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THE NLRB AND JURISDICTIONAL DISPUTES: THE AFTERMATH OF CBS

JAMES B. ATLESON*

Against a background of the factors which engender work assignment disputes, Professor Atleson considers the difficulties encountered by the National Labor Relations Board in implementing the Supreme Court's mandate to make affirmative determinations in these controversies. Analyzing the myriad of problems involved in this segment of labor law, including those of statutory interpretation, the author suggests that the present Board approach may be hampering the efficient operation of settlement machinery provided by the Taft-Hartley Act.

INTRODUCTION

Jurisdictional disputes are common in everyday life. Controversies between vested interests and interlopers in protected territory, between physicians and chiropractors, between lawyers and accountants or trust companies, between governmental agencies or state and federal courts, arise continually. Jurisdiction has been especially troublesome in labor relations. It has been said that "the principle of union jurisdiction lies at the very foundation of trade union structure in this country and that it is the feature which most clearly distinguishes the American labor movement from its European counterparts."

The failure on the part of labor to establish a completely effective machinery for the settlement of jurisdictional disputes stems in part from the concept of jurisdiction itself. Experience with the Knights of Labor taught American unions that overlapping jurisdiction inevitably meant rival unions; and competition was deemed harmful to the labor movement. The Knights admitted into their ranks individuals and locals which had been expelled from national unions and which, on occasion, undermined the standards of employment

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1 Mann & Husband, Private and Governmental Plans for the Adjustment of Interunion Disputes: Work Assignment Conflict to 1949, 13 Stan. L. Rev. 5 (1960) [hereinafter cited as Mann].


3 Mann 5-28.

4 Ulman, The Rise of the National Trade Union 367, 404-05 (1955) [hereinafter cited as Ulman].
which the national unions were striving to secure. Indeed, . . . it was the struggle with the Knights which elevated the principle of exclusive jurisdiction to its position of unchallenged eminence in the American trade union movement.\(^5\)

As a result, the AFL began as an agency of limited powers based upon doctrines of autonomy and exclusive jurisdiction.\(^6\) This latter principle meant that each national was to possess the exclusive right to acquire and retain members within the job territory authorized by its AFL charter. This principle was evolved to minimize competition and conflict among national unions and workers.

National unions drew their territorial boundaries along national lines. Each national union was issued a charter defining its jurisdiction along craft lines, but generally issuance of a charter merely involved the acceptance of the national's own definition of the scope of its job territory.\(^7\) "[T]he combined factors of exclusive jurisdiction and organization by craft both reflected and heightened job consciousness."\(^8\)

Only one union is to have title to particular work. "Only one national union in the territory covered . . . can be a legitimate union. Any rival local, sectional or national union is an outlaw (dual) union."\(^9\) Every local has a charter setting out its territory or trade boundary, and must belong to the national representing that trade or be labeled an "outlaw" union.\(^10\)

Jurisdiction of a union is considered a property right, and the charter its certificate of title.\(^11\) Given the importance of property rights in American life, it is easy to see why jurisdictional disputes generate the ardor usually associated with religious conflicts.

Persistent attempts on the part of the AFL to resolve disputes between national unions proved fruitless.\(^12\) Ironically, the jealously guarded

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\(^5\) Id. at 404-05. Furthermore, unions which were composed of workers who were not highly skilled or whose trade was not substantially organized feared the numerically larger Knights.


\(^7\) Ulman 406.


\(^11\) Dunlop, Jurisdictional Disputes, N.Y.U. Second Annual Conference on Labor 477, 482 (1942) [hereinafter cited as Dunlop].

\(^12\) Mann 8-28.
principles of autonomy and exclusive jurisdiction which evolved to avoid union competition caused continual jurisdictional warring among AFL affiliates. The AFL was reluctant to apply force to member unions, especially against unions which were unwilling to accept adverse arbitration awards and strong enough to contemplate withdrawal from the federation.

Implicit in the very notion of jurisdiction is a lack of class consciousness or working class solidarity. The American labor movement, composed of autonomous groups competing for employment opportunities, has used the concept of jurisdiction as a substitute control mechanism for class consciousness.

Jurisdictional disputes generally arise from economic and political factors, including the economic interests of the workers and the institutional interests of the union itself. The economic base of jurisdictional disputes is the competition for the control of jobs. Perlman has described the worker’s feeling of living in a world of limited opportunity. This “scarcity consciousness” may be the result of the worker’s feeling of personal limitations or may result from an institutional order which rations opportunity. In particular, it is recognized that any contraction of the area in which skills are to be employed curtails opportunity for jobs. The union senses the limitation of work in a given trade, and feels that if another union usurps some of its work, the amount left for its members is diminished.

This characteristic has been discussed at length by Perlman who attributes this phenomenon partly to the heterogeneity of the work force, the lack of a common language, culture or religion, and the existence of free land and the early ballot. Perlman, A Theory of the Labor Movement 162-69, 254-80 (1928). The phrase “class consciousness” refers to an individual’s perception of himself as a member of a particular socio-economic group and his perception of his opportunities for upward mobility. It does not refer to the actual structure of the existing stratification system or to the actual mobility rates of the system.


Concerted effort to protect or enlarge the employment opportunities of members or to prevent the undermining of the wage scale is not a unique characteristic of the labor movement. Other economic agents seek a greater degree of security in an economy in which economic well-being is subject to unpredictable changes. Farmers call upon government to prevent the undermining of parity prices while businessmen seek tariffs or other
Union members, having devoted substantial effort and time to acquiring knowledge of a particular trade or skill, feel they have an investment in, if not a right to, that trade. Thus, unions representing these individual interests desire full control of the craft. The essence of a property right is the right to exclude others; no other association can be permitted to enter into the trade. Furthermore, the bargaining strength of a union is in part measured by the degree to which the union is independent of the employer. This independence depends upon the existence of a demand for its services by another employer. Thus, "economic versatility" of a union's members is an important bargaining asset. Crafts normally consist of tasks that can be split off and performed by workers unable to perform other tasks involved in the craft. Such division weakens the economic position of the union and its members. The emotionalism surrounding jurisdictional disputes is therefore partially a result of a feeling on the part of union members that their jobs, wage standards or working conditions are at stake.

The extensive detail and fine distinction of jurisdictional disputes have evoked amazement and ridicule from the onlooker but they do not appear ludicrous or hair splitting to men who depend on jurisdictional lines to guarantee them work where very little or even none at all would otherwise be available and certainly not at such high rates of remuneration.

Jurisdictional disputes are critical, especially in periods of job scarcity, to those whose jobs may depend on the outcome.

Since the economic losses to the individual worker from jurisdictional

import controls on foreign goods. HABER, LABOR RELATIONS AND PRODUCTIVITY IN THE BUILDING TRADES 156 (1956).

18 "The higher the skill required on a particular job, the greater is likely to be job consciousness and pride . . . ." SECHTER 250.


A union's rights become paramount, not only over a rival union, but also over the wishes of the men actually performing the job. Although the AFL never fully exercised its jurisdiction in relation to unskilled workers, the federation vigorously opposed the intervention of the CIO. To the AFL the territory belonged to its affiliates even though the workers were not organized. The work itself, not the workers, was important.

Merger eased jurisdictional strife, and the older AFL concept of jurisdiction was modified. The new standard, set out in article III, § IV of the federation's constitution, uses the concept of "established bargaining relationships." Jurisdiction exercised at the time of merger was to be considered inviolate. Thus, the status quo was maintained. See SECHTER 248.

20 ULMAN 313-14.


strikes often exceed his rewards from victory, economic self-interest cannot be a complete explanation. It is important to note that unions also pursue institutional objectives, such as survival or growth, in addition to defending the economic self-interest of its members. A union seems basically to be a political institution operating in an economic environment. Its desire to expand its territory, increase its membership and protect its exclusive jurisdiction may be based upon overtones of sovereignty.\footnote{23}

Despite charters and constitutional expressions of jurisdiction, and although there is little difficulty with the core of a union’s jurisdiction, the outer boundaries of a union are unclear. In addition, though no craft can be completely substituted for another,\footnote{24} often, on the fringe of a craft’s expertise, the skills of one union can be substituted for the skills of another.\footnote{25}

It is impossible to describe work tasks in exhaustive detail. Furthermore, modifications in material, tools and techniques render existing definitions of jurisdiction obsolete and inadequate. Even precise definition, however, would not solve the problem of an aggressive union’s attempts to promote the job-oriented interests of its members or to strengthen itself.\footnote{26}

Turning to some of the specific causes of jurisdictional disputes, the introduction of new materials, techniques or machinery often creates problems\footnote{27} which cannot be resolved by the union’s delineation of jurisdiction in the charter.\footnote{28} Furthermore, the formal organization of separate crafts into unions\footnote{29} accentuates inter-union friction. In industries such as construction each union has a tradition of autonomy and freedom of

\footnote{23} Barnett, The Causes of Jurisdictional Disputes in American Trade Unions, 9 Harv. Bus. Rev. 400, 401 (1931). There may also be a psychological base. This “prima donna” factor may consist of vanity, pride or simply lust for power.

\footnote{24} STRAND 34 n.18. One exception may be the laborers, which is largely composed of unskilled workers. The nature of the work and the relatively low pay scale of laborers may deter rival union incursions into the laborers’ job territory while encouraging employer resistance to rival union demands.

\footnote{25} STRAND 35.

\footnote{26} The Carpenters Union considered that everything made of wood or which had ever been made of wood was within its jurisdiction. CHRIFFER, EMPIRE IN WOOD, A HISTORY OF THE CARPENTERS UNION 171, 208 (1956).

\footnote{27} STRAND 41-44.

\footnote{28} Dunlop states that this factor has been overemphasized as much technical change affects the “interior” of a union’s jurisdiction only. An adverse affect on job opportunities within a union may cause greater aggressive behavior at the frontier, however. Dunlop 488-89.

\footnote{29} Dunlop 484.
Moreover, work is mainly casual so union ties are more significant than association with a particular employer. Disputes are often caused by the existence of a large general worker's union such as the hod carriers. Laborers can often perform many of the more unskilled tasks within the jurisdiction of a craft union. Similarly, the growth of multcraft semi-industrial unions, such as the International Association of Machinists or International Brotherhood of Electrical Workers, has stimulated jurisdictional disputes by creating conflicts with craft unions.

Although "the proprietary interest in the scope of job duties is likely to be expressed more forcibly when work opportunities are slackening," unions will nevertheless guard against incursions in good times, and may become more aggressive when its membership is declining. Internal political conditions may also be relevant. In the building trades, where business agents are ordinarily elected for short terms, jurisdiction may become a political issue.

Associated with such campaigns, or to fulfill election promises, a business agent of a craft may seek to change jurisdictional lines that have been taken for granted in a locality. A new business agent may seek to take a tough position and extend his jurisdiction. The result may well be retaliation by other crafts and difficulties on existing projects.

Although jurisdiction is drawn on national lines, local variations may blur those lines. Differences in the application of jurisdiction are partly caused by differences in tradition and custom, employer preferences, local leadership and strength, and the degree of the union's specialization. Furthermore, the vigor of a union's assertion of jurisdiction may vary with the size of the job.

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20 Id. at 485.
21 Hyman 424.
22 Dunlop 485.
23 Industrial unions are less susceptible to jurisdictional disputes among themselves. Disputes may arise within an industrial union, however, between the craft and industrial segments. See SLICHTER 270-76.

Some feel that Taft-Hartley encourages preoccupation with work jurisdiction. By making it possible for a craft to carve out bargaining units from an industrial unit, "the law may have made the proprietary interest in work boundaries a more substantive issue in certain cases." Id. at 256-57. An industrial union, faced with a possible internal revolt, may become especially attentive to work boundaries. If the revolt is successful, the new craft unit may sharpen interest in work jurisdiction.

24 Id. at 251.
25 Id. at 253; STRAND 39-41.
26 SLICHTER 253-54. Jurisdiction will be valuable as a political issue when other factors have made it important to the union's members.

27 Dunlop 487-88.
Employers may cause jurisdictional disputes by making assignments contrary to traditional jurisdictional lines or by following a vacillating work assignment policy. On the other hand, the employer may honestly be in error. In any event, an employer’s violation of the traditional lines may seem reasonable to him because of wage rate differentials or because of antagonism to a particular union or its leaders, or may be motivated by union pressure or anti-union bias. Lower echelon supervisors may seek to favor those working with them by giving workers jobs properly within the jurisdiction of another union.

The structure of employer relationships may also lead to jurisdictional disputes. In the construction industry, boundaries between various specialty contractors are frequently vague. To some extent contractors on a single project are in competition with one another, and a union may be working exclusively for a particular contractor. Thus, competition among subcontractors, specialty contractors and general contractors may be converted into a jurisdictional dispute between unions.  

