clause from which the condition was implied was in fact an illegal closed shop provision); *Park Inn Hotel, Inc. v. Messing*, 31 Misc. 2d 961, 224 N.Y.S.2d 179 (Sup. Ct. 1962) (defense that agreement was invalid because the union did not represent a majority at the time the agreement was signed). The preemption issue is also relevant in, among others, disputes over the composition of a bargaining unit covered by an agreement, see *Local 1357, Retail Clerks Int'l Ass'n v. Food Fair Stores, Inc.*, 202 F. Supp. 322 (E.D. Pa. 1961), and in actions on "no-raiding agreements," see *United Textile Workers v. Textile Workers Union*, 258 F.2d 743 (7th Cir. 1958).

²⁰ E.g., *Local 1898, Int'l Ass'n of Machinists v. Brake & Elec. Sales Corp.*, 279 F.2d 590 (1st Cir. 1960).

²¹ See *H. N. Thayer Co.*, 99 N.L.R.B. 1122 (1952), *modified*, 213 F.2d 748 (1st Cir.), *cert. denied*, 348 U.S. 883 (1954), *modified*, 115 N.L.R.B. 1591 (1956).

Even though arguably protected activity is involved in a contract action in this way, *Lucas Flour* held the courts may proceed to a full adjudication. No matter what other qualifications the Supreme Court may one day graft onto footnote 9, this holding will remain unaffected, because, as we shall see,²² no other is possible.

One cannot be quite so dogmatic when the problem takes the special form of a defense that the no-strike clause was not violated because the union struck in protest against an unfair labor practice. Judicial rejection of this defense not only risks penalizing protected activity, but, in addition, usually involves an interpretation of the NLRA itself as a step in the determination that the employer was not guilty of an unfair labor practice. Although this additional factor could conceivably have led to a different result, the Court may have decided that it too is no obstacle to judicial decision. Footnote 9 remains literally applicable and the record does seem to have contained an arguably unfair-labor-practice strike.²³ However, the question was most unobtrusive in the record, the issue was not argued, and the Court gave no sign of thought about it. We have, then, a decision which the Court may not have been aware it was making, that an arguably unfair-labor-practice strike may be adjudicated a breach of contract by the courts without waiting for an NLRB determination of whether an unfair labor practice was involved or not.

Lucas Flour takes us no further,²⁴ except insofar as the breadth

²² See p. 559 *infra*.

²³ Defendant's answer alleged that the discharge which provoked the strike and plaintiff's "refusal to negotiate . . . was or reasonably appeared to the defendants to be for the purpose of reducing the effectiveness of Local 174 in representing its members and as a protest against the efforts of Local 174 to have Welsch put to work, and as a punishment to Welsch for having sought the assistance of Local 174 in this matter." Record, p. 15, Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962). If these facts were established in an NLRB proceeding, the company would, of course, be found guilty of an unfair labor practice.

²⁴ In arguing that the state courts lacked jurisdiction over the portion of plaintiff's complaint sounding in tort, the union maintained that its strike was arguably an unfair labor practice:

[I]t would be viewed as an effort to terminate or modify the contract without complying with the requisite waiting period and notices. The Board has taken the position that an economic strike in the face of a no-strike agreement is an unfair labor practice under § 8(b)(3) and § 8(d). *United Mine Workers Union and Westmoreland Coal Company*, 117 N.L.R.B. 1072 (1957); *United Mine Workers of America and Boone County Coal Corp.*, 117 N.L.R.B. 1095 (1957), and see 9 Labor Law Journal 406 (1958).

Petition for Writ of Certiorari, p. 11, Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962). However, the union conceded that

Enforcement of both of these decisions was denied by the Court of Appeals of the District of Columbia by a decision divided two to one. *Local 9735 U.M.W. v. N.L.R.B.*, 258 F.(2d) 146 (App. D.C. 1958); *International Union, U.M.W. of A. v. N.L.R.B.*, 257 F.(2d) 211 (App. D.C. 1958).

of the footnote suggests a general lack of receptivity to the argument that jurisdiction over a contract action is lacking because some aspect of the case is grist for the NLRB's mill. However, additional clues are to be found in three other cases decided at the same term.

The first of these was *Charles Dowd Box Co. v. Courtney*,²⁵ well known for its holding that section 301's grant of jurisdiction to the federal courts did not preempt the state courts of their power to enforce collective agreements. Although the case purports to have decided only that question, an overlap with the Board's jurisdiction was brought forcefully to the Court's attention. Indeed, the Court's own statement of the facts respecting defendant-employer's breach does everything but actually apply the label of arguable refusal to bargain. The employer's representatives, after a number of sessions with the union's representatives, had signed a "Stipulation" containing some new benefits including wage increases, as well as provision for continuation of many clauses from an earlier agreement. Then, the Court reports,

The petitioner originally announced to its employees that it would put into effect the wage changes and other provisions covered by the "Stipulation" and draft agreement, but a few weeks later notified its employees of its intention to terminate these changes and return "to the rates in effect as of May 18, 1957." It was the petitioner's position that its bargaining representatives had acted without authority in negotiating the new agreement, and that the union had been so advised before any contract had actually been concluded.²⁶

On these facts the General Counsel to the Board would not hesitate to issue a refusal-to-bargain charge. Nor was the employer ashamed to make that point. In its brief in the Supreme Court it argued that, "The conduct of the petitioner, complained of by the plaintiffs in the lower court action, if established to be true, constituted an unfair labor practice. This Court in prior decisions has held that state courts cannot in these circumstances

Id. at 11 n.6. If the union's contention is well founded, *Lucas Flour* also involved an overlap between a contract breach and an arguable unfair labor practice. Fortunately, we need not dwell on how arguable an unfair labor practice must be in order to be "arguable" within the meaning of the *Garmon* formula, for the case next discussed in the text tells us what we wish to know about the contract breach that is also arguably an unfair labor practice.

²⁵ 368 U.S. 502 (1962).

²⁶ *Id.* at 504.

exercise jurisdiction.”²⁷ The elaboration of this argument turned out to be rather unorthodox. In essence, the employer contended that the presence of an unfair labor practice ousts the state courts of their contract-enforcing power even though it does not have the same effect on the federal courts.²⁸ Although the use to which the employer put the information was unusual, it remains true that the Court was reminded that the contract breach was an arguable unfair labor practice and that this might make *Garmon* relevant. The reminder was presumably driven home by the answering arguments of both the union and the Wisconsin Employment Relations Board, appearing as amicus. Indeed, one passage in the union’s brief may well have provided the model for the first part of the *Lucas Flour* footnote. Counsel maintained that, “The cases holding that neither state nor federal courts may act in the area over which the NLRB has jurisdiction are not relevant . . . Congress specifically decided not to make the violation of a collective agreement an unfair labor practice, and decided instead to leave such matters to ‘the usual processes of the law and not to the National Labor Relations Board.’ ”²⁹

Whatever the Court said it was deciding in *Dowd Box*, it did in fact allow the Massachusetts courts to enforce an agreement even though the conduct constituting the breach of contract was also arguably an unfair labor practice. Moreover, there is reason to believe that the *Lucas Flour* footnote was a belated admission of that fact. We have the similarity of footnote 9 to the union’s *Dowd Box* brief as one item of evidence. More important, footnote 9, for all its brevity, contains several indications that the Court had been thinking about the contract breach that is also arguably an unfair labor practice. To begin with, four of the five lower-court cases cited in footnote 9 involved precisely that problem.³⁰ In addition, when the Court turned to the effect of its decision on the NLRB’s jurisdiction, it told us about the overlap between contract violation and unfair practice. Although the relevant sentence appears in the full quotation above, it bears

²⁷ Brief for Petitioner, p. 7.

²⁸ *Id.* at 21-26.

²⁹ Brief for Respondents, pp. 6-7; see Brief for the Wis. Employment Relations Bd. as Amicus Curiae, pp. 14-15.

³⁰ See Local 4264, *United Steel Workers v. New Park Mining Co.*, 273 F.2d 352 (10th Cir. 1959); *Lodge 12, Int’l Ass’n of Machinists v. Cameron Iron Works, Inc.*, 257 F.2d 467 (5th Cir.), *cert. denied*, 358 U.S. 880 (1958); *Independent Petroleum Workers v. Esso Standard Oil Co.*, 235 F.2d 401 (3d Cir. 1956); *International Union of Operating Eng’rs v. Dahlem Constr. Co.*, 193 F.2d 470 (6th Cir. 1951).

quoting again: "It is, of course, true that conduct which is a violation of a contractual obligation may also be conduct constituting an unfair labor practice, and what has been said is not to imply that enforcement by a court of a contract obligation affects the jurisdiction of the N.L.R.B. to remedy unfair labor practices, as such."³¹ Finally, the one secondary source relied upon by the Court was Bernard Dunau's excellent article, "Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems."³² The title accurately describes the contents of the article: it deals solely with the problem of conduct that is both contract violation and unfair labor practice.

The next decision in the series was *Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.*,³³ a case that on first impression appears to be little more than a fitting rebuff of an attempt by two companies to evade a strike-settlement agreement. The strike had been called against one of the companies after negotiations for a renewal of existing contracts had reached an impasse. Thirteen months later, a local mediation group succeeded in getting the parties to agree to a "Statement of Understanding," in which the unions promised to stop striking, the struck employer promised to reinstate all strikers within a limited period of time, and both employers made many of the promises typically found in a collective agreement. These included, among many others, wage and hour schedules, a ban on discharges except for just cause, a pledge not to discriminate because of union activities, a grievance procedure, and an arbitration clause. However, in place of the customary recognition clause, the agreement provided that the unions would not ask for recognition "unless at some future time within the discretion of the"³⁴ unions, they were certified by the NLRB after elections in single store units. Subsequently, the unions took a number of grievances arising under the "Statement of Understanding" to arbitration. The ensuing proceedings resulted in awards for the union on only two of the grievances processed. When the employers refused to comply with those two awards, the unions brought suit under section 301 to compel compliance. The district court decided that it lacked jurisdiction because, as the Supreme Court interpreted its opinion, an agreement between a union and an employer is enforceable under section 301 only if (1) the union was the majority repre-

³¹ 369 U.S. at 101 n.9.

³² 57 COLUM. L. REV. 52 (1957).

³³ 369 U.S. 17 (1962).

³⁴ *Id.* at 21 n.5.

sentative when the contract was made and (2) the agreement is a collective bargaining agreement; and neither of these conditions, according to the lower court, was met. In reversing the court of appeals' affirmance, the Supreme Court rejected both of these theories. Whether or not the "Statement of Understanding" was a collective agreement and whether or not the unions were majority representatives, the federal courts had jurisdiction to enforce the agreement.

The case seems an easy one. As the Supreme Court said, "If this kind of strike settlement were not enforceable under § 301(a), responsible and stable labor relations would suffer, and the attainment of the labor objective of minimizing disruption of interstate commerce would be made more difficult."³⁵ Nevertheless, *Lion Dry Goods* necessarily poses a difficult primary jurisdiction problem. Less than a year earlier, in *Bernhard-Altmann*,³⁶ the Court had upheld an NLRB determination that a minority union and an employer violate the NLRA when, instead of entering into a members-only contract, they conclude an agreement making the union exclusive representative of all of the workers in a bargaining unit. That decision raises a serious question as to whether the execution and implementation of the "Statement of Understanding" violated sections 8(a)(1), 8(a)(2) and 8(b)(1). To be sure, *Bernhard-Altmann* held "the exclusive representation provision . . . the vice in the agreement,"³⁷ and no such provision was included in the "Statement of Understanding," but *Bernhard-Altmann* was presumably intended to do more than teach minority unions to leave out the exclusive recognition clause when they make agreements covering all employees. After all, the Court also said: "The act made unlawful by § 8(a)(2) is employer support of a minority union."³⁸ It is hard to conceive of more impressive support than allowing a minority union to negotiate an agreement applicable to all employees, even if exclusive recognition is not accorded.

My purpose is not to try to determine the reach or wisdom of *Bernhard-Altmann*. I mean only to demonstrate that there lurked in *Lion Dry Goods* a substantial question as to whether the Supreme Court was aiding plaintiff unions and compelling defendant employers to participate in the commission of unfair labor practices. We may then be able to learn, from the way in

³⁵ *Id.* at 27.