Although jurisdictional strikes have aroused public concern and antagonism, they have not been numerous. During the period 1935-1947 jurisdictional strikes never “involved more than 1.6 percent of all workers on strike . . . and never resulted in a greater loss than 2.7 percent of the total number of man-days lost by strike activity.” Jurisdictional strikes, however, tend to be concentrated in particular areas or industries, and although they begin as internal affairs, the disputes break out into the open, adversely affecting employers and the public. The economic losses to the workers and to the employer often seem indefensible. The failure of organized labor successfully to avoid or settle these disputes prompted the passage in 1947 of a federal statutory scheme of dispute settlement.

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88 Id. at 486-87.
89 Fisher, The Settlement of Work Jurisdictional Disputes by Governmental Agencies, 2 Ind. & Lab. Rel. Rev. 335, 337 (1949). In 1946, jurisdictional disputes “accounted for only 3.5 per cent of the total number of work stoppages and only .5 per cent of the man-days of idleness.” Hyman 423.
40 "In such strikes the public and the employer are innocent bystanders who are injured by a collision between rival unions. This type of dispute hurts production, industry, and the public—and labor itself. I consider jurisdictional strikes indefensible." Address by President Truman on the State of the Union, Jan. 6, 1947, in 93 Cong. Rec. 136 (1947). Jurisdictional strikes are like secondary boycotts in some ways. Unions “strike at their opponents over the shoulder of some third party, usually an employer.” Aaron, Union Procedures for Settling Jurisdictional Disputes, 5 Lab. L.J. 238. Employers are seldom neutral, however. See Scharer 245. Indeed, most employers consider the determination of work assignments to be one of their basic rights.
41 For a summary of the legislative history of these sections see Mann 40-48.
Steps to Invoke Section 10(k)

Concerted action in support of a work assignment dispute was made an unfair labor practice in 1947. The filing of a charge, however, does not lead to the usual invocation of the Board's authority under section 10(c) because Congress interposed a special procedure to be followed when such charges are filed. Thus section 10(k) requires the NLRB to "hear and determine" an unfair labor practice covered by section 8(b)(4)(D) "whenever it is charged that any person has engaged in an unfair labor practice" within that section.

In order for the Board to proceed with the determination under Section 10(k), the record must show that a work assignment dispute exists; that there is reasonable cause to believe that the respondent union has resorted to conduct which is prohibited by Section 8(b)(4) in furtherance of the dispute; and that the parties have not adjusted their dispute or agreed upon methods for its voluntary adjustment.

After an employer files a charge, the Board makes three preliminary determinations. First it must discern whether there is "reasonable cause" to believe that the respondent union has engaged in prohibited activity. Although section 10(k) when read literally requires only a "charge" of proscribed activity, it seems logical to require the employer to present a prima facie case.

The Board has held that evidence must relate to "conduct or speech" of the union's representatives. In Local 106, Int'l Union of Operating Eng'rs (E. C. Ernst, Inc.) the Board found no evidence of a demand by the operating engineers upon Ernst that he assign certain work away from IBEW electricians. It was not sufficient that two competing groups claimed the same work or even that there had been a concerted work stoppage. All parties, however, had assumed that there was a dispute, and the dispute had been determined by the Joint Board in favor of the engineers. In light of the facts of this case the Board's standard seems too high. Although the "reasonable cause" standard is used by district courts when a request is made for a 10(l) injunction, the absence of

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46 General Teamsters, 144 N.L.R.B. No. 60 (1963) (B.P. John Furniture Corp.).
47 Ibid.
49 See note 198 infra.
such a standard in the language of section 8(b)(4)(D) or section 10(k), along with the arguable need for a higher standard in injunctions, raises doubts about the Board's approach. Apparently, the Board will require more than work stoppages, and illegal actions will have to be clear.51

Furthermore, veiled threats are also insufficient, and language is said to be "too vague and insubstantial" if it is "subject to interpretations other than as a threat to engage in illegal conduct."52 In a section 10(l) injunction proceeding brought by the General Counsel, the court must also find reasonable cause to believe that the union engaged in prohibited activity. For example, in Penello v. IBEW53 the court found "reasonable cause" even though the alleged threat was ambiguous and the union representative denied a threat was even made. Although resolving conflicts of evidence would infringe the Board's authority, there seems to be no reason for the court's standard in an injunction proceeding to be lower than the Board's standard in a preliminary determination.

While an unambiguous threat standing alone would seem to imply a work stoppage, the Board in Ernst54 held that such an isolated threat was not sufficient. The Board's position seems to permit unions to apply considerable pressure and yet remain immune from Board scrutiny. Such Board restraint will not encourage resort to private settlement machinery—one of the statutory goals—especially when certain unions, such as the IBEW, refuse to be bound by Joint Board determinations in certain areas.55 On the other hand, unions seeking Board review will be encouraged to make certain that their conduct violates the act. Such a dubious policy was questioned by President Truman in his veto message: "The bill would force unions to strike or to boycott if they wish to have a jurisdictional dispute settled by the National Labor Relations Board."56 Although the veto was overridden,57 the Board nevertheless should not re-

51 The "reasonable cause" standard has been extended into a full hearing on the merits of whether an 8(b)(4)(D) unfair labor practice has been committed. See International Ass'n of Machinists, 136 N.L.R.B. 1216 (1962) (Carling Brewing Co.).
52 General Teamsters, 144 N.L.R.B. No. 60 (1963) (B. P. John Furniture Corp.).
54 Local 12, Int'l Union of Operating Eng'rs, 144 N.L.R.B. No. 2 (1963) (Geo. E. Miller Elec. Co.).
55 93 CONG. REC. 7486 (1947), 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 916 (1948) [hereinafter cited as LEGISLATIVE HISTORY].
56 The Taft-Hartley Act was passed over the President's veto by a vote of 68 to 25 in the Senate and 331 to 83 in the House. 93 CONG. REC. 7692 (1947), 2 LEGISLATIVE HISTORY 1666 (passage by the Senate); 93 CONG. REC. 7504 (1947), 1 LEGISLATIVE HISTORY 922-23 (passage by the House).
quire a union to do more than "threaten, coerce, or restrain," as provided in section 8(b)(4)(D); indeed more recent Board decisions seem to indicate a less severe approach.

It should be noted that the act is not sympathetic to the equities of a union's case. A union cannot invoke the jurisdiction of the Board, and furthermore must commit an unfair labor practice to satisfy one of the conditions of the statutory settlement machinery. An employer, however, may refrain from filing a charge, thus leaving the union no recourse. Such a course of action may be followed by an employer faced with a weak or nonstrategically situated union and willing to ignore that weaker union's strike.

Second, the Board's "reasonable cause" standard has been extended to require an additional determination that a work assignment dispute within the scope of section 8(b)(4)(D) exists. Thus, the union must not only resort to prohibited activity to invoke the Board's authority, but it must be correct in its assumption that a work assignment dispute exists. Although this requirement would not seem to present an insuperable barrier to review, the Board has defined "work assignment dispute" narrowly. Beginning with Local 107, Highway Truckdrivers (Safeway Stores, Inc.) the Board has held that a work dispute under section 8(b)(4)(D) must involve a situation in which two or more employee groups are actively seeking certain work. When no jurisdictional dispute is found to exist, the Board will quash the notice of hearing under section 10(k). In Safeway, the employer unilaterally transferred work away from three teamsters who constituted the entire bargaining unit of Local 107, International Brotherhood of Teamsters, and arranged for members of a different IBT local, operating out of other plants of the employer, to do the work. The termination of the one trucking operation covered by Local 107's contract resulted in the teamsters' discharge. The local's picketing was held not to be a violation of section 8(b)(4)(D) although its conduct admittedly fell within the literal terms of that section.

The Board in Safeway interpreted NLRB v. Radio & Television

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58 See, e.g., Electrical Workers, 147 N.L.R.B. No. 159 (1964) (McCloskey & Co.); Local 1, Int'l Bhd. of Elec. Workers, 147 N.L.R.B. No. 73 (1964) (McDonnell Aircraft Corp.); Detroit Mailers Union, 146 N.L.R.B. No. 23 (1964) (Detroit Gravure Corp.).
59 Hyman 454.
61 Ibid.
Broadcast Eng'rs (CBS) to require "two or more employee groups claiming the right to perform certain work tasks." The dispute in Safe-way, the Board argued, was basically a dispute between Local 107 and the employer, and concerned only one union's attempt to retrieve jobs. The Board required that real competition between two unions be shown. Other IBT locals had not pressed the employer for the work. Indeed, the employer had caused the dispute. Section 10(k), reasoned the Board, should not arbitrate disputes between one union and an employer where no competing claims are involved. Whenever the employer "reallocates work among his employees or supplants one group of employees with another, there is not a jurisdictional dispute." Thus, while requiring two competing unions, the Board's narrow holding is that "reallocation" and allocation of work cannot be similarly treated under sections 8(b)(4)(D) and 10(k) even though both situations seem to fall within the statutory language.

The dissenters, Members Rodgers and Leedom, argued that nothing in CBS suggested that the 8(b)(4)(D) language should not be read literally. Indeed, the Court in CBS stated that the sections extend to a dispute between a union and an unorganized group of employees as well as between two unions, and pre-CBS Board decisions support this view. Furthermore, the dissenters reasoned, the addition of the words "trade, craft, or class" has broadened the coverage of section 8(b)(4)(D) to include disputes involving nonunion groups. However, it is doubtful that unorganized employees would actively contest the picketing union's claim. When work is assigned to nonunion employees, therefore, the dispute is actually between the employer and the challenging union.

There is evidence that the section was passed to protect employers from being caught in the middle of two rival employee groups. Although section 8(b)(4)(D) was primarily intended to cover a situation where two employee groups claimed certain work, neither the legislative

63 Local 107, Highway Truckdrivers, 134 N.L.R.B. 1320, 1322 (1961) (Safeway Stores, Inc.).
64 364 U.S. at 584.
history nor the statutory language expressly limits its coverage to disputes in which a union attempts to force a work assignment away from an employee group which is also actively claiming the work. The Supreme Court has indicated that a strike in protest of a work assignment violates section 8(b)(4)(D) regardless of how passive the other group of employees may be.

It would seem reasonable to permit an employer to test a union’s jurisdictional claim even though those to whom the work was assigned do not actively claim the work. It is difficult to tell whether a group of employees will strike to secure or retain work until the work has actually been denied them, and a union could strike although it disclaimed interest in the work while its members were performing it. The danger of work stoppages and harm to the employer is the same whether the group to which the work was assigned claims it or not. Indeed, the employees can now successfully bar a 10(k) determination by disclaiming interest in the work. The employer is in a dilemma because that group might strike if he submits to the striking union. Moreover, the Board has converted the Supreme Court’s accurate description of the dispute in CBS into a definition of a jurisdictional dispute. Although the Court did say that jurisdictional disputes are between “two or more groups of employees,” the Court was not called upon to determine what disputes come under section 8(b)(4)(D).

Interestingly, a respondent union, according to the Board’s decision in UMW (Turman Constr. Co.), cannot avoid a 10(k) determination by a disclaimer of interest in presently representing the employees in question. The Board stated that a 10(k) determination was necessary in such a situation because there was no assurance that further work interruptions would not occur. Surely this fear also exists when the union to which the work is assigned disclaims any jurisdictional rights to it.

Nevertheless, Safeway has been followed in subsequent cases. In Local

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70 Farmer 667.
71 364 U.S. at 579.
72 See Note, 73 Harv. L. Rev. 1150, 1157 (1960).
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272, Sheet Metal Workers (Valley Sheet Metal Co.) \(^7\) the alleged dispute was between two unions affiliated with the same international. The international’s constitution limited to two the number of employees belonging to an outside union who could work within the territory of another local. A local with jurisdiction forced the employer who had transferred three members of an outside union into its territory to replace one of the employees with one of its own members. Stressing that the outside local did not claim the work, the Board quashed a notice of a 10(k) hearing. \(^7\) It is not clear why the Board did not dispose of the case by holding that no “dispute” existed because both sister locals apparently agreed with the territorial limitation.

Member Leedom, the only dissenter, argued that it was immaterial that one union was not claiming the work so long as that group was performing it. As he correctly pointed out, there are factual differences between Safeway and Valley Sheet. In Safeway the employer precipitated the dispute by transferring work away from one local, and that local attempted to preserve its historical bargaining status. Member Leedom argued that the question of whether a jurisdictional dispute exists is now in the hands of the employee groups involved and, if they can agree, they can “divide up an employer’s operations as they wish.”\(^7\)

The Board’s narrow reading of section 8(b)(4)(D) will not be limited to the facts of Safeway, however. In a later case, \(^7\) the employer assigned work to carpenters rather than lathers because the latter had requested travel pay. Picketing by the lathers was held not to be a violation of section 8(b)(4)(D), because the carpenters did not claim that the work was within their jurisdiction and did not request that such work be assigned to them. A similar result was reached in Local 1905, Carpet Layers (Southwestern Floor Co.), \(^7\) where the disputed work had been assigned to the carpenters despite contrary Joint Board decisions and a 1961 agreement between the painters \(^8\) and the carpenters in which the latter disclaimed jurisdiction over the disputed work. The painters, as well as the carpenters, argued that no jurisdictional dispute existed. Thus, the carpenters performed work in violation of precedent and both

\(^7\) 136 N.L.R.B. 1402 (1962).
\(^8\) See also Local 1102, United Bhd. of Carpenters, 140 N.L.R.B. 79 (1962) (Port Huron Sulphite & Paper Co.).
\(^7\) 136 N.L.R.B. at 1406.
\(^8\) Local 328, Wood, Wire & Metal Lathers Union, 139 N.L.R.B. 598 (1962) (Acoustics & Specialties, Inc.).
\(^8\) 143 N.L.R.B. 251 (1963).
\(^8\) Respondent, as predecessor of Local 1095, Carpet Layers.
unions, possibly fearing an adverse result, were able to avoid a Board determination.

The Safeway rule will also be applied when the employer’s change of operation causes the discharge of employees of a different employer. In Local 331, Teamsters Union (Bulletin Co.) a newspaper publishing company’s decision to cease contracting out its home delivery distribution work resulted in the discharge of an employee of its contract-distributor. This employee’s representatives then picketed the replacement. The Board held that the union’s sole object in such activity was to regain lost employment, as in Safeway. The work was assigned to one of the company’s own drivers whose employee group wisely did not claim the work.

It is interesting that the Board preferred to base its decision on pre-CBS cases, determining that no jurisdictional dispute existed where a union struck to defend its past jurisdiction, rather than on Safeway, thereby limiting the latter decision to cases involving a lack of competing claims. In Local 292, Int’l Bhd. of Elec. Workers (Franklin Broadcasting Co.) a strike to secure renewed contractual recognition of work jurisdiction was held not to be a jurisdictional strike. In Franklin, however, the Board held that the dispute did not concern work assignments but involved the discharge of several union members and the employer’s refusal to sign a new union contract, despite the fact that the employer’s action resulted from his assignment of work formerly done by the union members to another group of employees. The dissenters in Bulletin, Members Rodgers and Leedom, while repeating their dissenting views in Safeway, also challenged the applicability of Franklin. The striking union in Bulletin represented none of the employer’s employees and was not concerned with the abolition of any jobs or the discharge of Bulletin’s employees. These distinctions were recognized by the majority, but the policy of Franklin was held to extend to the indirect loss of employment.

As the dissenters in Bulletin point out, however, the Board has decided on the merits cases very similar to Bulletin. In Longshoremen’s Ass’n

81 139 N.L.R.B. 1391 (1962).
83 126 N.L.R.B. 1212 (1960).
84 Cf. Local 110, Sheet Metal Workers Ass’n, 143 N.L.R.B. 974 (1963) (Brown & Williamson Tobacco Corp.).
for instance, the International Longshoremen's Association protested a loss of work resulting from the employer's decision to change its mode of operation and to have loading work performed by its own employees. The dispute was determined on the merits even though the object of ILA's conduct could be said to be the retrieval of work previously done by its members. Member Fanning, in a footnote to the majority's opinion in Bulletin, thought it crucial that the ILA sought to have its members perform the work under the changed method of operation, while the union in Bulletin sought to compel the employer to return to his old mode of operation. In either case, however, the object of the strike was to regain the same or similar work once performed by the striking union. Furthermore, work had been lost in both cases by an employee of an independent contractor because of a changed method of operation, and the striking union sought to return to the old mode of operation, i.e., to do the work it previously performed. It is difficult to disagree with the dissent's contention that such factual differences are immaterial.

Moreover, the Board has apparently extended the coverage of the act. In Longshoremen's Union (Northern Metal Co.) the ILA objected to the employer's use of a fifteen-man gang of its members, instead of one composed of twenty-two men, for the work of loading vehicles onto vessels. Prior to 1960 the employer had used fifteen-man gangs for loading of federal cargo under a contract with the United States. When the employer received a contract to load privately-owned vehicles, ILA claimed that it was the practice in Philadelphia to use a twenty-two-man gang. Under an arbitration clause in the ILA-employer association contract, the twenty-two-man crew was found to be the practice in the area, although the grievance committee could not settle the jurisdictional dispute. The employer took twenty-two men under protest, arguing that the additional seven men performed no work, and that if it had to assign work to these extra seven men, it would have to be work now performed by yardmen, represented by the Marine and Shipbuilding Workers Union. The ILA said its demand was not an attempt to displace the yardmen.

With little difficulty, the Board found reasonable cause to believe that the ILA had violated section 8(b)(4)(D), and held that the union

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85 137 N.L.R.B. 750 (1962).
86 139 N.L.R.B. at 1396 n.2 (1962).
87 For a striking example of the result of the Board's approach see Administrative Ruling of NLRB Gen. Counsel, Case No. SR-2177 (1962), 52 L.R.R.M. 1020 (1963).
had presented the employer with the alternative of either hiring seven extra men who could not be used or displacing yardmen and giving their work to the ILA. The Board found it significant that the yardmen had "actively" intervened on the employer's side, apparently only trying to defend area practice. The employer would not necessarily have to discharge the yardmen, and any wasted manpower would have been attributable to the operation of the work rule and does not seem relevant to a determination that a jurisdictional dispute exists.

Admittedly, the determination of reasonable cause involves close factual issues. All jurisdictional strikes and threats are not covered by section 8(b)(4)(D), but only those where an object is to force an assignment of work to one group of employees rather than to another. However, where one object is to force a work assignment, it matters not that the union has a dual purpose. Thus jurisdictional disputes have been held to be properly before the Board despite such additional union aims as the pursuit of better safety practices, adherence to union wage scales or to local standards of competency. In *International Bhd. of Elec. Workers (Bendix Corp.*) the IBEW claimed there was no jurisdictional dispute because the object of its picketing was to increase wage rates at the employer's construction site, not to compel a reassignment of work. The IBEW argued that Bendix was not complying with wage scales set by the Davis-Bacon Act. Most of its appeals to the public dealt with the wage-scale dispute. Indeed, the IBEW went so far as to stipulate with Bendix that any positive award made by the Board should be in favor of the engineers and technicians now performing the work. Nevertheless, the Board found that there was reasonable cause to find that an object "equal in importance" was to force assignment of work away from the Bendix employees and to union members and local electricians. IBEW was apparently concerned that lower wages to out-of-towners would undercut local wage scales and had suggested that the work be subcontracted to local electricians. Whether the employer would have hired IBEW men instead of Bendix's employees to do the work

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90 *Local 365, Bhd. of Painters, 126 N.L.R.B. 653 (1960) (Southern Fla. Hotel Ass'n).*
under Davis-Bacon Act standards, however, would be a matter of speculation.  

More recently, in *Local 3, Metal Polishers Union (Cleveland Pneumatic Tool Co.)*, the Board held that a case was properly before it even though the dispute concerned which of two existing bargaining units appropriately included employees who performed the disputed work. Although an election in the appropriate unit would have resolved the issue, the Board was precluded from holding one due to the absence of an election petition therefor and the unwillingness of parties to agree to such a procedure. Both the Metal Polishers Union and the Aircraft Employees Association had been certified and had worked in the same department doing almost the same work under the same supervision. The work in dispute covered a job classification called "snaggers," now included in the Aircraft Employees Association's contract. The employer, however, felt the work now belonged in the Metal Polishers' unit. The work dispute arose when a number of employees in both groups were laid off due to lack of work and the metal polishers threatened to strike unless they received all of the work of the department. The Board held that only one unit, consisting of the job classifications within the metal polishers unit and the snaggers, was appropriate and that an election would resolve the dispute. The Board also stated that it would entertain a petition for the above appropriate unit whenever one was filed. The Board, determining that the snaggers were in reality metal polishers, assigned the work to the metal polisher bargaining unit. Its approach in *Cleveland* was similar to its approach in pre-CBS cases in which it refused to resolve disputes in proceedings to clarify certified units. The Board had decided that jurisdictional strikes, in support of contract rights, do not fall within the 8(b)(4)(D) prohibition, despite the fact that the section's language does not make this exception. In these cases the Board viewed the dispute as primarily a question of which of two certified bargaining units more appropriately included the work. The Board seems to have reversed that position in this case, finding a probable violation of 8(b)(4)(D) in order to settle the matter. The Board's analysis of the

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96 For a discussion of the Board's treatment of rights based on certification, see Farmer 700-06.
dispute in this case, however, employs the pre-CBS "unit determination" approach rather than post-CBS criteria.

The third preliminary step to a 10(k) determination involves the existence of private settlement machinery. The Board is directed to hear and determine the dispute "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."998

The Board, having defined "parties to the dispute" to include the employer as well as the two employee groups,99 will not quash notice of a 10(k) hearing when agreement to private arbitration procedures is alleged if one party has not stipulated to such procedures.100 Furthermore, the Board has held that subcontractors and general contractors must also agree to the settlement or the method of settlement.101 Thus, it is not sufficient that both employee groups are bound by an agreement, or that each employee group has an arbitration clause in its collective bargaining contract with the employer. Arbitration would not bind one of the employee groups, and arbitration awards could be conflicting.102 Similarly, an agreement between the employer and the striking union concerning work assignments is not sufficient.103

It is doubtful that the Board's strict policy follows from the purpose of section 10(k), namely, the settlement of jurisdictional disputes.104 The section was intended to encourage private settlements and, if the employer is truly but a helpless victim, it is unclear why he should be concerned which agency settles the dispute. Indeed, the "settlement" exception to section 10(k) seems to have been designed to stimulate unions to resolve their own disputes. In Senator Murray's words: "We are confident

100 Local 9, Wood, Wire & Metal Lathers Union, 113 N.L.R.B. 947 (1955) (A. W. Lee, Inc.). Affiliates of the Building Trades Department, AFL, are bound by Joint Board determinations through the Department's constitution. Thus, locals of national unions which are members of the Department are bound despite their failure to agree to Joint Board procedures.
103 Retail Clerks Ass'n, 125 N.L.R.B. 984 (1959) (Food Employers Council).
that the mere threat of governmental action will have a beneficial effect
in stimulating labor organizations to set up appropriate machinery for the
settlement of such controversies within their own ranks, where they
properly should be settled. Neither a literal reading of section 10(k)
nor an examination of the legislative history of the act appears to re-
quire the employer's participation in private settlement proceeding.
On the other hand, it is arguable that private settlement machinery is
more effective when employers do participate in the proceedings. De-
fining "parties" to include only the competing employee groups would,
after all, force an employer to seek intervention or be bound by a de-
termination to which he was not a party. Assuming that intervention
were granted, however, private settlement devices would arguably be
strengthened. Furthermore, it is consistent with legislative policy to
permit the employer to test the respondent union's claim before the
Board when he has not agreed to be bound by private arbitration.
Since the employer initiates the Board's activities, it seems reasonable
to consider the employer a party; the fact that he may be neutral with
respect to the result of the settlement does not detract from the fact that
his actions precipitated the dispute and that he is directly affected
by it.