³⁶ *ILGWU v. NLRB*, 366 U.S. 731 (1961).

³⁷ *Id.* at 736-37.

³⁸ *Id.* at 739.

which the Court dealt with that question, something more about the reception it will accord *Garmon* in contract actions. Notice that a determination of whether the execution and implementation of the "Statement of Understanding" constitute unfair labor practices may require two questions to be answered. First, were the unions majority representatives at the time the "Statement of Understanding" was concluded? And, second, if they were not, was the "Statement of Understanding" an agreement of the sort condemned by *Bernhard-Altmann*? *Garmon*, if applicable in contract actions, would deny the courts the power to enforce the "Statement of Understanding" until those questions were answered by the NLRB; the appropriate procedure would presumably be for the trial court to retain jurisdiction over the suit but to refrain from deciding it until the unfair-labor-practice issues were resolved by the Board.

The Court appears to have rejected this mode of proceeding in *Lion Dry Goods*. Admittedly, it did not purport to decide the question, but having devoted an entire opinion to refuting the lower courts' restricted view of their jurisdiction under section 301, the Court could not reasonably expect the district court then to decide that it was still without jurisdiction because of the exclusive competence of the NLRB. A conscientious district judge would have to hold that this possibility was foreclosed, that the Court had rejected it sub silentio, unless of course, he was persuaded that the Court never saw the issue. That the Court overlooked the point is not wholly inconceivable, for in one passage it does seem to have been saying that its decision had nothing to do with unfair labor practices. The Court said:

Only a few words are necessary to dispose of respondents' second contention, that even if this agreement were otherwise within § 301 (a), petitioners' disclaimer of entitlement to recognition as exclusive representatives puts them out of court. This issue does not touch upon whether minority unions may demand that employers enter into particular kinds of contracts or the circumstances under which employers may accord recognition to unions as exclusive bargaining agents.³⁹

And yet to assume that the Court missed the point is to assume almost total blindness, for the parties repeatedly argued the unfair-labor-practice issue in their briefs. As early as their brief in opposition to the petition for certiorari, respondents maintained:

³⁹ 369 U.S. at 28-29.

To hold that there was a contract here between these unions and the employees would be a clear violation of the rights guaranteed to employees by Section 7 of the Labor Management Relations Act of 1947 to be represented through representatives of their own choice or the right to refrain from engaging in any activity involving collective bargaining through labor organizations.

If these statements of strike settlement conditions were held to be a labor contract between the employers and the Unions, both would be guilty of violation of Sections 8(a) (1) and (2) and 8 (b) (1) (A) of the Labor-Relations Management Act [*sic*] by entering into a contract when the Union had not been authorized by a majority of employees to act as their representative.⁴⁰

The theme recurs throughout the briefs, culminating in an entire section of petitioners' reply brief on how *Bernhard-Altman* is to be distinguished.⁴¹

We must assume, then, that the Court perceived the relevance of the NLRA to the contract problem before it and decided that it was no barrier to decision. The question then becomes: When a defendant maintains that enforcement of an agreement would compel the commission of an unfair labor practice, is the court to resolve the questions raised by that defense or is it to ignore them and enforce the contract without regard to whether its decision will oblige the defendant to violate the NLRA? The Supreme Court seems to have opted for the latter view, at least when resolution of the unfair labor practice issues would require an inquiry into the union's majority status, for in *Lion Dry Goods* it said: "Lastly, if the federal courts' jurisdiction under § 301 (a) required a preliminary determination of the representative status of the labor organization involved, potential conflict with the National Labor Relations Board would be increased . . . and litigation would be much hindered."⁴² The point seems fully applicable here, even though the Court made it in a somewhat different context.⁴³

In sum, *Lion Dry Goods* seems to support the proposition that in suits on collective agreements the courts are to ignore the

⁴⁰ Brief of Respondents in Opposition to Petition for Writ of Certiorari, p. 15.

⁴¹ Reply Brief for Petitioner, pp. 8-11.

⁴² 369 U.S. at 29.

⁴³ The Court was demonstrating that contracts are not beyond the scope of section 301 merely because they are not "contracts with exclusive bargaining agents." *Ibid.* Members-only contracts and agreements made pursuant to NLRA § 8(f), 73 Stat. 545 (1959), 29 U.S.C. § 158(f) (Supp. III, 1962), are given as examples.

defense that the union lacked majority support when the agreement was made. Judges are neither to wait for the NLRB to determine the issue nor to decide it for themselves. Presumably though, if the Board actually rules a contract an unfair labor practice, its decision would supersede that of the courts.⁴⁴

Lion Dry Goods plus *Dowd Box* and *Lucas Flour* make three cases, each involving a different kind of contract-NLRA overlap, in which the Supreme Court disdained *Garmon*. Three and a half months went by before the Court had another chance to reject *Garmon* in a contract action. Two sub silentio decisions and a footnote had left the problem still seeking a place in the text. It was not to be. In *Atkinson v. Sinclair Ref. Co.*,⁴⁵ an even shorter footnote than that employed in *Lucas Flour* disposed of the matter. The entire discussion follows:

The union also argues that the preemptive doctrine of cases such as *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, is applicable and prevents the courts from asserting jurisdiction. Since this is a § 301 suit, that doctrine is inapplicable. *Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 101 n. 9.⁴⁶

Beyond the fact of reaffirmation, *Atkinson v. Sinclair Ref. Co.* added nothing to its three predecessors. The suit overlapped the NLRA only in that a court deciding whether a strike is in breach of contract may, if it decides that question incorrectly, penalize a strike protected by section 7.⁴⁷ *Lucas Flour* had already decided that this danger is no reason to defer to the NLRB.

Four decisions⁴⁸ without an articulated rationale give little

⁴⁴ This would follow from NLRA § 10(a), 61 Stat. 146 (1947), 29 U.S.C. § 160(a) (1958): "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . ." See *Local 174, Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95, 101 n.9 (1962); cf. *Duralite Co. v. Local 485, IUE*, 50 L.R.R.M. 2556 (E.D.N.Y. 1962). In *Duralite* the NLRB had ordered the parties to cease and desist from giving effect to their agreement because its execution constituted an unfair labor practice; the court refused to enforce the agreement's arbitration clause with respect to grievances arising after execution and before the cease and desist order; according to the court, the agreement, in view of the Board's decision, was "at worst invalid and . . . at best unenforceable . . ." *Id.* at 2558.

⁴⁵ 370 U.S. 238 (1962).

⁴⁶ *Id.* at 245 n.5.

⁴⁷ However, as in *Lucas Flour*, in some sense it is also arguable that the strike was an unfair labor practice. See note 24 *supra*, for the basis of that argument and the reason for not exploring it further.

⁴⁸ A fifth should be noted for the slight doubt it casts on the steadfastness of the Court's purpose to keep the *Garmon* case out of the contract actions. In

reason to hope that one will be forthcoming. We must, then, begin at the beginning — with the rationale of preemption itself — and find our own way.

III. THE RATIONALE OF PREEMPTION

For all the twists and turns the Supreme Court has taken in working out the limits of preemption,⁴⁹ and for all the difficulties

re Green, 369 U.S. 689 (1962), held that the Ohio courts had improperly adjudged an attorney in contempt for advising his clients to ignore an injunction against picketing. The injunction had issued *ex parte* even though the attorney had advised the court that he was ready for a hearing at any time. Believing the injunction to be invalid because of preemption and the absence of a hearing and wishing to test its validity, the attorney advised his clients to continue picketing. He was held in contempt, the court again acting without a hearing, and his efforts to set that determination aside via habeas corpus failed. The Supreme Court reversed on the ground that the failure to accord petitioner a hearing before holding him in contempt had denied him due process. In an effort to indicate the function of such a hearing when petitioner had admitted urging disregard of the court's order, the Court also declared that "a state court is without power to hold one in contempt for violating an injunction that the state court had no power to enter by reason of federal pre-emption." *Id.* at 692. This made material the question whether the state court was preempted of its power to issue the injunction in the first place. The answer to that question, the Court said, was "impossible to determine from this record," *ibid.*, even though the employer argued that the injunction issued solely to enforce a no-strike clause in a collective agreement. At first blush, this suggests that the Court may have entertained some second thoughts about *Lucas Flour, et al.*, and was willing to concede at least the possibility that a contract action can be preempted. On closer analysis, however, it turns out that the Court probably meant only that it could not tell from the record in the habeas corpus proceeding whether the injunction had issued in aid of a collective agreement or not. The Court seems to have had in mind an argument that would run something like this: since petitioner maintained that no collective agreement had been properly executed, he was entitled to a hearing to make that point; success would take the contract out of the case and thereby demonstrate that the court lacked jurisdiction from the beginning; without jurisdiction, its injunction was not entitled to respect and so petitioner could not have been guilty of contempt for counseling his clients to disobey. This is, in essence, the argument that provoked Mr. Justice Harlan to write a separate opinion, in which Mr. Justice Clark concurred. On this reading, *Green* is entirely consistent with a rejection of *Garmon* in contract actions, a conclusion buttressed by: (1) the absence of any charge in the Harlan-Clark opinion, which builds in part on *Lucas Flour's* rejection of *Garmon*, that the Court was retreating from what it said in *Lucas Flour*; and (2) the fact that *Atkinson's* explicit reaffirmation of *Lucas Flour* came after *Green* was decided.

⁴⁹ The doctrine began with *Hill v. Florida*, 325 U.S. 538 (1945), and reached its zenith in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). A number of the cases on the subject are collected in the latter opinion, *id.* at 243 n.1. Among the best of the commentary stimulated by this line of decisions are Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 VA. L. REV. 1057 (1958); Hays, *The Supreme Court and Labor Law: October Term, 1959*, 60 COLUM. L. REV. 901 (1960); Hays, *State Courts and Federal Preemption*, 23 MO. L. REV. 373 (1958); McCoid, *Notes on a "G-String": A Study of the "No-Man's Land" of Labor Law*, 44 MINN. L. REV. 205 (1959); Meltzer, *The*

courts have had with the concept, the preemption idea and the reasons for it are really quite simple. The core of the idea, resting squarely on the supremacy clause, is familiar to lawyer and layman alike — the states cannot set aside congressional enactments. Consequently, when, for example, Congress granted employees certain rights in section 7 of the NLRA, it preempted the states of their power to deny those rights.

In some areas of law, preemption goes no further than this displacement of state power to prescribe the controlling substantive principle. The enforcement of collective agreements may turn out to be an example of this limited form of preemption. Federal law governs the interpretation of collective agreements and so the states may not apply inconsistent principles to them.⁵⁰ But the states retain their power to enforce such agreements⁵¹ — they are merely obliged to apply federal law when they do. In addition, even though federal law will award only damages for many breaches, the states may be free to supplement that remedy with injunctions.⁵²

However, preemption can go further. It can oust the states of their power to provide supplementary remedies in support of federally granted substantive rights, and, ultimately, of their power even to decide cases involving such rights. Further still, it can bar the states from deciding cases in which a federally granted substantive right is so much as arguably involved. According to the Supreme Court, this full-blown version of preemption is what Congress desires with respect to sections 7 and 8 of the National Labor Relations Act, except, we are now told, in suits to enforce collective agreements.

Why isn't it enough to preempt the states of their power to deny federally granted substantive rights? Why must they also be deprived of their power even to enforce those rights? The classic answer is to be found in *Garner v. Teamsters Union*:⁵³

Supreme Court, Congress, and State Jurisdiction over Labor Relations pts. 1-2, 59 COLUM. L. REV. 6, 269 (1959); Wellington, *Labor and the Federal System*, 26 U. CHI. L. REV. 542 (1959).

⁵⁰ Local 174, *Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95 (1962).

⁵¹ *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

⁵² See *id.* at 514 n.8, where the Court expressly refrained from intimating any view on "whether the Norris-LaGuardia Act might be applicable to a suit brought in a state court for violation of a contract made by a labor organization . . ." The Supreme Court said nothing further on the subject when it decided in *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962), that § 301 did not affect the Norris-LaGuardia Act's ban on federal-court injunctions against strikes.