One practical advantage of the Board's approach is that the employer
could introduce relevant evidence such as past practice, efficiency and
economy—factors peculiarly within his knowledge—at the private pro-
ceeding. Moreover, he may be deterred from ignoring the award by virtue
of his participation. It should be noted though, that before the Joint
Board the employer's assignment is not as significant a factor as it is
before the NLRB, assignments often being made by the former on the
basis of property rights between two or more unions. Finally, since
no procedures exist under section 10(k) to bind the employer, the

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105 93 CONG. REC. 4155 (1947), 2 LEGISLATIVE HISTORY 1046 (Emphasis added); see 93
CONG. REC. 6610 (1947), 2 LEGISLATIVE HISTORY 1554-55 (remarks of Senator Morse);
NLRB v. Radio & Television Broadcast Eng'rs, 364 U.S. 573, 577: "Section 10(k) offers
strong inducement to quarrelling unions to settle their differences by directing dismissal of
unfair labor practice charges upon voluntary adjustment of the jurisdictional dispute."
(Emphasis added.)
106 See O'Donoghue, Jurisdictional Disputes in the Construction Industry Since CBS, 52
Geo. L.J. 314, 332 (1964) [hereinafter cited as O'Donoghue].
107 Id. at 334.
108 See Farmer 673.
109 See Dunlop 482; Strand 61.
110 Mann 5; McGuinn, Jurisdictional Disputes and the NLRB, N.Y.U. FIFTEENTH
ANNUAL CONFERENCE ON LABOR 103, 122 (1962) [hereinafter cited as McGuinn].
private arbitrator’s ability to enforce the settlement is perhaps the main reason for the Board’s strict policy of requiring the employer’s presence.111

If a party refuses to comply with a settlement which it had previously agreed to accept, the Board will not make its own determination under 10(k);112 nor will the Board act under 10(k) when a party has announced it will not honor a future decision made under an agreed upon method, or that it has rejected a decision after it has been made.113 However, in one case114 repeated statements by the IBEW that it would not be bound by Joint Board determinations involving line work were considered relevant by the Board in rejecting a Joint Board determination and proceeding under section 10(k). Apparently, the employer’s association was not bound by Joint Board procedures and did not participate in the proceeding. In a later decision,115 however, the Board based a similar determination solely upon the continued refusal of the IBEW and the employer association to be bound by certain Joint Board decisions. This decision seems inconsistent with the policy of encouraging private settlements.116 Although the Board’s approach may be the only practical way to settle these disputes, it leaves no incentive for the union and employer association involved to submit to the Joint Board. The Board has permitted the union to withdraw one area from the jurisdiction of the Joint Board, while ostensibly remaining a party to Joint Board procedures.117

Although the Board refuses to render a decision under section 10(k), it will proceed with an unfair labor practice complaint against a union which will not comply with a private settlement. In *Wood, Wire & Metal Lathers Union (Acoustical Contractors Ass’n)*,118 the Board held that

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111 Ironworkers Ass'n, 137 N.L.R.B. 1753 (1962) (Armco Drainage & Metal Prods. Co.).
112 Millwrights, 121 N.L.R.B. 101 (1958) (Don Cartage Co., Inc.).
113 Ironworkers Ass'n, 137 N.L.R.B. 1753 (1962) (Armco Drainage & Metal Prods. Co.).
114 Local 825, Int'l Union of Operating Eng'rs, 137 N.L.R.B. 1425 (1962) (Nichols Elec. Co.).
117 Thus the IBEW submits disputes to the Joint Board dealing with “inside work” but refuses to submit disputes dealing with “outside work.” Local 181, Int'l Union of Operating Eng'rs, 146 N.L.R.B. No. 64 (1964) (Service Elec. Co.).
an 8(b)(4)(D) charge would be dismissed only upon compliance with the Board's decision "or upon such voluntary adjustment of the dispute," and not merely if a method of settlement existed. Thus, the existence of a method of adjustment precludes a 10(k) hearing, but not the issuance of an 8(b)(4)(D) complaint if the method is not successful. The "statute keeps the charge alive pending a final settlement . . . so that an 8(b)(4)(D) complaint action may be taken against a party that resorts to a jurisdictional strike despite the existence of an agreed method of adjustment."

The Board's position makes it an enforcement arm of a private agency. Since many private settlements do not provide effective enforcement devices, this approach seems to comport with the congressional policy of settling jurisdictional disputes and encouraging private settlements. Furthermore, an opposite approach would permit a party to secure redetermination by the Board by refusing to abide by an unfavorable Joint Board determination. Although the Board is merely proscribing conduct covered by 8(b)(4)(D), it is in effect enforcing the private settlement. The Board, however, has no means of enforcing the private settlement against a recalcitrant employer. The successful union which continues to strike is engaged in conduct literally encompassed by section 8(b)(4)(D) and yet there is no lack of compliance on its part. When the employer is obstructing the private settlement, however, and the respondent union has "complied" with Board procedures, the Board will probably dismiss the charge.

STANDARDS

Despite the apparent command in section 10(k) to "hear and determine" the dispute, the Board until 1961 had limited its inquiry under section 10(k) to whether the striking union had representational rights with respect to the employees performing the work under a prior Board order or certificate or under a collective bargaining contract. If not, the union would be prohibited from attempting to override the employer's assignment. In 1961 the Supreme Court decided that

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118 Wood, Wire & Metal Lathers Union, 119 N.L.R.B. 1345, 1352 (1958) (Acoustical Contractors Ass'n). It is arguable that "such voluntary adjustment" refers to the "agreed upon methods" mentioned in the first sentence of § 10(k). Congress may have wanted the Board to stay out of any dispute where there was an agreed upon method of settlement.

119 International Bhd. of Teamsters, 97 N.L.R.B. 1003 (1952) (William F. Traylor); see Note, 73 Harv. L. Rev. 1150, 1162-63 (1960).

120 Note, 73 Harv. L. Rev. 1150, 1163 n.68 (1960).

121 See, e.g., International Bhd. of Elec. Workers, 124 N.L.R.B. 323 (1959) (Peacock
NLRB's construction of section 10(k) was too narrow, and refused to enforce a Board order finding a violation of section 8(b)(4)(D) because the Board had not made an affirmative award of the work in the prior 10(k) proceeding, but had merely decided that respondent union was not entitled to the work under an outstanding certificate or contract.

The Board's brief set forth several arguments to justify its narrow construction of section 10(k). These arguments are set forth briefly here, since they are relevant to an understanding of the Board's subsequent decisions. It is worthy of note, however, that the problems expressed by the Board have generally not been solved.

1. Section 10(k) sets forth no standards by which the Board is to determine jurisdictional disputes. The Court, however, speaking of the NLRB, felt confident that the Board could design standards for the resolution of jurisdictional disputes. It has had long experience in hearing and disposing of similar labor problems. With this experience and a knowledge of the standards generally used by arbitrators, unions, employers, joint boards and others in wrestling with this problem, we are confident that the Board need not disclaim the power given it for lack of standards. Experience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board.

2. The broader interpretation of section 10(k) would conflict with other sections of the Labor Management Relations Act in three ways. First, the interpretation may cause unions to compel employers to discriminate with regard to employment. The prevailing organization may acquire a greater form of union security than is allowed by sections 8(a)(3) and 8(b)(2). If the winning union displaced an incumbent union, the displaced employees would be affected because of their union membership. The Court stated that this was not relevant in this case since both groups of employees were organized. Moreover, the Board "will devise means of discharging its duties under section 10(k) in a manner entirely harmonious with those sections." The Board's objection, however, is a broader one. Even though both groups of employees

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124 364 U.S. at 583.
126 364 U.S. at 584.
were organized and employed by CBS, an award in favor of the striking union might cause the employer to reassign or displace employees presently doing the work.127

Second, section 303128 permits suits for damages because of jurisdictional disputes. Section 10(k), however, is not applicable even though the same conduct is covered under sections 303 and 8(b)(4)(D). Thus, if the Board were to give effect to factors other than those in sections 8(b)(4)(D) and 10(k), the “substantial symmetry” of sections 303 and 8(b)(4)(D) would be lost. Since section 303 does not permit the union to establish as a defense in a suit for damages the fact that it is entitled to the work on the basis of factors such as custom or tradition, the Board could sanction what has been declared unlawful under section 303. The Court, holding that substantive symmetry between sections 303 and 8(b)(4)(D) was not required, did not decide what effect a Board decision under section 10(k) might have on actions under section 303.129 Symmetry, of course, would also be in danger in a section 303 action held before a 10(k) hearing when the union attempts to claim that it is entitled to the work.

Third, section 10(k) could sanction what section 8(b)(4)(D) forbids. An outside union could win on custom or tradition, for example, but the narrow exception to section 8(b)(4)(D)130 does not include a 10(k) award, and the union would still be guilty of an unfair labor practice. The 10(k) award would then become meaningless to the union.181 Alternatively, a 10(k) award, if included in “order” in section 8(b)(4)(D), could not retroactively validate a jurisdictional strike, the legality of which depends on the circumstances existing at the time it arose. This problem is bound up with the fact that no procedures exist to compel compliance with a 10(k) award by an unwilling employer.132 Thus a narrow reading of section 8(b)(4)(D) could lead to a situation where the respondent union receives a work assignment, but the employer refuses to assign the work and the initial strike still violates the act.

Neither of these two problems was faced by the Court. The initial

127 See Farmer 685-69; McGuinn 107-08.
129 364 U.S. at 584-85.
130 By its terms § 8(b)(4)(D) governs “unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.”
131 Mann 54 n.317.
132 Id. at 53-54.
problem set forth in the Board's brief may not arise, because section 10(k) states that a charge will be dismissed "upon compliance by the parties to the dispute with the decision of the Board." If a striking union is awarded the work it will certainly comply, and noncompliance by the other parties will not cause a cease and desist order to be issued against it. On the other hand, the charge remains to induce compliance when the striking union is not awarded the work.

(3) The Board further contended in CBS that a broader reading of section 10(k) would discourage private settlements. The Court held that this was a "policy determination" that was implicitly settled by the Congress' enactment of section 10(k).

The Board's general position had been challenged by the National Joint Board. The Board's stand, argued the Joint Board, induced contractors to disassociate from the Joint Board since a decision under section 10(k) was more likely to be favorable to the employer. The Joint Board felt that only if the two hearings were parallel, thus eliminating the tactical advantage of a 10(k) hearing, would private agreements be strengthened. The NLRB's position, it contended, had permitted contractors to disturb customs and established practices of industry, which in turn increased, rather than reduced, jurisdictional warfare.

Board Criteria

In International Ass'n of Machinists (J. A. Jones Constr. Co.), the first case following CBS in which an affirmative award was made, the Board set forth the guidelines that it would follow. At this beginning stage in making jurisdictional awards as required by the Court, the Board cannot and will not formulate general rules for making them. . . . The Board will consider all relevant factors in determining who is entitled to the work in dispute, e.g., the skills and work involved, certifications by the Board, company and industry practice, agreements between the unions and between employers and unions, awards of arbitrators, joint boards and AFL-CIO in the same related cases, the assignment made by the employer and the efficient operation of the employer's business. This list of factors is not meant to be exclusive, but is by way of illustration. The Board cannot, at this time, establish the weight to be given the various factors. Every decision will have to be an act of judgment based on common sense and experience rather than on precedent. It may be that later,

\[134\] 364 U.S. at 383.
with more experience in concrete cases, a measure of weight can be accorded the earlier decisions.\textsuperscript{137}

The relative weight given to various criteria set out in Jones has varied considerably from case to case.\textsuperscript{138} The results have generally favored the employer's assignee; the vast majority of the awards have been made in favor of the union to whom the work was originally assigned. One author suggests that this is not coincidental.\textsuperscript{139} On the other hand, the opposite result has generally been reached by the Joint Board.\textsuperscript{140} Such evidence raises doubts as to whether the Board is adequately carrying out the Court's mandate. Furthermore, such a policy, if being purposely followed by the Board, would hardly encourage employers to participate in private proceedings.

The post-CBS cases present a tremendous variety of factual situations which, when combined with the list of criteria set out by the Board, makes analysis and identification of coherent doctrine difficult. For this reason the cases will be discussed in categories determined by significant factors or important problems.

**THE EMPLOYER'S ASSIGNMENT**

Some cases may properly turn on the employer's choice. The striking union, for instance, may present no evidence supporting its claim.\textsuperscript{141} However, the use of the employer's assignment as an independent factor in a doubtful case raises some problems, and the required burden of proof could prejudicially favor the employer. It is arguable, however, that it is completely proper for the Board to require the striking union to present some justification for its claim. Although it might be maintained that any burden of proof is inconsistent with the Board's duty to "determine the dispute," perhaps it is justifiable at this point to stress the interest in protecting the employer. Furthermore, this approach may discourage groundless disputes. There is even a third position which would place the burden of justification upon the employer who initiated the dispute, as well as the NLRB intervention. Such an approach is not unreason-

\textsuperscript{137} Id. at 1410-11.  
\textsuperscript{138} O'Donoghue 321-23.  
\textsuperscript{139} Id. at 322. See also Cohen, *NLRB and Section 10(k): A Study of the Reluctant Dragon*, 14 LAB. L.J. 905, 918 (1963). In Detroit Mailers Union, 146 N.L.R.B. No. 23 (1964) (Detroit Gravure Corp.), in which the employer's assignment was not upheld, the Board felt it relevant to mention that the employer did not care which employee group received the work.  
\textsuperscript{140} O'Donoghue 322.  
\textsuperscript{141} Local 852, Treasurers Alliance, 137 N.L.R.B. 738 (1962) (Allied Maintenance Co.).
able, and analogies may be found in concepts, such as “discharge for cause,” which are employed in arbitration cases.

The employer's assignment is often considered as a factor separate and distinct from his past practice.\textsuperscript{142} Moreover, the employer's assignment has often been buttressed by other factors which are not really independent.\textsuperscript{143} Thus, the assignment may be upheld partly because the employees are sufficiently skilled to perform the disputed work and have done it to the employer's satisfaction.\textsuperscript{144} Even the fact that the assignment conforms to past practice may mean only that the employer wished the groups to do the work, that the particular division of work is efficient and economical, or that the respondent union has acquiesced in this division in the past. In one case,\textsuperscript{145} the Board emphasized that electrical work had been given to the employer's mechanics on three occasions in the past. IBEW pointed out, however, that each of these assignments drew a protest from other IBEW locals. In this case IBEW offered as evidence the custom in the area, the international's constitution which allegedly covered the work, and a collective bargaining contract with the local Electrical Contractors Association recognizing IBEW as the representative of all employees “within its jurisdiction” and covering all “electrical construction.” Nevertheless, the employer's assignment to its own mechanics was upheld, even though the assignment was the only substantial evidence favoring that group.