⁵³ 346 U.S. 485 (1953).

Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . *A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.*⁵⁴

In other words, the exclusive jurisdiction of the NLRB is mainly a corollary of the preemption of state power to establish substantive principles in conflict with the NLRA. Absent exclusive jurisdiction in the NLRB, state tribunals, while purporting or attempting to apply federal substantive principles, might in fact be misapplying them. The opportunities for misapplication are considerable, since factfinding errors as well as mistakes in the interpretation of legal principles are possible. Either can have the same practical effect as an outright refusal to apply the substantive principles Congress has said shall control. The same reasoning, although without nearly the same force, is applicable to the federal courts, for they too may be unsympathetic or inept in applying the NLRA.

In addition to protecting the substantive principles Congress has laid down, exclusive NLRB jurisdiction facilitates orderly administration of the NLRA. If courts cannot decide cases involving NLRA issues, they obviously cannot render decisions that conflict with those of the NLRB. Moreover, the settlement of NLRB cases, which must be encouraged lest truly interminable delays result, might be inhibited if litigants saw some prospect of doing better in another tribunal.

Exclusive NLRB jurisdiction thus serves important ends, but the need for it should not be exaggerated. In all probability, neither the NLRA nor its orderly administration would be subjected to wholesale subversion if state and federal courts were left free to enforce the substantive rights conferred by Congress.⁵⁵

⁵⁴ *Id.* at 490-91. (Emphasis added.)

⁵⁵ It should be recalled that in *Garmon* four members of the Court were willing to allow the states to award damages for "nonviolent tortious conduct which is not federally protected," even though it might be federally prohibited.

To begin with, since federal law is involved, review by the Supreme Court would serve as a partial check on lower courts. This is, to be sure, an imperfect solution: the Court could hear only a handful of cases and, even with respect to those, reversal would normally come too late to be of any practical use. But the Supreme Court's guidance would still be important. Its determinations would control a great many subsequent lower-court decisions. Any who doubt the Supreme Court's influence when it declares what the federal labor law is need only contrast the way in which lower courts have been herding cases to arbitration since the Court handed down the "arbitration trilogy"⁵⁶ with the innumerable judicial refusals to compel arbitration before the Supreme Court spoke.⁵⁷

Another point should be kept in mind. The NLRB sometimes errs too. To prefer it to the courts is to assume that its mistakes will be less frequent or less destructive of congressional policy than those the courts make. I happen to be willing to embrace that assumption, but many informed observers are not.⁵⁸ In any event, preemption enthusiasts must recognize that exclusive NLRB jurisdiction does not eliminate error; at best, it minimizes it.

We could, then, have viable federal regulation of labor rela-

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 253 (1959) (concurring opinion of Harlan, J., joined by Clark, Whittaker and Stewart, JJ.). They concurred in the result "solely because it is fairly debatable whether the conduct here involved is federally protected . . ." *Id.* at 254. In *DeVries v. Baumgartner's Elec. Constr. Co.*, 359 U.S. 498 (1959), the four Justices apparently had no difficulty in concluding that the activity in question was not protected; they dissented from a *per curiam* reversal of a state damage award.

⁵⁶ Cases cited note 8 *supra*; see *Posner v. Grunwald-Marx, Inc.*, 56 Cal. 2d 169, 363 P.2d 313, 14 Cal. Rep. 297 (1961); *International Union of Elec. Workers v. General Elec. Co.*, 148 Conn. 693, 174 A.2d 298 (1961); In the Matter of *Borden Co.*, 15 App. Div. 2d 151, 222 N.Y.S.2d 301 (1961); *Application of Fownes Bros. & Co.*, 14 App. Div. 2d 235, 218 N.Y.S.2d 764 (1961); *Application of Morten, Inc.*, 216 N.Y.S.2d 825 (Sup. Ct. 1961), *aff'd per curiam sub nom.* *Morton Karten, Inc. v. Snow Suit Workers*, 230 N.Y.S.2d 347 (App. Div. 1962).

⁵⁷ *E.g.*, *Pari-Mutuel Employees' Guild v. Los Angeles Turf Club, Inc.*, 169 Cal. App. 2d 571, 337 P.2d 575 (Dist. Ct. App. 1959); *International Union of Elec. Workers v. General Elec. Co.*, 21 Conn. Supp. 175, 149 A.2d 910 (Super. Ct. 1959); *Textile Workers v. Firestone Plastics Div.*, 6 N.J. Super. 235, 70 A.2d 880 (App. Div.), *petition for certification denied*, 4 N.J. 515, 73 A.2d 212 (1950); *International Ass'n of Machinists v. Cutler-Hammer, Inc.*, 271 App. Div. 917, 67 N.Y.S.2d 317, *aff'd per curiam*, 294 N.Y. 519, 74 N.E.2d 464 (1947).

⁵⁸ Some idea of how the "labor relations bar" regards the relative merits of the Board and the courts is provided by the fact that the Labor Relations Law Section of the ABA recently defeated by a margin of only four votes a proposal to recommend that jurisdiction in unfair-labor-practice cases be taken from the NLRB and entrusted to the federal district courts. See 48 L.R.R.M. 42 (1961).

tions without full-blown preemption. Indeed, limitations on preemption deriving from the Supreme Court's own construction of it, from the Taft-Hartley Act, from Landrum-Griffin, and from lower-court misunderstanding and resistance⁵⁹ make it clear that we have in fact been operating without full-blown preemption. Thus, the Court has permitted the states to regulate conduct "arguably subject to § 7 or § 8 of the Act" when such conduct violates a sufficiently important local policy. In particular, states have been allowed to assert jurisdiction over claims of violence and mass picketing.⁶⁰ This represents a significant departure from preemption because an individual state judge's decision about the point at which picketing becomes violent or massed may obviously differ from the decision the NLRB would have reached on the same facts. In any particular case, the difference may mean the issuance of an injunction, an award of damages, or even the imposition of criminal penalties as the result of activity which the Board would have held protected by section 7.

The Court also seems disposed to treat suits to enforce the duty of fair representation as an exception to the exclusive jurisdiction of the NLRB, at least when the claim of unfair representation rests on alleged racial discrimination.⁶¹ State and fed-

⁵⁹ The history of lower-court misunderstanding of and resistance to preemption gives some reason to question the assertion, at note 55 *supra*, that neither the NLRA nor its orderly administration would be subjected to wholesale subversion if state and federal courts were left free to enforce the rights conferred by Congress. Nevertheless, to generalize from the experience with preemption would be hazardous. For one thing, the Supreme Court was extraordinarily confusing in its pronouncements on the subject, leaving most observers, and not just judges, in serious doubt about the direction the law was taking. For another, the temptation to flout preemption in cases over which the NLRB would not exercise jurisdiction must have been uniquely compelling; indeed Congress ratified the practice in 1959. See note 65 *infra*, and accompanying text. In many such cases preemption would have meant denial of a remedy even though no serious question existed about the plaintiff's substantive rights. Indeed, in some instances plaintiff obviously had valid claims under both state and federal law. The fact that in such cases state judges refused to withhold the state's protection when the NLRB was denying the national government's solely because it was too busy does not necessarily mean that state judges are not to be trusted with other federal principles. The risks of generalizing from experience under such circumstances are underscored by the fact that judges have intruded into the NLRB's domain far less frequently since 1959, when preemption was clarified in *Garmon* and the states were empowered to deal with the cases the NLRB was too busy to hear.

⁶⁰ See *International Union, UAW v. Russell*, 356 U.S. 634 (1958); *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957); *UAW v. Wisconsin Employment Relations Bd.*, 351 U.S. 266 (1956); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954).

⁶¹ See *Syres v. Oil Workers*, 350 U.S. 892 (1955) (memorandum decision); *Sovern, The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563, 608-13 (1962).

eral courts apparently retain jurisdiction to compel unions to live up to that duty, even though the activity allegedly violating it is "arguably subject to § 7 or § 8 of the Act."

The Taft-Hartley Act included a substantial exception to exclusive NLRB jurisdiction in section 303. That section, as simplified by the Landrum-Griffin Act, provides as follows:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.⁶²

This exception opens up to enforcement by both state and federal courts some of the NLRA's most difficult and sensitive provisions. Hot-cargo agreements, secondary boycotts, and work assignment disputes are among the troublesome concepts thus entrusted to the courts. Not only are inconsistent decisions by Board and court possible, but they have in fact been rendered.⁶³ None-

⁶² 61 Stat. 158 (1947), 29 U.S.C. § 187 (1958), as amended, 73 Stat. 545 (1959), 29 U.S.C. § 187 (Supp. I, 1962).

⁶³ Compare *NLRB v. Deena Artware, Inc.*, 198 F.2d 645 (6th Cir. 1952), *cert. denied*, 345 U.S. 906 (1953), with *United Brick & Clay Workers v. Deena Artware, Inc.*, 198 F.2d 637 (6th Cir.), *cert. denied*, 344 U.S. 897 (1952), in which the court of appeals said:

We recognize that this finding is contrary to the finding in the companion case of *NLRB v. Deena Artware, Inc.*, No. 11156, *supra*, in which the Trial Examiner found that the picketing of the area of construction which caused the cessation of work by the general contractors was on the part of the Teamster's Union and not by the Appellants, which finding we have upheld and on which we have based a ruling in that case. Under our existing system of courts, juries, administrative agencies, and appellate review, such findings, even though inconsistent, are not invalid, and one does not destroy the other. The two proceedings, even though arising out of the same labor dispute, were heard by separate fact finding agencies. The witnesses in the two proceedings were not the same. The cross-examination of some witnesses who testified in both proceedings was not by the same attorneys. Necessarily, the evidence produced in the different proceedings by such testimony was not identical. Each fact finding agency was entitled to make its own decision upon the evidence before it. Though this Court on review recognizes the inconsistency, and may not be in accord with one of the two rulings if it was making the ruling as a matter of original jurisdiction, it does not have the right to set aside such ruling, if, in the case of the jury verdict, it is supported by substantial evidence, or, in the case of the Labor Board proceeding, it is supported by substantial evidence on the record considered as a whole. In our opinion, the respective findings are so supported in each of the two proceedings.

theless, in 1959, when Congress expanded 8(b)(4),⁶⁴ it expanded 303 right along with it.

The Landrum-Griffin Act added still another major exception to exclusive NLRB jurisdiction by amending section 14 of the NLRA to permit state courts and agencies to act when the NLRB declines "to assert jurisdiction over any labor dispute . . . [because] the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction" ⁶⁵

Finally, to some extent now but especially before 1959, the year in which section 14 was amended to allow the states to deal with "small" cases and in which the Supreme Court clarified the preemption doctrine in *Garmon*, preemption was often inoperative because lower courts were unable to understand it or unwilling to bow to it. Writing in November 1958, Professor (as he then was) Hays concluded: "[A]dding up the effects of ignorance and misunderstanding of the preemption doctrine, and what in some cases seems to be a deliberate determination to grant injunctions in spite of it, there is still, in practice, a large body of labor activity which is subjected to state power."⁶⁶

In short, not only have we been operating with gaping holes in the principle of exclusive NLRB jurisdiction, but, in addition, both Congress and the Court have indicated their willingness to sacrifice that principle when to apply it would frustrate other significant policies.

Id. at 642-43. *Cf.* *NLRB v. Radio & Television Broadcast Eng'rs Union*, 364 U.S. 573, 584-85 (1961) ("separate and distinct nature" of 303 and 8(b)(4) recognized and a requirement of "substantive symmetry" between the two sections rejected); *International Longshoremen's Union v. Juneau Spruce Corp.*, 342 U.S. 237, 244 (1951) (right to bring action under section 303 not "dependent on any prior administrative determination that an unfair labor practice has been committed").

⁶⁴ 73 Stat. 542 (1959), 29 U.S.C. § 158 (Supp. III, 1962).

⁶⁵ 73 Stat. 541 (1959), 29 U.S.C. § 164 (Supp. III, 1962). Most commentators on the subject have concluded that this amendment dispenses with federal preemption of substantive law as well. That is to say, state courts and agencies are not only free to decide the cases declined by the Board pursuant to section 14; in addition, they are free to apply state law to them. See, e.g., Aaron, *The Labor-Management Reporting and Disclosure Act of 1959* pt. 2, 73 HARV. L. REV. 1086, 1097-98 (1960); Cox, *The Landrum Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 157, 262 (1959). But see, e.g., Hanley, *Federal-State Jurisdiction in Labor's No-Man's Land: 1960*, 48 GEO. L.J. 709, 721-35 (1960); Papps, *Section 701 and the State Courts: What Law To Be Applied?*, 48 GEO. L.J. 316 (1959). The state authorities seem to have taken it for granted that they are to apply their own law. See, e.g., *Cooper v. Nutley Sun Printing Co.*, 36 N.J. 189, 175 A.2d 639 (1961).

⁶⁶ Hays, *State Courts and Federal Preemption*, 23 MO. L. REV. 373, 382 (1958). For a recent example see *Jafco, Inc. v. Liner*, 49 L.R.R.M. 2585 (Tenn. Ct. App. 1962).

IV. WHAT ROLE IN CONTRACT ACTIONS FOR PRIMARY JURISDICTION

It follows from what has just been said that the principle of exclusive NLRB jurisdiction should yield in suits on collective agreements if: (1) assuring an expeditious remedy for contract breaches is as significant a policy as making a forum available to those whose cases are too "small" for the NLRB, or as providing a judicial remedy, in addition to that available from the NLRB, for victims of violence, mass picketing, unfair representation, hot-cargo agreements, secondary boycotts, or work-assignment disputes; and (2) the policy of affording an expeditious contract remedy would be frustrated by applying the principle of exclusive NLRB jurisdiction. Condition (1) need not detain us. Section 301 amply demonstrates Congress' judgment that the policy of enforcing collective agreements is comparable in significance to the other policies just listed.⁶⁷ The Supreme Court has discerned a similar commitment to arbitration as a fundamental policy,⁶⁸ and fulfillment of that commitment is, of course, dependent in part upon the enforceability of collective agreements.

That condition (2) is also satisfied is equally clear. The NLRB has no jurisdiction to enforce collective agreements as such.⁶⁹ If they are to be enforced, the courts must do it. Consequently, to say that the courts may not decide or must delay adjudication of the many contract actions involving conduct "arguably subject to § 7 or § 8 of the Act" would necessarily frustrate *pro tanto* the policy of enforcing collective agreements.

Contract enforcement overlaps NLRA administration often enough by coincidence to support the conclusion that wholesale application of *Garmon* to contract actions would seriously impede the enforcement of collective agreements. Serious impediment could become near-total obstruction if parties chose to

⁶⁷ See, e.g., S. REP. NO. 105, 80th Cong., 1st Sess. 17-18 (1947).

⁶⁸ See *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

⁶⁹ See H.R. REP. NO. 510, 80th Cong., 1st Sess. 41-42 (1947):

The Senate amendment contained a provision which does not appear in section 8 of existing law. This provision would have made it an unfair labor practice to violate the terms of a collective bargaining agreement or an agreement to submit a labor dispute to arbitration. The conference agreement omits this provision of the Senate amendment. Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.

exploit the possibilities of fabricating unfair labor practices to defeat or delay contract actions. Almost any breach can, after all, be brought arguably within the reach of sections 7 or 8. One gambit, which could be used against uncertified unions, would be to defend by questioning the union's majority at the time the agreement was made.⁷⁰ This would, as we saw in connection with *Lion Dry Goods*, inject into the lawsuit arguable infractions of 8(a)(1), 8(a)(2) and 8(b)(1), all of which would be violated by continued adherence to an agreement made by a minority union.⁷¹ Another tactic would have to be used against certified unions: convert the breach of contract into an arguable refusal to bargain. This technique could also serve as a second line of defense against the uncertified union, and, with admirable even-handedness, could be used by unions to defeat employer actions.

A contract breach can be converted into an arguable refusal to bargain in a number of ways, but one example for each side is sufficient to make the point. Management could shield its breaches from judicial redress by refusing to discuss them with the union. If management met a union attempt to invoke the grievance procedure with the response that the subject was none of the union's business, would not a court order compelling arbitration be directed against conduct arguably subject to section 8(a)(5)?⁷² Unions, since their breaches usually take the form of strikes in disregard of no-strike clauses, would probably find another approach more congenial. They might seek to dress up any dispute as an attempt to modify some aspect of an outstanding agreement.⁷³ A court asked to decide whether the union had defaulted on its no-strike pledge could then be met with the contention that it would have to pass on conduct arguably subject to 8(b)(3) and 8(d).⁷⁴

The Supreme Court was right, then, to refuse to import *Garmon* bodily into the contract field, for to do so might well cripple the jurisdiction of the courts to enforce collective agreements.

⁷⁰ See, e.g., *Park Inn Hotel, Inc. v. Messing*, 31 Misc. 2d 961, 224 N.Y.S.2d 179 (Sup. Ct. 1962).

⁷¹ See p. 540 *supra*.

⁷² Cf. *Independent Petroleum Workers v. Esso Standard Oil Co.*, 235 F.2d 401 (3d Cir. 1956).

⁷³ No great effort is required. A union can convert any dispute over the meaning of an agreement into an arguable attempt to modify that agreement by conceding that the employer's interpretation is correct and then maintaining that the agreement should be altered to state the union's interpretation. By resorting to the same tactic, an employer can claim that he has unilaterally modified the agreement, thereby giving rise to an arguable refusal to bargain in violation of § 8(a)(5).

⁷⁴ Cf. *NLRB v. Lion Oil Co.*, 352 U.S. 282 (1957).

However, this is not to say, as the Court did in *Lucas Flour*, that *Garmon* "is not relevant" in suits on collective agreements. In fact, a moment's reflection makes it perfectly clear that the considerations that produced *Garmon* are operative in many contract actions. Otherwise, no conflict between exclusive NLRB jurisdiction and the jurisdiction of the courts to enforce agreements would exist. What is being suggested, to emphasize the point, is that courts must be permitted to decide contract actions involving conduct "arguably subject to § 7 or § 8 of the Act," even though permitting them to do so risks an occasional decision disserving rights protected by the NLRA and a modicum of disorder in administration, because a contrary rule probably would emasculate section 301.

My difference with the Court's way of putting its rejection of *Garmon* is not merely verbal. Its formulation blinks the fact that something has been sacrificed to maintain full judicial power to enforce collective agreements. More important, its formulation purports to be definitive: courts enforcing contracts need no longer be concerned with the NLRB's jurisdiction. The formulation suggested here, by recognizing that significant objectives have been sacrificed, leaves open the possibility of a different outcome if in some special class of cases the need for exclusive NLRB jurisdiction seems more compelling than the need for judicial enforcement of agreements.

Moreover, even if no special class of cases can be isolated and we conclude that the NLRB never has exclusive jurisdiction of a portion of a contract action, occasional instances may still arise in which a court would do well to keep one eye on the NLRB. In other words, the courts should in any event retain their discretionary power to delay decision when, for example, a controlling Board determination appears imminent.

The remainder of this article is devoted to the search for a class of contract cases to which the doctrine of primary jurisdiction should be applied. It seems appropriate to begin by asking whether *Dowd Box*, *Lucas Flour*, *Atkinson v. Sinclair Ref. Co.*, and *Lion Dry Goods* were properly decided in accordance with the general predisposition against *Garmon* or whether any of them exemplifies a class of cases deserving special treatment. Accordingly, the next three subsections deal with: (1) conduct which is claimed to be a contract breach but which is also arguably an unfair labor practice; (2) conduct which is claimed to be a contract breach but which is also arguably protected by section 7; and (3) alleged contract breaches which can only be

remedied by compelling the commission of an arguable unfair labor practice. This discussion is followed by consideration of two other kinds of cases that the Supreme Court almost certainly did not have in mind when it wrote footnote 9: (4) cases in which a union arguably lost its representative status after the negotiation of a valid agreement; and (5) representation disputes covered by no-raiding agreements.

A. Contract Breach and Arguable Unfair Labor Practice

I suggested above that the *Lucas Flour* footnote, for all its succinctness, contains considerable evidence that the Court will not retreat from the implicit holding of *Dowd Box* that the courts are free to remedy a contract violation even though it is also an arguable unfair labor practice.⁷⁵ I now submit that the Court should not retreat from *Dowd Box*. In other words, that type of case should not be treated as an exception to the proposition that exclusive NLRB jurisdiction must yield in contract actions.

Perhaps the point is sufficiently obvious to require no further discussion. The contract breach that is also arguably an unfair labor practice was, it will be recalled, the prototype that helped us conclude that the jurisdiction of the courts to enforce collective agreements would probably be crippled if *Garmon* were held applicable. Nevertheless, since this is far and away the most frequent cause of overlap between contract and NLRA, and since some have argued that *Garmon* should apply,⁷⁶ a little painting of the lily may be forgivable.

Dunau's article, cited in *Lucas Flour*, makes the key point well: "Perhaps the central support of the arbitrator's jurisdiction, however, is the lack of jurisdiction by the NLRB over contract violations as such. . . . [A]lmost never does a contractual prohibition of an unfair labor practice exist without also implicating a part of the relationship between the employer and the union which rests wholly on their agreement."⁷⁷ If Dunau is correct in the second sentence just quoted (he is, of course, in the first), primary jurisdiction must yield. Otherwise, either of two highly undesirable consequences would follow. One would leave the victim of the breach without redress for the portion of

⁷⁵ See pp. 538-39 *supra*.

⁷⁶ See, e.g., *Stowe v. Aircooled Motors, Inc.*, 204 Misc. 228, 126 N.Y.S.2d 42 (Sup. Ct. 1953); *Western Express Co. v. International Bhd. of Teamsters*, 277 App. Div. 928, 98 N.Y.S.2d 440 (1950); Christensen, *Arbitration, Section 301, and the National Labor Relations Act*, 37 N.Y.U.L. REV. 411 (1962).

⁷⁷ Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems*, 57 COLUM. L. REV. 52, 80 (1957).

his contract claim not covered by the NLRA. This we can reject out of hand, for Congress obviously did not intend to render unenforceable contract rights which offend no public policy and for which an exchange of other valuable rights was presumably given. We must assume, then, that the portion of the contract claim not covered by the NLRA is to remain enforceable.

On that assumption, if preemption did not give way, the injured party could obtain complete relief only by going both to court and to the NLRB. Even the Supreme Court, the conscientious guardian of exclusive NLRB jurisdiction, has relented in order to avoid requiring a party to pursue two wholly separate remedies to vindicate his contract rights. *International Ass'n of Machinists v. Gonzales*⁷⁸ presented exactly that issue for the Court's consideration. Gonzales, claiming to have been expelled from the Machinists in violation of its constitution and bylaws, sued to compel restoration of his membership and to recover damages resulting from the expulsion. The state courts granted the relief requested, basing the damage award on lost wages as well as on physical and mental suffering. The union did not question the portion of the judgment requiring restoration of membership, since the NLRB had no jurisdiction over this portion of the complaint. It did, however, contend that the state courts could not award damages for lost wages and suffering. If preemption is to conquer all, the union was plainly on solid ground: an award for lost wages could only rest on a showing that the union had caused an employer to deny the plaintiff employment because of his lack of membership, the very showing required to establish a violation of section 8(b)(2) of the NLRA. But the Supreme Court rejected the union's argument; it refused to require the plaintiff to go to the state courts for his lost membership and to the NLRB for his lost wages. It said:

No radiation of the Taft-Hartley Act requires us thus to mutilate the comprehensive relief of equity and reach such an incongruous adjustment of federal-state relations touching the regulation of labor.⁷⁹

The Court went on to add two other arguments in support of the result reached, but neither of them will withstand analysis.⁸⁰

⁷⁸ 356 U.S. 617 (1958).

⁷⁹ *Id.* at 621.

⁸⁰ The first of these was: "If, as we held in the *Laburnum* case, certain state causes of action sounding in tort are not displaced simply because there may be an argumentative coincidence in the facts adducible in the tort action and a plausible proceeding before the National Labor Relations Board, a state remedy

To repeat, then, if Dunau is correct in his assumption that contractual prohibitions of unfair labor practices almost always give the promisee something more than the NLRA, the desirability of permitting enforcement of the right to that something more, plus the undesirability of requiring a wronged party to go to two separate forums for complete relief require the conclusion that primary jurisdiction must yield.