The Board's consideration of the employer's assignment, which is accorded little weight before the Joint Board, would seem to weaken the use of private settlement machinery to the extent that parties can get better treatment before the NLRB.

\textbf{TRADITIONAL JURISDICTIONAL LINES}

The National Joint Board for the Settlement of Jurisdictional Disputes, created by the Building Trades Department, AFL-CIO, and general and specialty contractors associations, attempts to afford protection to traditional jurisdictional lines.\textsuperscript{146} Such recognition of the concept of

\textsuperscript{142} See, e.g., Carpenters Council, 146 N.L.R.B. No. 133 (1964) (J. O. Veveto & Son); New York Mailers' Union, 137 N.L.R.B. 665 (1962) (New York Times Co.).

\textsuperscript{143} See Carpenters Council, 146 N.L.R.B. No. 114 (1964) (Stephen Gorman Bricklaying Co.).

\textsuperscript{144} See, e.g., New Orleans Typographical Union, 147 N.L.R.B. No. 21 (1964) (E. P. Rivas, Inc.); Local 964, United Bhd. of Carpenters, 141 N.L.R.B. 1138 (1963) (Carlton Bros. Co.).

\textsuperscript{145} Local 38, Int'l Bhd. of Elec. Workers, 137 N.L.R.B. 1719 (1962) (Cleveland Elec. Illuminating Co.).

\textsuperscript{146} Dunlop 496-98; see \textit{Strand} 94-104.
job ownership would seem to be a requirement of any plan evolved by
the industry itself.\textsuperscript{147} The NLRB, however, has rejected this concept,
even though craft lines are often maintained in nonunion firms in the
construction industry.\textsuperscript{148} Although the Board's "failure to utilize this
property concept" may be a failure to appreciate fully the "unique charac-
teristics of the construction industry,"\textsuperscript{149} the Board's reluctance may be
a recognition of problems arising from sections 8(a)(3) and 8(b)(2) of
the LMRA.\textsuperscript{150}

The Board's reluctance was illustrated by a dispute between oper-
ating engineers and the plumbers over certain pipe connections of refrig-
eration equipment.\textsuperscript{151} The employer had assigned the work to the operat-
ing engineers, although the work was included among the skills and
duties traditionally performed by plumbers. The Board stated that
it had to decide between two groups of employees, and that thus the
name of the union was of little significance. This approach, although con-
sistent with the language of section 10(k), weakens reliance upon
traditional work divisions. The plumbers showed "clear and uncon-
tradicted evidence" that they had for some time represented journeymen
in this area. Indeed, the employer had used plumbers for this work for
three years. The engineers conceded that this was traditionally plumbers' work and their regional director admitted that the disputed work was
regular pipefitting work which the plumbers were entitled to perform.
Despite this evidence, the employer's assignment to the engineers was
upheld. The Board stated that the work required less skill than is involved in normal plumbers' work, that the employees were sufficiently
skilled to perform the work, and that the employer had assigned them
the work. Ironically, the Board admitted that this work was an "ele-
mentary part of the plumbing and pipefitting craft." Thus, it appears
that although nearly all of the substantive evidence favored the plumbers, nonetheless the employer's assignment apparently was the determining
factor. The Board ignored the regional director's view, arguing that it was based only on traditional positions. His opinion "was not directed to the

\textsuperscript{149} O'Donoghue 324.
sections see p. 139 infra.
\textsuperscript{151} Enterprise Ass'n of Steam Pipefitters, 136 N.L.R.B. 1641 (1962) (All-Boro Air Con-
ditioning Corp.).
merits of competing claims for pipefitting work where lesser and higher skilled workmen quarrel over the right to do the simpler forms of the work of their trade.\footnote{152}

Shortly thereafter, the Board made another award in opposition to traditional work jurisdiction in \textit{Local 991, Int'l Longshoremen's Ass'n (Union Carbide Chem. Co.)}.\footnote{153} The company, Union Carbide, had changed its method of operation so that its own employees, represented by the Texas City Metal Trades Council, performed ship-loading work previously done by a contractor using longshoremen. The employer built its own container dock when it began using aluminum containers rather than paper bags. The ILA had always loaded cargo in the area, including that of Carbide. The Board, in upholding the employer's assignment, found the work to be only an extension of shipping functions currently carried on and an integral part of the plant's operations. It found that the present employees were capable of performing the work and stated that no general cargo was loaded at the container dock. Furthermore, the work was not steady, and Carbide's employees worked throughout the plant wherever they were needed. The work was similar to some work performed in the plant and, as the employees worked part time in the plant, the longshoremen would not have been full time employees.

Member Brown, dissenting, argued that ILA's traditional work jurisdiction should control. The \textit{Jones}\footnote{154} factors could not be "accorded meaningful implementation," he argued, unless the work was awarded to the ILA.\footnote{155} The loading was virtually identical to work done by ILA in the past, albeit through a common carrier. Furthermore, there was no evidence that the Trades Council had ever made any jurisdictional claim to the work or that the employees had ever worked as longshoremen. The change in operation, he argued, was in reality a switch of assignment of the work to a new group of employees.\footnote{156}

Failure by the Board to follow traditional lines may lead to continued jurisdictional strife.\footnote{157} Traditional "rights" or jurisdictional boundaries

\footnotetext[152]{Id. at 1647.}
\footnotetext[153]{137 N.L.R.B. 750 (1962).}
\footnotetext[154]{International Ass'n of Machinists, 135 N.L.R.B. 1402, 1410-11 (1962) (J. A. Jones Constr. Co.); see text accompanying note 137 supra.}
\footnotetext[155]{137 N.L.R.B. at 760.}
\footnotetext[156]{The United States Court of Appeals for the Fifth Circuit, in enforcing the Board's order, fully agreed that the factor of trade jurisdiction should not be disregarded, but found substantial evidence to support the Board's award. NLRB v. Local 991, Int'l Longshoremen's Ass'n, 332 F.2d 66, 71 (5th Cir. 1964).}
\footnotetext[157]{After the decision in \textit{Union Carbide}, the ILA notified the Board that it did not intend}
have been accorded deference for many years in most industries, and unions will continue to dispute assignments which they consider to be in opposition to their traditional jurisdiction. Furthermore encouraging employers to follow such lines would decrease the number of jurisdictional disputes, and use of this criteria by the Board would make that body's awards more predictable.

A meaningful jurisdictional standard should consider the nature of the functions performed and the equipment used, and at least one NLRB case has followed this rationale. Utilization of this approach would cause Board awards more closely to parallel those of arbitrators and the Joint Board. Even though application of this standard may weaken the employer's interest in a 10(k) proceeding, attention should be focused on the competing claims of the two unions involved, rather than on the interests of the employer. Statutory compulsion has been brought to bear on the problem for the purpose of eliminating the social waste and the loss to innocent parties resulting from stoppages caused by work assignment disputes—not for the purpose of forcing a more rational and efficient distribution of labor in areas in which craft work predominates.

EFFICIENCY AND ECONOMY

Employers will consider the efficiency and wage scale of the particular workers as significant factors in making jurisdictional awards. The former criterion would seem more proper for use by the Board than the latter. Although the Board has stated that labor costs cannot be determinative in deciding jurisdictional disputes, they are one of the relevant factors to be considered. Use of comparative wage rates by the Board would not discourage disputes, however. Indeed, unions to comply with the award. Since an 8(b)(4)(D) charge is only dismissed upon compliance, the Board held an unfair labor practice hearing. A cease and desist order was issued since the union's only defense was that the 10(k) award was erroneous. See Local 991, Int'l Longshoremen's Ass'n, 139 N.L.R.B. 1152 (1962) (Union Carbide Corp.).

Some agreements and decisions of record based upon traditional jurisdiction antedate the existence of the NLRB by thirty years. O'Donoghue 325.

This factor is arguably irrelevant. Congress made jurisdictional strikes illegal despite the fact that the assignment may have violated even clear traditional jurisdictional lines.

Note, 73 Harv. L. Rev. 1150, 1164 (1960).

See Cohen, supra note 139, at 918.

Local 825, Int'l Union Operating Eng'rs, 139 N.L.R.B. 1426 (1962) (Schwerman Co.).

See Cohen, supra note 139, at 918.

with lower wage scales would be encouraged to extend their jurisdictional claims. As one author points out, jurisdictional disputes are often caused at the border line of craft jurisdiction because of the wage rate differential. Thus, use of this factor would add fuel to existing problems and “breed bitter resistance and antagonism.”

Efficiency, on the other hand, is a more appealing criterion. It may refer either to the nature of the operation, or the competence of the workers involved. The nature of the work itself may aid in determining the work assignment. In one case for instance, the Board upheld an assignment to the lathers of certain work involving the installation of nailing bars on a suspended ceiling. The Board found it significant that the use of carpenters would involve installing temporary ceiling bars, necessitating duplication of effort. Admittedly, time and costs are components of efficiency. This factor, however, does not present the difficulties mentioned above in reference to comparative wage scales.

Since the competence of the workers involved to perform the disputed work must, of course, be considered, the respondent must be able to demonstrate that its members can perform the task “at least in a way which will meet the standards of performance normally applicable in the trade or industry.” The Board usually mentions competence but has apparently accorded this factor little weight. It is clear, however, that the more difficult question involves the relative skill of the competing employee groups.

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165 Dunlop 485.
166 Hyman 454. If a task has “traditionally been performed by a craft, and calls for the tools and skills normally exercised by the members of that craft, the task should not be taken from that craft merely because a more economical flow of work could be secured by shifting it to a different craft and because a union can be found to assert a claim to it.” Id. at 455. The author acknowledges, however, that there are limits to the worker’s interest in security. Ibid. Economical conduct of the work should be recognized only where the disputed work involves a new task created by changes in materials or techniques. Compare Address by Member Brown, Convention of Alaska State Federation of Labor, Sept. 17, 1962, in 51 L.R.R.M. 103, 105 (1963) ; pp. 124-28 infra.
167 United Bhd. of Carpenters, 139 N.L.R.B. 591 (1962) (O. R. Karst); see New Orleans Typographical Union, 147 N.L.R.B. No. 21 (1964) (E. P. Rivas, Inc.).
168 Cf. Local 964, United Bhd. of Carpenters, 141 N.L.R.B. 1067 (1963) (Carleton Bros. Co.). See also Local 1, Int’l Bhd. of Elec. Workers, 147 N.L.R.B. No. 73 (1964) (McDonnell Aircraft Corp.).
169 Hyman 454.
170 Id. at 452.
SKILL

Where a high degree of skill is required, it seems justifiable to give weight to this factor.\textsuperscript{171} The opposite approach, however, may be inap-
propriate. Work has been assigned to less skilled laborers when no need was found for the abilities of the higher skilled union.\textsuperscript{172} Similarly, work has been assigned to less skilled production workers where the use of skilled machinists was not necessary to the performance of the work.\textsuperscript{173} However,

most skilled work involves some operations that can be isolated and performed relatively easily. There appears to be no good reason why the settlement of work assignment disputes should become a factor in determining the extent to which jobs are to be thus broken down.\textsuperscript{174}

Furthermore, it is critical to a craft union’s economic position to have versatile members able to perform a number of tasks. Public policy would not be furthered by the use of factors which in themselves often cause jurisdictional disputes.\textsuperscript{175}

SIMILARITY TO PAST PROCESSES AND SUBSTITUTION OF FUNCTIONS

The above sections demonstrate the need to recognize to some extent the traditional jurisdiction of the unions and the worker’s interest in job security. This latter interest is often affected when new material or technological changes are introduced. Such changes are a common cause of jurisdictional disputes, often resulting in a decrease of work opportunities for a particular union.\textsuperscript{176} When tasks are replaced by the introduction of new materials or equipment, the Board has recognized the claim of workers who had performed the similar work in the past. In Local 681, \textit{Int'l Ass'n of Machinists (American Radiator & Standard Sanitary Corp.)},\textsuperscript{177} the machinists had been operating planers, one of which was replaced by a timesaving machine. The assignment to the machinists was upheld, based in a large part on the historical operation of the predecessor machine by that group. Similarly, when an employer, a television and


\textsuperscript{172} International Union of Operating Eng'rs, 135 N.L.R.B. 1392 (1962) (Frank P. Badolato & Son).

\textsuperscript{173} Lodge 681, Int'l Ass'n of Machinists, 135 N.L.R.B. 1382 (1962) (P. Lorillard Co.).

\textsuperscript{174} Hyman 454.

\textsuperscript{175} See Dunlop 485.

\textsuperscript{176} \textit{Id. at 488-89; Strand 41-44.}

\textsuperscript{177} 137 N.L.R.B. 1524 (1962).
radio station, replaced his records with magnetic tape equipment, the indexing and filing of tapes were assigned to workers who had filed records in the past.\textsuperscript{178}

In the cases referred to above the new work did not require new skills, nor did it fall directly within the jurisdiction of another union. When these facts do exist, the Board must choose between employees who possess the necessary skills and have traditionally performed the work in question, and employees who have performed functionally similar work in the past but whose function has now been replaced. Job security at this point meets its severest test, as it may run counter to traditional work boundaries. Although the Board has not met the problem in these terms, it is clear that the problem of job security and employment has influenced some awards.\textsuperscript{179} An example may be found in \textit{Philadelphia Typographical Union (Philadelphia Inquirer)},\textsuperscript{180} one of the most significant post-CBS cases to date. In 1959 the employer-newspaper introduced a new process, called photocomposition, and a new piece of equipment called a linofilm machine. Photocomposition, a substitute for the older "hot metal" process which used molten metal for the creation of type, employs a photographic principle. The work in dispute—darkroom tasks of developing the film and sensitized paper and printing of "velox" prints—was assigned by the employer to the typographers. The Newspaper Guild argued that its photographers in the editorial department should do the darkroom tasks.\textsuperscript{181} A third group, the Photo-Engravers Union, claimed the making of the velox prints. The employer argued that photocomposition was an integrated process, all parts of which should be performed by members of the same union, and that typographers should get the work because they did the hot metal work for which the new process was a substitute. The ITU added that it had instituted schools to train its members in the photocomposition process. The Guild replied that its members already possessed the necessary skills, and that similar darkroom photography had been done by them for years. Thus, the

\textsuperscript{178} Local 4, Int'l Bhd. of Elec. Workers, 138 N.L.R.B. 335 (1962) (Pulitzer Publishing Co.).


\textsuperscript{181} The Guild invoked its grievance procedure; the arbitrator decided in favor of the Guild but expressly stated that he would not and could not pass on the rights of the typographers.
problem was posed: to what extent shall interest in job security outweigh traditional jurisdictional lines?

The Board split four ways, three members upholding the assignment to the typographers. The majority opinion of Chairman McCulloch and Member Fanning based the determination on two “novel” grounds: (1) that photocomposition is a substitute for hot metal processes done previously by the typographers and (2) that a contrary assignment could result in a loss of employment for typographers. They found that the Board’s usual criteria were of no help, and that the collective bargaining contract and the union constitution of each of the three unions could be construed to cover the work. The skills were similar, ITU members having been specially trained to handle this new process, and there was no past practice or clear industry custom. Under these circumstances, they felt, the Board should call upon what the Court in CBS termed “experience and common sense.” It was noted that photocomposition and other photographic processes were gradually replacing hot metal methods of composition, and that both processes fulfill the same function in the production of newspapers. Photocomposition, however, requires new skills. The introduction of these new processes, it was therefore found, threatened the jobs of typographers who have always performed composing room work but have only recently acquired photographic skills.

In response to these changes the ITU had established schools to retrain its members in order to retain their jobs as new methods were introduced. The Board (Chairman McCulloch and Member Fanning) assumed that the particular typographers assigned to the work had the necessary training and skills, and implied that the typographers may even possess greater skills because the Guild and photo engravers had not performed darkroom work in connection with composing a newspaper. Significantly, the Board mentioned that the Guild and photo engravers would not “lose even one hour of work they had previously done,” whereas a contrary assignment could cause the discharge of typographers. Thus, to overturn the assignment would take away employment of typographers and open up new opportunities for the other two unions. The Board was careful to point out that it relied “particularly on the fact that photocomposition is a substitute for the earlier ‘hot metal’ process” previously done by typographers. Thus, “loss of jobs,” though discussed at

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182 Member Rodgers concurred.
183 142 N.L.R.B. at 43.
length, was de-emphasized. This factor, however, is doubtless a component of the "substituted functions" factor.

Member Rodgers, justifiably intimating that Member Fanning and Chairman McCulloch had introduced "new criteria," concurred on a ground which seemed more consistent with the prior Board policy of giving "substantial, if not decisive, weight" to the employer's assignment in cases where all claims have some validity. He would "upset such assignment only in the face of circumstances which virtually compelled a contrary result," thus following prior decisions which seem to have turned, either expressly or impliedly, on the employer's assignment when factors were in balance, or when the respondent union introduced no significant evidence.  

In his dissent Member Leedom found no need to discuss "socio-economic" factors since the work should have been assigned to the Guild based on past criteria. The Guild, he noted, had done similar darkroom work and possessed the necessary skills. He found the ITU's training courses irrelevant because, since any employee could attend school and learn the skills necessary for a job, the "skills" criterion could become meaningless. The fact that new skills were required, he argued, made irrelevant the rationale that the new process was a substitute for an older process. The reasoning of the dissent, however, evades the fact that both groups possess the necessary skills. Surely a "skill" criterion is meaningless where both employee groups possess adequate skills; and no showing was made that Guild members possessed higher skills.

The majority's willingness to broaden the 10(k) inquiry beyond the criteria used in past cases is explained by its realization that there are no fixed factors in jurisdictional dispute cases, and that such cases must be decided on their own facts rather than on rigid precedent. The list of factors in Jones was not meant to be exclusive; the relevance of various factors depends upon their applicability to particular factual situations, with the ultimate view toward resolving the dispute in accord with congressional policy.

Although Member Leedom deprecates the introduction of "socio-economic" factors in 10(k) proceedings, it seems that at least three

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184 New York Printing Pressmen's Union, 143 N.L.R.B. 167 (1963) (Stuyvesant Press Corp.).
185 142 N.L.R.B. at 44. Member Brown, dissenting, would have assigned the work to the Guild but did not endorse Leedom's dissent in its entirety. Id. at 47.
186 Unimpressed with the "loss of jobs" factor, Member Leedom pointed out that there was no evidence as to the kind of reorganization which would take place due to the intro-
members of the Board are concerned with the impact of automation. In *Machinists Union (P. Lorillard Co.)* the employer installed cigarette packaging machines which eliminated hand packing of cartons. The company assigned the work of adjusting the machines to the Tobacco Workers Union rather than to machine shop workers represented by IAM who had done the repair work on the old machines. The IAM's certificate excluded fixers (machine adjusters) although a few machinists had been retained as fixers under an agreement to permit them to retain their jobs. The Board held that fixers were needed continuously, that skills of machinists were not needed, and that the work was closely related to the production process. In a later speech Member Brown pointed out that the new machines would cost the jobs of seventy production workers, a fact not mentioned in the *Lorillard* opinion. He also felt that the decision “weighs to the extent possible the impact of automation on the production workers.” Since the employer's past practice, Board certificates and industry practice favored the tobacco workers, it is significant that Member Brown referred to the “socio-economic” factors inherent in the case.

Furthermore, the Board has explicitly recognized the “loss of jobs” factor. In *Denver Photo-Engravers Union (Denver Publishing Co.)* the Board mentioned that its award would not cause respondent's members to lose jobs, but that a contrary award would adversely affect the jobs of the union members originally assigned the work. Such recognition of the interest in job security seems justified, although awards employing this factor may not always be consistent with traditional jurisdictional lines. Although what one group loses as the result of a 10(k) determination becomes another's gain, this fact does not “justify disregarding the relative importance of the task in question to both groups in the light of industrial and technological developments.”

While the introduction of the new processes and the effect of the reorganization on job opportunities. *Id.* at 46-47.

187 See International Longshoremen's Union, 147 N.L.R.B. No. 42 (1964) (Howard Terminal), where the Board (Members Fanning, Brown and Jenkins) discusses the impact of automation.


190 144 N.L.R.B. No. 137 (1963). See also International Printing Pressmen's Union, 146 N.L.R.B. No. 186 (1964) (Kelley & Jamison, Inc.).

191 Hyman 451; see International Printing Pressmen's Union, 146 N.L.R.B. No. 186 (1964). *But see* New Orleans Typographical Union, 147 N.L.R.B. No. 21 (1964) (E. P. Rivas, Inc.).
"loss of jobs" factor may not be legitimately determinative, it has the value of easing, to some extent, the impact of technological change on workers and may reduce union opposition to new techniques or machinery.

ACQUIESCENCE

The Board has occasionally used union acquiescence in past practices or work assignments as a factor in 10(k) cases. In General Teamsters Union (Snow White Baking Co.) the work in dispute was delivery of bread directly to retail stores. The employer had in the past employed driver-salesmen represented by the Teamsters Union, and had, when necessary, used as drivers certain plant employees on a part-time basis. In 1960 the company decided to eliminate most of its routes and the driver-salesmen left its employ. Regular employees, however, continued to supply two retail stores. The union first objected five months later when discussion of the renewal of the contract with the teamsters began. The Board held that the teamsters had acquiesced in the employer's action because they had not complained about the occasional deliveries in the past.

Members Fanning and Brown, in a vigorous dissent, would not impute to the teamsters a "past intent" to relinquish their claim. Indeed, they noted that the use of plant employees was instituted only to supplement the carrying capacity of the driver-salesmen. The failure to object to the occasional deliveries should not, they felt, change the fact that the driving in question was normally within the teamsters' jurisdiction. Though the inside employees had performed the specific work in dispute for some time, this was subsidiary to the main portion of delivery work; furthermore, the dissenters pointed out, the system was instituted for the driver-salesmen's convenience. Logic as well as traditional work lines supports the position of the dissenters, who aptly characterized the majority's position as requiring the respondent union to have objected, and perhaps struck, when the supplemental system was instituted. This would encourage workers to refuse to assist a "new helper" on the job in order to avoid a Board ruling that by failing to object at the proper moment they surrendered a part of their traditional work claim. Such action would surely disrupt the employer's operation and would not serve the long-run interest of either party.

192 Hyman 456.
194 Id. at 1483.
195 See Local 1291, Int'l Longshoremen's Ass'n, 137 N.L.R.B. 1451 (1962) (Northern
The “acquiescence” factor has not only been dubiously applied, but has been over-extended. In *Local 28, Int'l Stereotypers Union (Capital Electrotype Co.)*\(^{196}\) the work of affixing electrotypes to Tympan sheets had been done by pressmen for many years. When magnesium carriers were substituted for Tympan sheets, electrotypers requested the work. The Board held that the electrotypers' acquiescence in the work assignment for ten years was decisive even though the process had now been changed. The disputed work, however, was “substantially similar” to the old work which was found to be within the jurisdiction of the pressmen. Why the decision was not based solely on this latter point, or on the similarity of processes, is not clear. The opinion appears inappropriately to extend the doctrine of “acquiescence.” Carried to an extreme, it could be reasoned that whenever a new process is instituted the workers who had performed the replaced work or process are entitled to operate the new process since no other group had objected before.

An easy case is presented where one union has not objected to assignments of similar work over a long period of time, as in *Pipefitters Union (Brown & Williamson Tobacco Corp.)*\(^ {197}\) where an employer's assignment to machinists of the job of installing guard rails was supportable because machinists had for twenty years performed the same work. There was no new process; the work in question was exactly that which machinists had done in the past. Even though the work was covered by the Pipefitters' constitution, that union had never claimed the work or attempted to bargain for it. Acquiescence in such a case is no different from the employer's past practice, a factor often considered by the Board.

**PRIVATE SETTLEMENTS: A PROBLEM OF FULL FAITH AND CREDIT**

Since one of the aims of the 1947 legislation was to encourage private settlements, it would seem that the Board should consider relevant, in a 10(k) proceeding, evidence of decisions of private bodies or agreements of the parties. Although private settlements or arbitration procedures may not satisfy the exclusionary clause of section 10(k), decisions and precedent of private arbitration machinery should have some impact upon the merits of the 10(k) proceeding.

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\(^{196}\) 137 N.L.R.B. 1467 (1962).

\(^{197}\) 139 N.L.R.B. 1140 (1962).
Decisions of the Joint Board were mentioned by the NLRB in *Jones* as one of the factors to be used in determining 10(k) awards. However, this factor has been accorded only minimal weight. For example, in *Local 1622, United Bhd. of Carpenters (O. R. Karst)* the carpenters submitted approximately 300 Joint Board decisions showing awards of similar work to carpenters over a twelve to thirteen year period. The Board held that this evidence merely showed that the dispute was a long-standing one and that neither union had conceded to the other the right to perform the work in dispute. The Board's cavalier rejection of Joint Board precedents seriously undermines the statutory purpose of avoiding jurisdictional disputes by refusing to aid in clarifying and enforcing established jurisdictional lines. The fact that the dispute is a long-standing one should not affect the value of the evidence. Further, the Board's assignment to the lathers may well encourage further jurisdictional strife, since each union now has some precedent as authority for its position. The Board's approach in *Karst* hampers the establishment of national jurisdictional rules, and hardly encourages resort to Joint Board procedures. Unions which have lost past decisions before the Joint Board will be encouraged to avoid that body and take their case to the Board.