Let us now examine Dunau's key assumption. It is perfectly clear that some suits to enforce collective agreements involve both an arguable unfair labor practice and something more. A simple example might arise from the dismissal of an employee for distributing union leaflets. The union demands arbitration, invoking two contract clauses, one barring discrimination for union activity, the other barring discharge except for just cause. If the case were put to the NLRB, it could do nothing for the employee unless the employer had violated 8(a)(1) or 8(a)(3). The contract, however, gives something more; reinstatement would be proper, even though the employer committed no unfair labor practice, if the arbitrator were persuaded that the leaflet distribution in question was not "just cause."⁸¹ Dunau offers a number of other examples,⁸² but he has set himself an impossible burden of per-

for breach of contract also ought not be displaced by such evidentiary coincidence when the possibility of conflict with federal policy is similarly remote." *Ibid. Laburnum*, of course, was subsequently limited to instances "of conduct marked by violence and imminent threats to the public order." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959). If *Gonzales* had in fact been decided on the basis of its similarity to tort actions, *Garmon* should have ended its influence; *Garmon* instead expressly approves *Gonzales*. *Id.* at 243-44. The other argument offered in *Gonzales* was that the award of damages presented no greater risk of conflict with the Board than did the order restoring *Gonzales* to membership. This simply is not true. As the Court itself recognized, the Board has no jurisdiction over the membership question; it does, however, have jurisdiction to decide the very same issues that the state courts considered in making the damage award. *Garmon's* attempted explanation of *Gonzales* as a case in which "the activity regulated was a merely peripheral concern of the Labor Management Relations Act," *id.* at 423, is no more convincing. If this is a reference to the membership question, it is true but does not explain the award of damages. If it is a reference to the award of damages, once again it is not true, for the award of damages is based on the resolution of issues that are central to the NLRA.

⁸¹ *E.g.*, *Lodge 12, Int'l Ass'n of Machinists v. Cameron Iron Works, Inc.*, 257 F.2d 467 (5th Cir.), *cert. denied*, 358 U.S. 880 (1958); *Post Publishing Co. v. Court*, 334 Mass. 199, 134 N.E.2d 431 (1956); *McAmis v. Panhandle Eastern Pipe Line Co.*, 273 S.W.2d 789 (Mo. Ct. App. 1954).

⁸² Dunau, *supra* note 77, at 68-79. Consider, for example, the difference between the Board's and an arbitrator's "remedial authority," as Dunau calls it. *Id.* at 69. He means by this that an arbitrator usually has the power to decide whether the penalty imposed upon an employee is excessive "in the light of the numerous factors pertinent to the assessment of punishment—length of service,

suation. One cannot demonstrate, without an exhaustive and expensive canvass, that "almost never does a contractual prohibition of an unfair labor practice exist without also implicating a part of the relationship between the employer and the union which rests wholly on their agreement."⁸³

Fortunately, a conclusive demonstration of the point turns out to be unnecessary. It is enough that the phenomenon occurs frequently, and it undeniably does. Common occurrence is sufficient because of the difficulty, indeed typically the impossibility, of deciding on the basis of the pleadings that an unfair labor practice, no more and no less, is the subject of a contract action. Collective agreements do not usually quote the NLRA, even when our reading of them may persuade us that the parties intended essentially the same protection. Normally, then, either party is free to argue that something different from the NLRA was intended and only a decision on the merits can refute that argument. Indeed, even when a contract clause is in all respects indistinguishable from the NLRA, the parties may still contemplate a different construction. Again, only a determination on the merits can resolve the matter. Consequently, if the courts attempted to defer to the exclusive jurisdiction of the NLRB only when a contract gave no more than the NLRA, the result would be a system of contract enforcement that left plaintiffs in doubt as to their proper forum until after a trial on the merits. The price of error would be no relief whenever the judicial proceeding lasted longer than the six-month limitation period of the NLRA,⁸⁴ unless plaintiff took the precaution of proceeding before the Board as well as in the courts.

Finally, a standard that required the courts to defer to the NLRB whenever a contract merely duplicated the NLRA's protection would be an irony indeed. It would require the courts, whenever the primary jurisdiction point was raised, to construe the NLRA, the very practice *Garmon* is supposed to avoid.

Since contract rights going beyond the NLRA are involved in a substantial proportion, perhaps the overwhelming majority, of contract actions seeking relief against conduct that also arguably constitutes an unfair labor practice, the best course is to permit

past conduct, extenuating circumstances, the relationship between the gravity of the offense and the severity of the punishment, and the like." *Ibid.* The Board, on the other hand, normally lacks the power to make such an inquiry. Although Dunau speaks of this as a remedial matter, it is, in fact, a difference in substantive protection. The contract as construed by arbitrators limits management's right to dismiss a worker more severely than the NLRA does.

⁸³ *Id.* at 80.

⁸⁴ 61 Stat. 146 (1947), 29 U.S.C. § 160(b) (1958).

courts and arbitrators to decide all such cases. What the Supreme Court said in *Garmon* is also applicable here: "The nature of the judicial process precludes an *ad hoc* inquiry into the special problems of labor-management relations involved in a particular set of occurrences in order to ascertain the precise nature and degree of federal-state conflict there involved, and more particularly what exact mischief such a conflict would cause. . . . Our task is confined to dealing with classes of situations."⁸⁵ In *Garmon*, this approach led to preemption; in the contract context, for the reasons already suggested, it leads in the opposite direction.⁸⁶

⁸⁵ 359 U.S. at 242.

⁸⁶ Several other arguments offered in support of judicial power to remedy a contract breach that may also be an unfair labor practice should be evaluated. Perhaps the most seductive of these was nicely dispatched by Dunau:

To the extent that it [*Independent Petroleum Workers v. Esso Standard Oil Co.*, 235 F.2d 401 (3d Cir. 1956)] implies that jurisdiction exists simply because the source of the right asserted is the contract and not the NLRA, it is clearly wrong. The NLRB's jurisdiction is exclusive, not merely because the source of right asserted in the other tribunal is the NLRA itself, but because the other tribunal is asked to exert its power over a subject regulated by the NLRA regardless of the source of the right there asserted.

Dunau, *supra* note 77, at 76. However, Dunau himself appears to have been taken in by another delusive argument. He seems to give considerable weight to the NLRB's own rejection of the idea that it has exclusive jurisdiction to deal with conduct that is both unfair labor practice and contract breach. See *id.* at 59-64. It is certainly true that, far from insisting that other tribunals defer to it, the Board has on many occasions deferred to the arbitration process. *E.g.*, *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955); *McDonnell Aircraft Corp.*, 109 N.L.R.B. 930 (1954); *Crown Zellerbach Corp.*, 95 N.L.R.B. 753 (1951); *Timken Roller Bearing Co.*, 70 N.L.R.B. 500 (1946), *enforcement denied on other grounds*, 161 F.2d 949 (6th Cir. 1947). The conditions under which the Board will exercise its discretion to decline to act because of an outstanding arbitration award or the availability of arbitration have been commented on extensively. In addition to Dunau, see, *e.g.*, Levitt, *Interrelationships in the Interpretation of Collective Bargaining Agreements*, 10 LAB. L.J. 484 (1959); Wollett, *The Interpretation of Collective Bargaining Agreements: Who Should Have Primary Jurisdiction?*, 10 LAB. L.J. 477 (1959). Admittedly, abstention by the Board reduces the chances of actual conflict between Board and court or Board and arbitrator, and this is important, but so would denying courts and arbitrators the power to remedy contract breaches that may also be unfair labor practices. Why prefer Board abstention? This is just another way of asking the question with which we began: should courts and arbitrators be permitted to proceed here? The fact that the NLRB says they should adds little, particularly since the Board is not the appropriate forum to decide the power of the courts.

Dunau makes the common error of implicitly attacking the rationale later used in *Garmon* while claiming to be distinguishing it. He suggests that when parties are having a dispute that may be both a contract breach and an unfair labor practice, arbitration is preferable to the NLRB because either party can invoke arbitration without having to persuade the General Counsel to issue a complaint. Dunau, *supra* note 77, at 68. However, this obviously makes a tort action preferable to the NLRB too; the Supreme Court nevertheless closed the courts to tort plaintiffs complaining of conduct that arguably constitutes an unfair labor practice. Meltzer succumbed to the same fallacy when he said: "The destruction

B. Contract Breach and Arguably Protected Activity

We saw earlier that virtually every contract action in which a union defends by denying that its strike was prohibited by the contract sued upon involves activity arguably protected by section 7. By finding a broader strike ban in the agreement than the Board would, a court could penalize conduct that the Board would hold protected. Moreover, inconsistent determinations could conceivably be rendered on the basis of the very same incident. The court's reading of a no-strike clause might lead it to render judgment against the union, while the Board, reading the clause as inapplicable to the strike in question, found the employer guilty of an unfair labor practice for disciplining those who participated in it.

Nevertheless, if anything is clear it is that Congress wanted the courts to have jurisdiction over suits for breach of no-strike agreements.⁸⁷ There is no reason to believe that it wished virtually all such suits to wait until the NLRB had first decided that the contract was broken and that the strike was therefore unprotected. Such a procedure would be absurd, particularly since some employers would have no way of getting the matter before the NLRB in the first place; only an employer powerful enough to make disciplinary action stick would have reason to hope that the union or an employee would charge him with an unfair labor practice and thereby ultimately open the judicial forum to him. Moreover, the courts, not the NLRB, were designated as the primary forum for construction of collective agreements. Why, then, should the courts wait for the NLRB's guidance as to what an agreement means? *Lucas Flour* and *Atkinson v. Sinclair Ref. Co.* were plainly right insofar as they decided that the courts are free to construe no-strike clauses even though, in so doing, they may impinge on protected activity.

However, as was noted above, the problem comes up somewhat differently when the union's defense is that it struck in protest against an unfair labor practice committed by the employer. It

of judicial competence on the ground of contractual and statutory overlap . . . would deprive litigants of a judicial remedy, which is often more expeditious and comprehensive, because of the possible existence of a Board remedy which might not be forthcoming and which, even if it were, might be inadequate." Meltzer, *supra* note 49, at 283; see Dunau, *supra* note 77, at 81. Once again, it is hard to see how this factor can keep the courts open to contract actions when it failed to do so for tort actions. Other reasons must account for special treatment of the contract action, and I respectfully submit that they are to be found in the text.

⁸⁷ See note 67 *supra*.

has been argued that such cases are, for present purposes, indistinguishable from the garden variety action on a no-strike clause.⁸⁸ The argument rests on the theory of the decisions holding unfair-labor-practice strikes protected though seemingly in breach of contract. The Supreme Court has said that such strikes are protected because the ordinary no-strike clause is not intended to apply to them.⁸⁹ Therefore, the argument has it, these cases are just like those already discussed: whether the strike is protected by section 7 depends on a construction of the agreement.

Notwithstanding the literal validity of the argument, the case of the unfair-labor-practice strike is different. Suppose, for example, that a court is faced with an employer's suit on an agreement in which the union promised "to refrain from engaging in any strike or work stoppage during the term of this agreement."⁹⁰ The union concededly struck during the term of the agreement, but it did so in protest against the dismissal of two employees who had violated the employer's no-solicitation rule. The agreement obviously contains no exceptions for strikes against dismissals for soliciting union members, but under the Supreme Court's *Mastro Plastics* decision it does contain an implicit exception for strikes against unfair labor practices. A court must accordingly address itself to the question whether the employer's no-solicitation rule violates section 8(a)(1), and if so, whether that was the reason for the strike. In short, the court must think about the NLRA rather than the agreement.⁹¹

Is that reason enough to make an exception for such cases and apply the principle of exclusive NLRB jurisdiction? I think not, although the argument for an exception has some force. The court is, after all, explicitly construing the NLRA. Nevertheless, to say that the courts cannot decide this case would seriously weaken the right, which Congress wished employers to have, to meaningful relief from breach of a collective agreement. Unions could be expected to seize every colorable opportunity to plead the defense of employer unfair labor practice. Even if the courts required that such a defense be acted upon by the filing of a charge with the NLRB, so that the union could not keep the employer from court altogether, substantial delay would result while the court waited for the Board to decide the unfair-labor-

⁸⁸ See Meltzer, *supra* note 49, at 290-91.