Apparently, the Board's narrow reading of the "agreed upon methods" exclusion of section 10(k) has resulted in considerably less weight being accorded to the determinations of the Joint Board. In *Local 825, Int'l Union of Operating Eng'rs (Nichols Elec. Co.)* the engineers offered in support of their position 130 recent Joint Board decisions. The Board dismissed them, stating that there was no evidence that IBEW joined in submitting any of these disputes to the Joint Board. IBEW is bound by Joint Board determinations, however, even though it has steadfastly refused to comply with its determinations involving line work. IBEW's refusal to comply was emphasized by the Board to demonstrate that

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199 135 N.L.R.B. at 1411.


201 See United Bhd. of Carpenters, 142 N.L.R.B. 165 (1963) (Berti Co.).

there was no agreed upon method of adjustment and to weaken the
evidentiary value of the award on the merits.203 The Board held that the
Joint Board awards could not be given sufficient weight to offset the
other relevant considerations—a determination which seems to overstate
the weight actually given the awards by the Board.204

The Board did give substantial weight to a federation ruling, however, in an early post-CBS case,205 where, incidentally, the ruling was consistent with the employer's assignment. Finding "no outstanding equities in favor of the machinist as against the electrician operation of the crane," the Board gave "substantial weight to the long-standing rulings by the parent federation of both disputing unions that the operation of electric cranes . . . 'shall be Electrical Workers work.'"206 In 1922 the Building and Construction Trades Department, AFL, decided that this type of work should be performed by electricians.207

On the other hand, little deference will be accorded the Joint Board determinations when it does not address itself to the underlying dispute. In Glaziers Union (Pittsburgh Plate Glass Co.),208 for instance, the employer had assigned work involving the moving of glass crates on a construction project to laborers represented by Local 18, Hod Carriers Union. Local 1778, Glaziers Union, representing outside glaziers and inside handlers, induced a work stoppage. The Joint Board had decided in favor of the glaziers but it is clear that the NLRB regarded that award as at best ambiguous since the successful union was the representative of both groups of "glaziers."209 The work dispute was in reality between the outside glaziers and "all other nonskilled categories." The Board's award, however, was in favor of the laborers and inside glaziers whether represented by Local 18 or 1778 under their collective bargaining

203 A Joint Board award to respondent union will not be "controlling" where all parties were not bound by it. Carpenters Council, 146 N.L.R.B. No. 114 (1964) (Stephen Gorman Bricklaying Co.). Apparently, however, the award would not be controlling even if all parties were bound. The real question involves the weight to be given an award.

204 Although the Board found it "highly probable" that operating engineers would bring more skill and experience to the operation, it felt that IBEW members possessed sufficient skills. The assignment to IBEW was upheld although the only substantive evidence favoring that union, besides the employer's choice, was the employer's use of IBEW members since 1955 and some evidence that other employers in the state also used IBEW members.

205 International Ass'n of Machinists, 135 N.L.R.B. 1402 (1962) (J. A. Jones Constr. Co.).

206 Id. at 1411.

207 PLAN FOR SETTLING JURISDICTIONAL DISPUTES NATIONALLY AND LOCALLY 76-77 (1962). This plan is commonly known as the Green Book.

208 137 N.L.R.B. 968 (1962).

209 Glaziers Union, 137 N.L.R.B. 975 (1962) (Binswanger Glass Co.).
contracts covering inside warehouse employees. Thus, the Board awarded
the work to two competing unions. The Board refused to assign the work
solely to the inside glaziers because laborers had done “a major portion
of the work” during the past several years while Local 1778 had been
used to a lesser degree. As Chairman McCulloch and Member Brown
point out in their dissent, leaving two competing unions entitled to do the
work hardly decides the controversy.210

The Miami Agreement211

A tribunal faced with the “law” of another jurisdiction must interpret
that law. Such a problem faced the Board in Bricklayers Union (Consol-
idated Eng’r Co.).212 The work in dispute was the installation of “drop
lines” from overhead T-valves down to assembly line locations where
wiring was to be done. Consolidated had received a general contract for
the construction of a large addition to a Chevrolet assembly plant. The
work was assigned by Chevrolet to its maintenance employees, repre-
sented by the United Auto Workers, rather than to the employees of
Consolidated, represented by the Building and Construction Trades Coun-
cil. Chevrolet argued that it had not given this work to Consolidated under
its general contract.

The Council, on the other hand, argued that its pipefitters should
receive the work because it was part of “new construction,” and was not
comparable to electrical or pipefitting work performed by production
or maintenance employees. Claiming that it was entitled to the work
on the basis of area and past company practice, the Council further
argued that under the Miami Agreement of 1958, the UAW had agreed
to cede new construction work to craft unions. The mediation team,
operating pursuant to the procedures of the Miami Agreement, was
unable to get the parties to agree, but did determine that the work
fell within the “new construction” provision of the Miami Agreement.
The Agreement was not a contract for binding arbitration, as the Board

210 137 N.L.R.B. at 974.
211 The Miami Agreement was made in 1958 between the presidents of the Building and
Construction Trades Department and the Industrial Union Department—subordinate groups
of the AFL-CIO. By its terms, “new” construction work was assigned to the building trades
unions and production and maintenance work to the industrial unions. Special teams were
set up to adjust disputes that arose between the two groups. The agreement admitted the
existence of a doubtful area in between, where decisions would have to be based on past
practices.
pointed out, and neither party agreed to be bound by the conclusion of either the initial investigatory team or the AFL-CIO Executive Council.

Indicating that the UAW had never conceded its jurisdictional claim in this case, the Board held that the Miami Agreement was not a firm contract for arbitration, nor conclusive evidence that UAW had ceded jurisdiction. The Agreement recognized a "doubtful area" between new building construction and production and maintenance work in which decisions should be based on past practices on an area, industrial or plant basis. The Board held that the disputed work fell within this doubtful area, a fact, the Board reasoned, which "must be conceded from the very fact that the parties ... were unable to agree upon its proper allocation." Finding no difference in the skills of either union, that evidence of past practice revealed a "mixed experience," and apparently no substantial evidence favoring either group, the Board assigned the work to the UAW employees, thus upholding the employer's assignment. Indeed, the employer's assignment was the only significant factor remaining.

Employer-Union Agreements

Agreements between the employer and the striking union seem to have been interpreted in such a way as to favor the employer's assignment. In Local 10, Int'l Longshoremen's Union (Matson Nav. Co.), the work in dispute was the assembly of lumber on the docks used by carpenters in shoring cargo on board ships. Carpenters performed the shoring work, but the longshoremen sought the assembly work. The employer's assignment to the carpenters was upheld. The International Longshoremen's and Warehousemen's Union had always assembled lumber loads in Seattle, Portland and Los Angeles. This was also true in San Francisco before World War II, but carpenters began performing such work during the war due to manpower shortages. A few contractors in San Francisco, however, still used ILWU members. A provision in the contract between the ILWU and the employers' association (PMA) stated that "Longshore work shall include the following dock work ... (e) the building of all loads on the dock." The Board did not deal with this provision, perhaps deciding that it was offset by Matson's past practice. It also ignored an arbitration award under the contract to the ILWU. Matson's practice, however, as

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213 id. at 129-30.
pointed out above, was an exception to practice on the West Coast.\textsuperscript{216} Thus, the employer's assignment was upheld despite area practice, a contract clause and a contrary arbitration award.

The value of precedent in this area is well demonstrated by the recent case of \textit{Longshoremen's Union (American Mail Line, Ltd.\textsuperscript{217}} which involved the same parties and the same contract. In this instance the Board awarded certain cargo handling operations to members of the ILWU although the employer had originally assigned the work to the operating engineers. The employer had changed his assignment, however, and had given the work to ILWU members. Although other facts also favored the ILWU, the Board found that the "most persuasive factor" was the interpretation of the ILWU-PMA arbitrator that the work belonged to the longshoremen under the parties' mechanization agreement. The Board accepted the parties' urging to "honor their agreement as interpreted by them." In \textit{Matson}, however, an arbitration award interpreting the same automation agreement\textsuperscript{218} and also awarding the work to the ILWU was brushed aside because the Board usually gives such awards no "significant weight unless all parties to a dispute have participated in the arbitration." Thus in both cases arbitration awards between the same two parties and involving the same agreement favored ILWU's claim. One award was the "most persuasive factor" while the other award received no "significant weight." It seems more than coincidental that the Board's determination in \textit{both} cases upheld the employer's final award.\textsuperscript{219}

There may have been greater significance to the Board's apparent switch of policy, however. The changing nature of the arbitration process is well demonstrated by the recent Supreme Court decision in \textit{Carey v. Westinghouse\textsuperscript{220}} where the Court held that an employer must arbitrate a work assignment dispute if one of the unions involved so requests. Recognizing the fact that an arbitration award would not bind the second union unless it intervened or were joined, the Court nevertheless stated that

\textsuperscript{216} The Board conceded that there was no evidence of any superiority in skills, even though carpenters at Matson serve a four year apprenticeship. Efficiency favored carpenters, however, as it was thought efficient to have the selection of proper lumber on the docks performed by the same worker who would use that lumber in the hold of the ship.

\textsuperscript{217} 144 N.L.R.B. No. 138 (1963).

\textsuperscript{218} PMA-ILWU memo of agreement on mechanization and modernization.

\textsuperscript{219} See Longshoremen's Union, 147 N.L.R.B. No. 147 (1964) (Howard Terminal); Longshoremen's Union, 144 N.L.R.B. No. 140 (1963) (Albin Stevedore Co.).

\textsuperscript{220} 375 U.S. 261 (1964).
arbitration may as a practical matter end the controversy or put into movement forces that will resolve it . . . . Since § 10(k) not only tolerates but actively encourages voluntary settlements of work assignment controversies between unions, we conclude that grievance procedures pursued to arbitration further the policies of the Act.221

It is ironic that the court would require bilateral arbitration on an essentially trilateral controversy when the Board has consistently ignored such awards. Since one union has not participated in the arbitration proceedings, the Board’s past approach seems justified. Although national labor policy favors private settlements of disputes, as is clearly expressed by the exclusionary clause in section 10(k), surely an equally important policy is the promotion of arbitration which will be “final and binding.” However, without intervention an arbitration award cannot finally settle a work assignment dispute.222

Although a general critique of *Carey* is beyond the scope of this article, it is significant to note this decision in light of *American Mail Line*.223 *Carey* will probably have some effect upon the Board’s resolution of work assignment disputes. However, the Board’s giving the decision weight would conflict with its past, and more sound, approach to arbitration awards. Since the arbitrator bases his decision in large part upon the collective bargaining contract, emphasizing this award would seem to violate the Board’s mandate to “hear and determine” the dispute. Furthermore, giving weight to the bilateral arbitration proceeding raises due process problems.224

An employer-respondent union contract was used to reverse the employer’s assignment in *Printing Pressmen’s Union (Stuyvesant Press Corp.)*,225 one of the few cases in which the Board awarded the disputed work to the respondent union. The employer installed offset printing presses in 1958 but subcontracted all offset preparation until 1962 when part-time duties were assigned to a member of the ITU. However, in 1958, at the company’s request, the local employer’s association, of which Stuyvesant was a member, had notified the pressmen that it recognized their jurisdiction over the operation of offset presses. This letter was considered to be a contract by the Board and was made the basis of an

221 Id. at 265-66.
award to the pressmen. The company's preference was held "not persuasive" as the assignment was made after the "contract" with the pressmen. Although the decisive factor was the 1958 agreement which the Board, in effect, enforced, the Board noted that the work in question constituted a normal accretion to the offset press work. The Board also noted that in determining bargaining units it customarily includes offset preparation employees in a unit of offset press employees as it is clear that the former have a close community of interest with the latter. Generally, however, Board standards for the determination of bargaining units do not seem appropriate for deciding jurisdictional disputes.

Inter-union Agreements

A statewide agreement between two disputing unions was given substantial weight in Local 68, Wood, Wire & Metal Lathers Union (Acoustics & Specialties, Inc.), the first case to depart from the employer's assignment. The employer assigned acoustical ceiling installation work to its own employees, represented by the Carpenter's Union. The lathers objected because of an agreement entered into between the two unions which stipulated that the disputed work was to be within the jurisdiction of the lathers. The company stated that it was not a party to the agreement and was therefore not bound by it. As might be expected, the inter-union agreement was held not to be an agreed upon method of settlement.