⁸⁹ *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956).

⁹⁰ *Id.* at 281.

⁹¹ *Cf. McLean Distrib. Co. v. Brewery & Beverage Drivers Local 993*, 254 Minn. 204, 94 N.W.2d 514, *cert. denied*, 360 U.S. 917 (1959); *Pattenge v. Wagner Iron Works*, 275 Wis. 495, 82 N.W.2d 172 (1957).

practice issue. As Professor Meltzer has pointed out, "Delay is particularly undesirable in connection with any action to enforce collective bargaining agreements because of the adverse impact of such action on the parties' continuing relationship and on subsequent negotiations."⁹² In addition, to the extent that injunctive relief is obtainable in state-court actions,⁹³ delay would obviously defeat the whole point of the suit.

In short, the courts should be permitted to decide whether a strike was called in protest against an unfair labor practice when that decision is necessary to determine whether the strike was in breach of contract. Once again, then, *Lucas Flour* seems to have been rightly decided.

*C. Enforcement Would Arguably Compel the Commission
of an Unfair Labor Practice*

We saw above that *Lion Dry Goods* apparently means that in suits on collective agreements the courts are to ignore the defense that the union lacked majority support when the agreement was made.⁹⁴ The courts are, then, to enforce a collective agreement even though its execution may have violated sections 8(a)(1), 8(a)(2) and 8(b)(1), and even though compelling the defendant to honor it may require further violations of those sections. There is no denying that if the union did in fact lack a majority, a judicial decision to enforce its agreement would deprive individual workers of basic rights guaranteed by sections 7 and 8, exactly the sort of result that preemption is intended to forestall. Moreover, a decision to enforce could conceivably lead to actual conflict with the NLRB.

Nevertheless, to permit this defense to oust a court of jurisdiction or to delay decision would seriously impede the enforcement of collective agreements. Many unions are still uncertified. Deference to exclusive NLRB jurisdiction whenever the defense of no majority was raised would leave them vulnerable to loss of their contract rights or to attenuation of those rights through delay. The extent of the damage would depend on how the Supreme Court's decision in *Local 1424, Int'l Ass'n of Machinists v. NLRB*⁹⁵ were applied. That case allowed the Board only six months from the date of execution to proceed against an employer

⁹² Meltzer, *supra* note 49, at 291.

⁹³ See note 52 *supra*; e.g., *McCarroll v. Los Angeles County Dist. Council of Carpenters*, 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958).

⁹⁴ See pp. 539-43 *supra*.

⁹⁵ 362 U.S. 411 (1960).

and a union for maintaining an agreement that was invalid when made because the union lacked majority support. Even though "the maintaining of such an agreement in force is a continuing violation of the Act,"⁹⁶ the Court said, a proceeding may not be begun after six months since the "unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint" ⁹⁷ Sensible application of this principle to contract actions would seem to require that, whether or not deference is paid to the NLRB, the no-majority defense is worthless six months after execution. But it must be remembered that *Garmon* makes no exceptions for cases in which a Board remedy is time-barred. The fact that a party can get no help from the Board for reasons having nothing to do with the merits does not license the courts to step in.⁹⁸ Consequently, application of the primary jurisdiction principle when the no-majority defense was raised might leave many plaintiffs remediless. Whenever six months had passed, the courts would be deferring to a tribunal powerless to act. Properly applied then, *Local 1424, Int'l Ass'n of Machinists* would mean that we need only be concerned about what courts should do with the no-majority defense during the first six months of an agreement; improperly applied, it makes deference to the NLRB unthinkable.

Whatever is to be done with contracts past the age of six months, uncertified unions with new agreements should not be subject to dismissals or delays whenever an employer chooses to question their representative status. Consequently, the courts should not await Board adjudication of the no-majority defense.

⁹⁶ *Id.* at 414.

⁹⁷ *Id.* at 419.

⁹⁸ See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245-46 (1959):

To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. . . . [T]he Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge [issue a complaint], or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic problem underlying our decision in *Guss v. Utah Labor Relations Board*, 353 U.S. 1. In that case we held that the failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction.

Nor should they undertake to adjudicate it themselves, given the special and difficult questions posed by representation disputes. Accordingly, although far from satisfactory, the result apparently reached in *Lion Dry Goods* seems the best of a bad lot: the no-majority defense should be deemed immaterial in a contract action. Obviously, though, if the NLRB in an independent proceeding upholds the employer's contention, the Board's decision should control. This would mean dismissal of the contract suit if it were still pending when the Board acted, or supersession of the court's judgment if one had already been rendered.

Lion Dry Goods may also imply that a court asked to enforce a collective agreement should reject all claims that enforcement would require the commission of an unfair labor practice. On that reading of the case, a court would, for example, be obliged to order an employer to discharge an employee for failure to pay dues in accordance with a union security clause even though the clause arguably exceeded the limits of 8(a)(3). Cummings emphasizes another example — a union's attempt to compel an employer to apply their agreement to a new facility.⁹⁹ Established Board doctrine has it that unless the new facility is an "accretion" to the existing unit, extension of the agreement deprives the employees in the new facility of their section 7 rights.¹⁰⁰ *Lion Dry Goods* may mean that, in determining whether the union is entitled to the relief requested, a court should be guided solely by the agreement and not by whether application to the new facility constitutes an unfair labor practice.

Any resolution of these problems will exact a heavy sacrifice of competing values. To ignore the NLRA in accretion cases risks depriving workers of rights guaranteed by sections 7 and 8. So does allowing a court or arbitrator to determine what the NLRA permits, for the law on this subject is difficult to apply. Moreover, a decision to apply the agreement is quite likely to

⁹⁹ See Cummings, *NLRB Jurisdiction and Labor Arbitration: "Uniformity" vs. "Industrial Peace,"* 12 LAB. L.J. 425, 428-29 (1961); cf. *Carey v. Westinghouse Elec. Corp.*, 50 L.R.R.M. 2740 (N.Y. Ct. App. 1962), holding the courts impotent to order arbitration of a grievance arising under a recognition clause's bargaining unit description. The court regarded the dispute as "within the exclusive jurisdiction of N.L.R.B., which has the expertise to make clear the precise nature of the bargaining units certified by it."

¹⁰⁰ See, e.g., *Essex Wire Corp.*, 130 N.L.R.B. 450 (1961); *Perry Coal Co.*, 125 N.L.R.B. 1256 (1959), modified, 284 F.2d 910 (7th Cir. 1960), cert. denied, 366 U.S. 949 (1961); *Illinois Malleable Iron Co.*, 120 N.L.R.B. 451 (1958), adhered to on rehearing, 127 N.L.R.B. 1509 (1960), modified, 129 N.L.R.B. 1347 (1961), enforcement denied sub nom. *NLRB v. Appleton Elec. Co.*, 296 F.2d 202 (7th Cir. 1961) (on ground that newly acquired facility was an accretion to the existing unit).

give rise to actual conflict with the NLRB, for workers affected by the decision may well turn to the Board for relief. Finally, a decision extending the agreement could cause the employer exasperating and expensive difficulties. The employees in the new facility may have their own union, a situation hardly conducive to tranquil labor relations. Actual out-of-pocket losses could result if the agreement the employer is ordered to extend contains a union-security agreement and he is obliged to dismiss someone for nonpayment of dues. If the NLRB should then hold that the new facility was not an accretion, it presumably has the power to order the employer to make the discharged employee whole, notwithstanding the fact that the discharge was judicially compelled.¹⁰¹

On the other hand, deference to the Board would often mean considerable delay and trips to two forums before full relief could be obtained. Delay could be a disaster for the union, particularly where the establishment of the new facility caused a reduction in the work available to those in the existing unit.

The choice is not an easy one. If over-refinement were not likely to create more problems than any blanket choice, I would urge that we not attempt a single answer. I would, then, incline to the view that only the Board should decide the accretion and union-security problems. But I have already urged that the courts ignore the defense that the union lacked a majority at the time of execution, and the next subsection deals with another cluster of instances in which I believe that the courts should risk compelling the commission of unfair labor practices. And these do not exhaust the possibilities. The desirability of avoiding uncertainty as to the proper forum until each fresh variation is worked out seems to me to outweigh the conceded virtues of a discriminating approach. A court should not, then, allow itself to be frightened off by the defense that it is being asked to compel the commission of an unfair labor practice. For lack of a better solution, it should decide the merits of that defense even though its decision will be no proof against a superseding decision by the Board.¹⁰²

In sum, *Dowd Box*, *Lucas Flour*, *Atkinson v. Sinclair Ref. Co.*, and *Lion Dry Goods* seem to have been rightly decided. The courts should not hesitate to enforce a collective agreement merely because the conduct constituting the alleged breach is

¹⁰¹ See note 44 *supra*.

¹⁰² Once again, though, the no-majority defense should be rejected out of hand.

also an unfair labor practice; they should not hold back from deciding whether a strike violates an agreement merely because an arguable construction of that agreement might lead to the strike's being held protected activity; and they should not be deflected from enforcement by a claim that the union lacked majority support when the agreement was made. In all of these instances, the courts should proceed, for all practicable purposes, as though the NLRA did not exist.

The Court was also on solid ground insofar as it indicated a general reluctance to apply the principle of exclusive NLRB jurisdiction to contract actions. Thus, the principle should not be applied to deny the courts power to determine whether a strike, allegedly in breach of contract, was protected activity because called in protest against an unfair labor practice. And, while one cannot avoid some misgivings if the Court really meant that primary jurisdiction has no place at all in suits on collective agreements, so far at least we have discovered no clear error on that score either. Even where defendant maintains that enforcement would compel the commission of an unfair labor practice, it seems best to gamble on the courts' deciding that question correctly.

Some problems that the Court almost certainly did not consider when it uttered footnote 9 are our next concern.

D. Representative Status Arguably Lost After the Negotiation of a Valid Agreement

Suppose that in the fourth year of a five-year collective agreement most of the employees subject to it elect to bolt their local and affiliate with a competing union. What should a court do if the old local sues to enforce its contract, and further, if the new one claims that it is the only proper plaintiff? A new agreement between the employer and the successor union would complicate matters but would not significantly affect the primary jurisdiction problem.

Meltzer, in his landmark article on preemption,¹⁰³ concluded that where the NLRB has certified the successor union, the courts should feel free to decide who has the right to enforce what contract. However, absent certification, he seems to favor exclusive NLRB jurisdiction by a slight margin. Meltzer's first conclusion is unassailable. The existence of the certification plus rather clear indications from the Board that a defeated union can no longer

¹⁰³ See Meltzer, *supra* note 49, at 293-95.

administer its contract¹⁰⁴ provide easy answers to the questions most likely to be bungled by a court and therefore diminish the probabilities both of unwitting subversion of protected rights and of clash with the Board.¹⁰⁵ The case for primary jurisdiction, in other words, is not particularly compelling. On the other side of the balance, the case for permitting judicial decision is particularly strong because a refusal to decide might leave the certified union without a forum — the Board says that it will not determine the effect of its certification on an outstanding contract in the course of a representation proceeding¹⁰⁶ and unless the employer has refused to bargain, no unfair-labor-practice proceeding will lie.

However, Meltzer's second conclusion, as he recognized, is more doubtful. Exclusive NLRB jurisdiction would mean that neither union could enforce contract rights against the employer until the Board decided which of them was exclusive representative. In the great majority of circumstances, would not either union be better for the employees than none at all?¹⁰⁷ The best solution may be for the courts to reject the claim of an alleged successor union during the term of another union's contract unless the successor comes armed with a certification. This may lead to error, but at least the original union was presumably the choice of the workers at one time. Consequently, relatively little harm to rights protected by the NLRA is to be anticipated from con-

¹⁰⁴ See, e.g., *American Seating Co.*, 106 N.L.R.B. 250 (1953), in which the Board also held that the certified successor is entitled to insist that the employer negotiate a new agreement even though the old purports to be unexpired. The authorities are ably discussed in Freidin, *The Board, the "Bar," and the Bargain*, 59 COLUM. L. REV. 61, 82-92 (1959). Freidin is highly critical of *American Seating* for requiring the employer to negotiate anew before the old agreement has expired; he would prefer to see the successor union merely entitled to take over the administration of the outstanding agreement.

¹⁰⁵ See, e.g., *Modine Mfg. Co. v. Grand Lodge Int'l Ass'n of Machinists*, 216 F.2d 326 (6th Cir. 1954), in which it was held, the court describing the law as "crystal clear," that a union cannot enforce the checkoff and union-shop clauses of its agreement when another union has been certified before the agreement's expiration. The court also said: "Recognition of IAM [the contracting union and loser in the certification election] after the election and certification of CIO would have been unlawful. Since it is established that the bargaining agent can be dispensed with or changed by the employees, it is evident that the contract of 1948 after the election of 1950 had to be administered by CIO." *Id.* at 329.

¹⁰⁶ See *Hershey Chocolate Corp.*, 121 N.L.R.B. 901 (1958); *enforcement denied on other grounds*, 297 F.2d 286 (3d Cir. 1961). However, as Freidin, *supra* note 104, points out, the Board did in fact say a great deal in the *Hershey Chocolate* case about the effect of its certification on an outstanding agreement.

¹⁰⁷ A glaring exception would be a suit to compel adherence to a union security agreement.

tinued recognition of that union until its contract expires or the Board rules otherwise. Moreover, a refusal to enforce the original union's agreement pending Board action could itself subvert rights protected by the NLRA. Denial of the contractual benefits obtained by a union now contending with another union for worker loyalties could conceivably determine the outcome in favor of the alleged successor. Although enforcement only at the behest of the original union might tip the scales the other way, that union would seem to have the better claim to legitimacy.

Similar problems may arise even after the original union's contract has expired. Contractual rights can persist beyond the term of an agreement; *Zdanok v. Glidden Co.*¹⁰⁸ — with its determination that seniority rights are not necessarily limited by a contract's term — is the most dramatic example, but hardly the only one. Pensions, severance pay, and various welfare benefits all may survive the termination date of the agreement giving rise to them. May the courts decide who is to enforce these rights?

Once again no serious problem exists when a successor union has been certified: the certified union should be permitted to maintain the appropriate action.¹⁰⁹ Absent certification, enforcement by somebody still seems preferable to delaying all relief until the NLRB acts. A successor union that has negotiated a new agreement would seem to have the better claim and so the courts should probably treat it as the proper plaintiff. Where no new agreement has been negotiated, the least undesirable course may be to allow the courts to grapple with the representation question, subject to supersession by the Board.

Finally, when no successor union is involved, a problem may still be posed if a union that has arguably lost its majority seeks to enforce rights created by an expired contract. The simplest answer would be to ignore the representation question and allow the union to enforce those rights whether or not it still commands majority support. It would, after all, have been entitled to enforce them during the term of the contract without regard to whether it retained the majority support with which it started. Fears about impingement on the right of employees not to have an unwanted representative thrust upon them can be allayed by permitting joinder of any employee who wishes to participate. However, where the union has actually been decertified, it can

¹⁰⁸ 288 F.2d 99 (2d Cir. 1961), *affirmed on other grounds*, 370 U.S. 530 (1962).

¹⁰⁹ *Cf. Kenin v. Warner Bros. Pictures, Inc.*, 188 F. Supp. 690 (S.D.N.Y. 1960).

no longer enforce rights arising out of its agreement, even though no successor union has been chosen.¹¹⁰

E. Representation Disputes Covered by No-Raiding Agreements

Section 301, it will be recalled, includes in its jurisdictional grant suits for violation of contracts between labor organizations. Accordingly, the federal courts would appear to have the power to enforce a union's promise not to organize workers already being represented by another union. However, the exercise of that power creates a serious risk of head-on collision with the NLRB's power over representation proceedings. The problem deserves inclusion in this discussion because, calling as it does for exclusive NLRB jurisdiction, it teaches us something about the limits of section 301's predominance over *Garmon*.

*International Union of Doll & Toy Workers v. Metal Polishers Union*¹¹¹ exemplifies the problem. Plaintiff and defendant unions had executed a no-raiding agreement in which each had promised, among other things, not to "seek to represent, or obtain the right to represent" employees already being represented by the other in an "established bargaining relationship."¹¹² Disputes arising under the agreement were to be resolved by final and binding arbitration. Subsequently, the Metal Polishers petitioned the NLRB for certification in a unit then being represented by the Doll and Toy Workers. The Doll and Toy Workers turned to the arbitration forum and an award was rendered holding that the agreement had been violated; this required the Metal Polishers to withdraw its petition for certification. It chose instead to ignore the award and to ask the NLRB to proceed with an election. The Board obliged¹¹³ and the Metal Polishers overwhelmed the Doll and Toy Workers. The vanquished union then brought suit to compel specific performance of the arbitration award. The Metal Polishers and the Board maintained that the court lacked jurisdiction of the subject matter. Notwithstanding a decision by the Court of Appeals for the Seventh Circuit granting relief on essentially the same facts,¹¹⁴ Judge Mathes dismissed the action. His choice was a sensible one. The key factor distinguishing

¹¹⁰ See *Retail Clerks v. Montgomery Ward*, 50 L.R.R.M. 2702 (N.D. Ill. 1962).

¹¹¹ 180 F. Supp. 280 (S.D. Cal. 1960).

¹¹² *Id.* at 281.

¹¹³ Unreported decision.

¹¹⁴ *United Textile Workers v. Textile Workers Union*, 258 F.2d 743 (7th Cir. 1958); cf. *Local 2608, Lumber Workers v. Millmen's Local 1495, United Bhd. of Carpenters*, 169 F. Supp. 765 (N.D. Cal. 1958).

cases of this sort from all of the others discussed above is that the enforceability of contracts is not diminished one whit by deference to the Board. It has the power to grant the raided union its full contractual rights. Its decision not to is attributable to a substantive judgment, not to a deficiency of power.

To make the same point another way, while it will be small consolation to the Doll and Toy Workers, it lost, not because no forum was open to vindicate its rights, but because it had no rights. The NLRB had rejected its contract right as subordinate to the right of employees to free choice of a bargaining representative. In effect, the NLRB had decided that enforcement of the no-raiding pact in question and probably of all no-raiding pacts is contrary to the policy of the NLRA.¹¹⁵

Although that decision has been effectively criticized,¹¹⁶ disagreement with it should not be confused with disagreement with two very different propositions. First, I take it that somebody should decide whether no-raiding pacts are a permissible limitation on free employee choice. And, second, I submit that Judge Mathes correctly concluded that the Board is a more appropriate agency than the courts to make that decision. Certainly, if the Board held that no-raiding pacts should be honored in representation proceedings, no one would suggest that a district court could, by holding one unenforceable, affect the Board's decision to the contrary. More important, as Judge Mathes put it,

[T]here can be little doubt that the Congress expressly empowered an administrative agency to deal with disputes as to employee representation, because such matters invariably concern more than the interests of the litigants themselves. The interests of the public, of the industries affected, of the unions affected, as well as the individual employees' right to choose freely their bargaining representatives, all must be considered. An administrative agency, with its flexible procedures, is obviously better able to evaluate all these competing interests, and to determine as well the permissibility of non-raiding agreements in this area, than is a court.¹¹⁷

V. CONCLUSION

Predicting what the Supreme Court or the NLRB will do often requires not wisdom, but patience. Sooner or later, if only for

¹¹⁵ Obviously, though, if a union voluntarily complies with a no-raiding agreement, the NLRB cannot compel it to seek the right to represent.

¹¹⁶ See Aaron, *Interunion Representation Disputes and the NLRB*, 36 TEXAS L. REV. 846, 851-56 (1958).

¹¹⁷ 180 F. Supp. at 286.

a little while, one is likely to be right. The prospect is too tempting: I submit that the Court will continue along the lines it marked at the October 1961 Term, that it will, as it said it would, treat *Garmon* as "not relevant" in suits on collective agreements.¹¹⁸

Once again, the disadvantages of this departure from primary jurisdiction should not be overlooked: rights protected by section 7 may occasionally be subverted; and parties may suffer loss and inconvenience when a court and the Board take the same situation in hand and render conflicting orders. But these prospects should not be exaggerated either. Some risk of erroneous decision inheres in any system of adjudication; allowing courts to proceed with contract enforcement in cases in which the NLRA is somehow implicated will not often increase that risk substantially. Loss and inconvenience from head-on conflict between Board and court will be even rarer. In the great mass of cases clashing mandates are impossible.

Thus no clash can arise out of the most frequent cause of overlap between contract and NLRA — the contract breach that is also a possible unfair labor practice. Even if the Board did not defer to the arbitration process in such cases, no conflict would ensue. Normally, there would not even be any inconsistency in decision. For example, a Board decision that an employee is not entitled to reinstatement because no case has been made that his employer discriminated against him in violation of section 8(a)(3) can easily be reconciled with an arbitrator's decision that the same employee is entitled to reinstatement because no just cause for discharge existed. When inconsistency does occur in this class of cases — *e.g.*, the Board believes the employer and finds no violation of the statutory ban on antiunion discrimination,

¹¹⁸ This would mean reversal for *Smith v. Evening News Ass'n*, 362 Mich. 350, 106 N.W.2d 785 (1961), *cert. granted*, 369 U.S. 827 (1962), a decision affirming the dismissal of a contract suit because of *Garmon*. Plaintiffs, members of the Newspaper Guild, brought an action claiming that their employer had violated a collective agreement barring "discrimination against any employee because of his membership or activity in the Guild." 362 Mich. at 351, 106 N.W.2d at 786. The Supreme Court of Michigan put the question presented this way: "Does a State court have jurisdiction of an action at law by an employee against his employer for breach of a contract between such employer and a labor organization to which such employee belongs where the action is based upon facts which if true would constitute both a breach of such contract and an unfair labor practice under the provisions of section 8(a) of the national labor relations act as amended?" 362 Mich. at 353, 106 N.W.2d at 786. Relying heavily on *Garmon*, the court held that state courts do not have jurisdiction over such an action. At this writing, the case has been argued before the Supreme Court of the United States but has not yet been decided.

while the arbitrator finds the employer's testimony incredible and holds that he violated the contractual ban on antiunion discrimination — the employer will still not be in the position of violating one order if he obeys the other. Compliance with the arbitrator's award will get him into no difficulty with the Board.

The situation exemplified by *Lucas Flour* and *Atkinson v. Sinclair Ref. Co.* is similarly free from the danger of a conflict in orders. To be sure, the NLRB may, for example, order an employer to reinstate dismissed strikers because their strike was not a breach of contract and so was protected, while a court, reading the contract differently, holds that it was broken and assesses damages against the union. This may be a bit startling, and it would of course be better if one tribunal could adjudicate all of the legal incidents of this single episode, but neither tribunal has jurisdiction to do so. Given that state of affairs, inconsistency in decision is not manifestly unfair, particularly since, again, the employer can comply with the Board's order without offending the court's.

It is only when we come to the cases in which requiring a party to abide by the contract may require him to violate the NLRA that real loss and inconvenience from conflicting decisions are to be feared. The prospect of an employer's being ordered by a court to dismiss an employee pursuant to a union security clause and subsequently being ordered by the NLRB to reinstate that employee with back pay is an ugly one. And this is not, of course, the only situation in which a party to a contract might find himself victimized by clashing orders.

Nevertheless, several factors persuade me that, given the division of labor between Board and courts, we must accept this unpleasant hazard. First, actual clashes of this sort have in fact been almost unheard of even though most courts and arbitrators have regularly ignored *Garmon* in contract actions. Second, to say that courts retain jurisdiction is not to say that they must always exercise it. Where, for example, the Board has actually issued a complaint against an employer and a union charging them with the maintenance of an illegal union security agreement, a court asked to enforce that clause would be well advised to await the Board's decision. This would be a trivial interference with the enforcement of contracts, as contrasted with the major impediment represented by the principle that a court lacks jurisdiction to enforce an agreement whenever to do so would arguably compel the commission of an unfair labor practice. This suggests the third factor militating in favor of rejecting *Garmon* even

when enforcing an agreement would arguably compel the commission of an unfair labor practice—the alternative would introduce uncertainties and delays that would gravely hamper the enforcement of collective agreements. *Garmon's* ouster of the courts, it must be emphasized, does not depend on actual clash with the Board, or even on a substantial probability of clash. It is sufficient that the NLRA arguably be involved, and we have seen how easy it is to inject an arguable unfair labor practice into a contract action.

In sum, *Garmon* cannot be applied to contract actions without depriving parties of a forum for the expeditious settlement of their contract claims. If for some definable class of cases involving collective agreements it could be said—as it can for suits on no-raiding pacts—that the Board can give all that the courts can give, application of *Garmon* would be appropriate. But no such class is apparent.

VI. POSTSCRIPT

Labor law waits for no man, least of all for printers. Since the foregoing paper was written, its theme has been the subject of a new Supreme Court decision¹¹⁹ and the Court has granted certiorari in yet another relevant case.¹²⁰ Although neither of these developments requires any modification of the substance of the main paper, the compulsion to be current is overpowering. Accordingly, I shall say a few words about them.

A summary of the Michigan Supreme Court's decision in *Smith v. Evening News Ass'n* and a prediction that it would be reversed appear above.¹²¹ In brief, the Michigan court had relied heavily on *Garmon* to conclude that state courts lack jurisdiction of an action on a collective agreement "where the action is based upon facts which if true would constitute both a breach of such contract and an unfair labor practice" ¹²² On December 10, 1962, the Supreme Court of the United States, Mr. Justice Black dissenting, reversed.¹²³ The Court was faithful to its practice of the preceding term: it refused to apply *Garmon* to a suit on a collective agreement but said little about the reasons for the refusal.

¹¹⁹ *Smith v. Evening News Ass'n*, 31 U.S.L. WEEK 4041 (U.S. Dec. 10, 1962).

¹²⁰ *Local 1505, IBEW v. Local Lodge 1836, Int'l Ass'n of Machinists*, 304 F.2d 365 (1st Cir.), cert. granted, 31 U.S.L. WEEK 3171 (U.S. Nov. 19, 1962) (No. 419).

¹²¹ See note 118 *supra*.

¹²² *Smith v. Evening News Ass'n*, 362 Mich. 350, 353, 106 N.W.2d 785, 786 (1961).

¹²³ 31 U.S.L. WEEK 4041 (U.S. Dec. 10, 1962).

One paragraph in the text and one supporting footnote carry the burden. The paragraph follows:

Lucas Flour and *Dowd Box*, as well as the later *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, were suits upon collective bargaining contracts brought or held to arise under § 301 of the Labor Management Relations Act and in these cases the jurisdiction of the courts was sustained although it was seriously urged that the conduct involved was arguably protected or prohibited by the Labor Management Relations Act and therefore within the exclusive jurisdiction of the National Labor Relations Board. In *Lucas Flour* as well as in *Atkinson* the Court expressly refused to apply the preemption doctrine of the *Garmon* case; and we likewise reject that doctrine here where the alleged conduct of the employer, not only arguably, but concededly, is an unfair labor practice within the jurisdiction of the National Labor Relations Board. The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301. If, as respondent strongly urges, there are situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice, we shall face those cases when they arise. This is not one of them, in our view, and the National Labor Relations Board is in accord.¹²⁴

The supporting footnote reports that an amicus brief filed on behalf of the NLRB urged the result reached and that the Board has in the past declined jurisdiction over unfair labor practices "where, in its judgment, federal labor policy would best be served by leaving the parties to other processes of the law."¹²⁵

The remainder of the Court's opinion is devoted to demonstrating why this discussion controls an action on a collective agreement brought by an individual employee. The reason, the Court explains, is that a suit on a collective agreement arises under section 301 no matter by whom brought.¹²⁶ *Garmon*, then, can no more block an individual's suit on a collective agreement than it can a union's or an employer's. Once again, though, we are told little about why it cannot block a union's or an employer's.

Several weeks before deciding *Smith v. Evening News Ass'n*, the Court granted certiorari in *Local 1505, IBEW v. Local*

¹²⁴ *Id.* at 4041-42.

¹²⁵ *Id.* at 4042 n.6.

¹²⁶ This aspect of the decision has a number of noteworthy aspects, not the least of which is the long-anticipated overruling of *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955).

Lodge 1836, Int'l Ass'n of Machinists.¹²⁷ That action arose out of a claim by the Machinists that the recognition clause of its agreement with the company entitled its members to certain work being done by members of the IBEW. The company rejected the demand and refused to arbitrate the matter. A district court decision ordering it to arbitrate was reversed by the Court of Appeals for the First Circuit on the ground that the NLRB had exclusive jurisdiction to resolve the controversy.¹²⁸

The case is a hard one. The difficulty stems from doubts about which tribunal — court or Board — can deal more definitively with the work assignment dispute. Let us consider first the choices left to the Machinists by the court's decision to dismiss. It could, as the court apparently wished, petition the NLRB for a clarification of its certification to cover the work in question. If the Machinists prevailed in such a proceeding, it would obtain the right to represent those doing the work in question. That, however, would be only half the battle. The Machinists' interest was not merely in representation; it was claiming a contractual right to oust those doing the work so that its members could take their places. Whether this end would be achieved by a clarification of its certification would depend on other factors. Chief among these would be the existence of a seniority clause and how it was applied to those doing the disputed jobs. The Machinists would presumably maintain that as newcomers to its bargaining unit, the holders of the disputed jobs were junior to everyone else in the unit. Therefore, if any other members of the unit were on layoff, they would have the right to replace the newcomers. If this view prevailed, either in negotiations with the employer or in arbitration, the Machinists would have achieved everything it set out to achieve.

However, the number of "ifs" on the path to that relief might well deter the Machinists from pursuing it. In particular, fresh litigation might be necessary to obtain a determination of the seniority status of the newcomers and the Machinists would have to reckon with the possibility that the determination would be adverse to it. Moreover, clarification of certification would do the Machinists no good at all if it were seeking the jobs in question for members without prior service with this employer. The Machinists might, therefore, prefer another course. Section 10(k)

¹²⁷ 31 U.S.L. WEEK 3171 (U.S. Nov. 19, 1962) (No. 419).

¹²⁸ Local 1505, IBEW v. Local Lodge 1836, Int'l Ass'n of Machinists, 304 F.2d 365 (1st Cir. 1962).

of the NLRA directs the NLRB to resolve a work assignment dispute whenever someone charges that such a dispute has given rise to a violation of section 8(b)(4)(D).¹²⁹ The Supreme Court has decided that this means that the Board must decide who is entitled to do the work in controversy.¹³⁰ If, then, the Machinists could provoke the filing of an 8(b)(4)(D) charge against it, it could obtain a determination of the sort it seeks. A threat to strike to compel assignment of the work to it, like an actual strike for the same purpose, would be sufficient to support such a charge, but the employer might refrain from filing one nevertheless: for example, the threat may not seem credible to the company and it may prefer that the work remain subject to the other union's agreement. The Machinists might, then, actually have to strike to get the determination for which it initially came to court.

If, instead of dismissing, the court of appeals had affirmed the lower court's order compelling the employer to arbitrate with the Machinists, a different set of uncertainties would have come into play. Victory for the Machinists in the ensuing arbitration proceeding would presumably have moved the IBEW, the other interested union, to action. It, in turn, might have chosen to invoke the arbitration clause of its agreement, to petition the NLRB for clarification of its certification, or to violate 8(b)(4)(D) in order to obtain a 10(k) determination. In any event, ordering the employer to arbitrate with the Machinists would plainly not have ended the matter.

¹²⁹ Section 10(k) provides: "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

Section 8(b)(4) makes it an unfair labor practice for a union to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or . . . to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

. . . (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work . . ."

¹³⁰ *NLRB v. Radio & Television Broadcast Eng'rs*, 364 U.S. 573 (1961).

In general, then, perhaps the courts should refuse to order arbitration of a work assignment dispute whenever only one of the contending unions would be a party to the arbitration proceeding. Whatever difficulties recourse to the NLRB may pose, that forum can produce a definitive, peaceful solution at least some of the time. An arbitration proceeding with one of the vitally interested parties missing holds no such promise.

However, it is at least arguable that the IBEW-Machinists dispute under discussion involved a special set of circumstances. The IBEW asked the court to allow it to participate in the Machinists' arbitration with the employer if arbitration were ordered. The Machinists, as the party seeking equitable relief, would seem to have no valid complaint if that relief included provision for the protection of the rights of the IBEW; consequently, as far as the Machinists was concerned, the order to arbitrate could fairly have been conditioned on the IBEW's being permitted to participate in the arbitration proceeding. Nor would any right of the employer seem to be overridden by an order so conditioned. Each of its collective agreements contained an arbitration clause; each of the unions, then, had a contractual right to arbitrate the issue in dispute with the company; if consolidation of the ensuing arbitration proceedings is necessary to make those rights meaningful, no contract principles would seem to be offended by such a consolidation. In short, the court of appeals probably could have issued an order that would have permitted an arbitrator to settle the right to the disputed work with all of the interested parties before it.

What harm was to be apprehended from this course? The court feared that "a decision by the arbitrator in IAM's favor, if erroneous, would invade IBEW's certification."¹³¹ The risk seems a nominal one. The work in question was almost certainly marginal, of a sort that the Board could just as well have assigned to the unit represented by the Machinists as to the one represented by the IBEW. An arbitration award either way, then, would not make much difference to the NLRB. A more serious problem would arise if the Machinists prevailed at arbitration and the IBEW members, dismissed as a result, brought unfair labor practice proceedings against the company for discriminating against them for lack of membership in the Machinists.¹³² The company might then be held liable for doing only what an arbitration award

¹³¹ 304 F.2d at 367.

¹³² Section 8(a)(3) of the NLRA would be the arguably applicable provision. It is quoted in note 5 *supra*.

had compelled it to do. There is, however, good reason to believe that the employer is not liable under these circumstances.¹³³ On this view, the court should have granted the Machinists' prayer for arbitration, on condition that the Machinists consent to the IBEW's being made a party to the arbitration proceeding.

¹³³ The conclusion that no unfair labor practice has been committed may well follow from *NLRB v. Radio & Television Broadcast Eng'rs*, 364 U.S. 573 (1961); and see Administrative Decision of the General Counsel, Case No. SR-297, 1960 CCH N.L.R.B. ¶ 8680 refusing to issue an unfair-labor-practice complaint on a charge filed by several individuals who had been laid off when their work was taken from them and assigned to craftsmen who were members of a different union. The charging employees' union and the union to which their replacements belonged had an agreement for the settlement of jurisdictional disputes. When the instant dispute arose, the employer agreed to abide by the unions' resolution of the controversy and the charging employees were dismissed pursuant to that resolution. "Since the alleged discrimination occurred as the result of employer's decision to abide by the resolution of the two unions, General Counsel deemed further proceedings unwarranted." Also relevant is the NLRB's recent decision in *International Harvester Co.*, 138 N.L.R.B. No. 88 (1962): the trial examiner had found the employer and union guilty of unfair labor practices for enforcing a union-shop clause against a particular employee; they had enforced it only after an arbitration award had been rendered upholding the union's position that it could validly be enforced; the Board reversed the trial examiner, saying: "If complete effectuation of the federal policy [favoring arbitration] is to be achieved, we firmly believe that the Board, which is entrusted with the administration of one of the many facets of national labor policy, should give hospitable acceptance to the arbitral process as 'part and parcel of the collective bargaining process itself,' and voluntarily withhold its undoubted authority to adjudicate alleged unfair labor practice charges involving the same subject matter, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act." And see note 86 *supra*. Perhaps, then, the Board will refuse even to consider whether an unfair labor practice has been committed when an employer acts pursuant to an arbitration award resolving a work assignment dispute, unless, of course, the award is clearly contaminated by one of the deficiencies listed at the end of the passage just quoted.