The Board found that a balance existed between the equities of both unions and that many criteria determinative in the past were not present. There was no collective bargaining contract with either union; there were no Board certifications; the skills possessed by members of both unions were similar; company and area practice were split almost evenly; and efficiency was apparently not materially affected because the employer had regularly used members of both unions to perform the disputed work. Noteworthy is the fact that the carpenters could have prohibited the Board from proceeding further by arguing that they did not claim that the work was within their jurisdiction. The statement that a balance of factors exists heralds either a new approach or the creation of new factors. In cases in which both sides had equally impressive claims

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227 Hyman 450.
228 142 N.L.R.B. 1073 (1963).
or neither side had any substantial claim, the Board emphasized the employer's assignment. In *Jones* the Board gave substantial weight to a federation ruling when "no outstanding equities favored either union." However, this ruling favored the union chosen by the employer.280

In *Acoustics & Specialties*, on the other hand, the Board gave effect to the inter-union agreement even though it was not consistent with the employer's preference. The Board visualized its duty as being much like that of an arbitrator,

balancing all of the interests involved and aiming at a solution which will, in its judgment, finally resolve the dispute. . . . In attempting to resolve this dispute, individual interests in a particular case may have to be subordinated to a practical and effective solution of the overall problem.

As noted earlier the Carpenters-Lathers Agreement is an attempt by the Unions to eliminate jurisdictional disputes between them. Like all compromises it satisfies neither side completely, but is an attempt to replace the picket line by the bargaining table. That this solution may discommode an individual union member or cause an employer to divide his work between the various crafts differently than before the agreement cannot be gainsaid.231

Assuming that the factors are in balance, it is difficult to quarrel with the Board's forthright approach. The employer's assignment has been upheld in other cases in which the striking union had more substantial claims than that of the lathers in *Acoustics & Specialties*. Indeed, since all traditional factors are neutral, what balances out the employer's choice? Apparently the Board decided that the union agreement outweighed the employer's assignment.

Member Rodgers, dissenting, argued that the Board had improperly applied the *Jones* criteria. He thought efficiency, as well as economy, favored the carpenters, since carpenters were cheaper to employ and the number of lathers in the area was small.232 Furthermore, he argued, the Board should not "enforce" the private agreement because the parties had not abided by it, and its terms should not be imposed upon the employer since he was not a party to the agreement.233 The basis of the

280 International Ass'n of Machinists, 135 N.L.R.B. 1402 (1962) (J. A. Jones Constr. Co.).
231 142 N.L.R.B. at 1078-79. The majority added: "An employer's assignment of the disputed work cannot be in all cases the controlling factor in determining jurisdictional disputes." Id. at 1079 n.4.
232 Recognition of this factor is important despite the prohibition of the closed shop because craft association and trade skills often create "the practical equivalent of the closed shop." Hyman 453.
233 142 N.L.R.B. at 1082.
dissent, however, can only be that the application of traditional jurisdictional criteria favored the carpenters. The argument that the Board is "enforcing" a private agreement and "imposing" its terms on an employer seems primarily rhetorical. Furthermore, since the agreement was balanced against the employer's choice, the significance of the fact that the employer was not a party thereto diminishes. 234

The Board's approach in *Acoustics & Specialties* would be approved by those writers believing that the Board should focus on the competing claims of the unions rather than on the employer's interests. 236 Such an approach, however, follows the national policy of promoting private settlement only if the employer is not required to be a party to the private agreement. *Carey* may not be helpful on this question since one of the two parties involved in that case was the employer. Since the Board has held that the employer is a necessary party to any agreed upon method of adjustment, 239 the weight the Board will give to an inter-union agreement remains unclear. One writer has suggested that such agreements should not be significant since the "two unions may place greater emphasis on the need for agreement than on the effect of the agreement on production and efficiency." 237 The "need for agreement," however, may be more important in relation to national policy than "production and efficiency."

In any event, the Board appears to recognize limits to the application of inter-union agreements. First, the Board will find there is no dispute under section 8(b)(4)(D), and therefore none under section 10(k), when one union does not claim the work, even though that union had previously ceded the work tasks to the respondent union. 238 Second, the inter-union agreement will not be accorded significant weight where the Board finds the division of work to be "arbitrary." In *Bricklayers Union (Engineered Bldg. Specialties, Inc.)*, 239 where two competing unions had divided caulking work, the Board stated that

234 Member Leedom, dissenting, recognized the majority's balance but thought that the assignment and the efficiencies outweighed this agreement. The employer's assignment, he argued, should govern the result in the absence of countervailing factors of greater weight. *Id.* at 1083.

235 See Hyman 455.

236 Local 825, Int'l Union of Operating Eng'rs, 139 N.L.R.B. 146 (1962) (Schwerman Co.).

237 STRAND 113.


such a division of the work would be arbitrary in nature, rather than based upon legitimate jurisdictional claims. In our view, we would not be meeting our responsibilities under the Act if we were to accept such an arbitrary division of the work as the basis for our award.  

Although the contract division may not follow normal craft lines, it is not clear why the agreement was "arbitrary." Certainly, as in Acoustics & Specialties, it is justifiable to say that this was an "attempt by the unions to eliminate jurisdictional disputes between them." Indeed, the inter-union agreement in that case was given substantial weight although it was not consistent with the employer's preference. Furthermore, the Board has given effect in several cases to an employer's "arbitrary" but practical division of work based upon the destination of the finished product.  

Third, the use of the interim agreement in Acoustics & Specialties was predicated upon the existence of a "state of balance." In a recent case involving the same unions, the agreement was not held determinative because past practice and efficiency favored the lathers.

THE 10(k) AWARD

AFFIRMATIVE AWARDS AND SECTION 8(a)(3)

Assuming that a decision on the merits is reached, problems remain to be solved. Specifically, the formulation and enforcement of the award must be determined. Soon after CBS the Board in Local 66, Int'l Union of Operating Eng'rs (Frank P. Badolato & Son) upheld the employer's work assignment to respondent union even though the employer did not at that time employ any members of the respondent union. The implication that an award may be in favor of an outside union has been confirmed in later cases. Similarly, it appears immaterial that the employer is not a neutral bystander.

Even if both employee groups have the same employer there is still

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240 Ibid.
241 See, e.g., New York Mailers' Union, 137 N.L.R.B. 665 (1962) (New York Times Co.), where the employer divided work between deliverers and mailers on the basis of the ultimate destination of the product.
245 Local 991, Int'l Longshoremen's Ass'n, 137 N.L.R.B. 750 (1962) (Union Carbide Chem. Co.).
the problem of assigning work on the basis of union membership. The major Board objection to the granting of affirmative work assignments before CBS was that the enforcement of 10(k) determinations by an employer might, in the words of the act, encourage or discourage union membership by “discrimination in regard to hire or tenure of employment.”²⁴⁶ It seems clear that an award based upon union membership would conflict with sections 8(b)(2) and 8(a)(3).

Jurisdictional disputes can be distinguished from representational disputes because in the former, two or more unions seek the right to do specific work for their members, not to change the union affiliation of the other claimants of the work. The membership and representation rights of the unions are not affected; the conflict is over the right to do certain work and not to represent certain employees. The application of section 8(a)(3), however, is based on whether job rights are affected because of union membership; it does not turn on whether the discrimination is intended to change the union status of the employees discriminated against.²⁴⁷ “[T]here is no substantial evidence that Congress intended to subordinate the prohibition against discrimination to the desire for jurisdictional peace.”²⁴⁸ Since CBS expressly requires affirmative awards to be made, it seems obvious that such awards cannot be made to a particular union.²⁴⁹

The Board has attempted to avoid this problem by assigning the work in dispute to certain employees but not to their union. Thus, in Jones the Board assigned the disputed work to “electricians, who are represented by the IBEW, but not to the IBEW or its members.”²⁵⁰ Such an approach seems justifiable in light of the “trade, craft, or class” language in section 8(b)(4)(D).²⁵¹ Thus, the Board made it clear in Enterprise Ass’n of Pipefitters (All-Boro Air Conditioning Co.)²⁵² that it must decide “which of two groups of employees is entitled to the

²⁴⁷ See Radio Officers’ Union v. NLRB, 347 U.S. 17 (1954); NLRB v. Oertel Brewing Co., 197 F.2d 59 (6th Cir. 1952).
²⁴⁸ Farmer 687. But see NLRB v. Radio Eng’rs Union, 272 F.2d 713, 716 (2d Cir. 1954).
²⁴⁹ See generally Farmer 685-90.
²⁵⁰ 135 N.L.R.B. at 1411.
²⁵¹ This approach was suggested in the union’s brief in CBS. “The Board need not even make its determination in terms of the unions involved. It may resolve the jurisdictional dispute in terms of crafts . . . .” Brief for Respondent, p. 41, NLRB v. Radio & Television Broadcast Eng’rs Union, 364 U.S. 573 (1961).
work,” and, “the name of the incumbent union is of little consequence.”

In All-Boro pipe connecting work was assigned to operating engineers even though the Board conceded that plumbers traditionally performed the work. The Board will, therefore, look at the skills of employees involved rather than the traditional jurisdiction of the unions to which they belong.

Although it has been argued that a 10(k) determination cannot be a defense to an 8(b)(2) charge, the Board has decided that an award to certain employees represented by a particular union, but not to the union itself, can be a defense. In Local 502, Int'l Hod Carriers Union (Cement-Work, Inc.), the trial examiner, finding all the essentials of an 8(b)(2) charge as well as a jurisdictional dispute under section 8(b)(4)(D), decided that all issues pertaining to the alleged jurisdictional dispute should be considered before the conduct could be treated as a violation of any other section. The examiner, therefore, recommended dismissal of the 8(b)(2) and 8(b)(1)(A) charges because the challenged conduct was “inextricably interwoven” with a jurisdictional dispute.

The Board agreed with the trial examiner's recommendation and held that if the union's right to the work could be established it could assert such right as a defense to the 8(b)(2) charge. Therefore, the act would be effectuated by permitting the union to introduce evidence as to whether its members were entitled to perform the work. Members Rodgers and Leedom, dissenting, argued that jurisdictional disputes are not properly asserted as defenses to 8(b)(2) and 8(b)(1)(A) charges.

The Board has apparently assumed either that the strong policy against discriminatory displacement of employees has legislatively been outweighed by the policy of settling jurisdictional disputes or, more likely, that its awards to employees successfully avoid violations of section 8(b)(2). Admittedly, an employer's compliance with a Board award is different from unilateral discrimination, but the courts and the Board have been reluctant to compromise sections 8(a)(3) and 8(b)(2) in the past. Furthermore, it would be difficult to hold that section 10(k), a

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253 Id. at 1645.
254 Local 1, Bricklayers Union, 141 N.L.R.B. 119 (1962) (Consolidated Eng'r Co.).
256 140 N.L.R.B. 694 (1962).
procedural provision, conflicts with or modifies sections 8(a)(3) or 8(b)(2), substantive provisions which set absolute standards.

The importance of the discrimination issue, represented by the scope and emotion of the congressional debate on the subject, should be contrasted with the rather haphazard manner in which section 10(k) was incorporated into the act. Although Congress' failure to recognize the inherent conflict involved in these sections cannot be justified, the omission may be explained by the fact that Congress' sole aim in the 1947 jurisdictional dispute deliberations was the protection of employers and not protection of employee rights. Even if the Board does feel that its awards avoid the prohibitions of sections 8(b)(2) and 8(a)(3), in making its awards, it nonetheless considers factors which deal directly with the union itself and not the particular employees in question. Thus, the Board looks at Board certificates, collective bargaining contracts, traditional jurisdictional boundaries, union constitutional provisions and area practice. The wording of the award, therefore, cannot alter the fact that the employees' freedom from discrimination on the basis of union membership is compromised by the work assignment. The verbal distinction, however, is based to some extent on other factors used by the Board in 10(k) proceedings and may be the most satisfactory way to harmonize the sections.

ENFORCEMENT

If the Board upholds the employer's assignment there is little difficulty in enforcing the 10(k) award, since the 8(b)(4)(D) charge will simply be dismissed upon compliance with the Board's award. Noncompliance, on the other hand, subjects the union to both an unfair labor practice proceeding and, possibly, a damage action under section 303. Little difficulty would seem to be encountered where the respondent union is awarded the work, the employer reassigns the work, and the union originally assigned the work strikes. Although this union is a party to the dispute, the unfair labor practice charge is directed against the other union. The employer may desire Board action even though an action under section 303 may lie. He must file a section 8(b)(4)(D) charge, and a literal

261 "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." LMRA § 10(k), 61 Stat. 149 (1947), 29 U.S.C. § 160(k) (1958).
reading of the act would seem to require another 10(k) proceeding. However, since the Board has already heard and determined the dispute, it would seem reasonable to permit the Board to avoid unnecessary duplication.262

Difficulty arises, however, if the respondent union is awarded the work by the Board and the employer refuses to comply.263 The act contains no language which would make an award judicially enforceable against a recalcitrant employer. Statutory procedure for enforcement of any Board decision264 is limited to "orders" issued after unfair labor practice proceedings, and the 10(k) award is not such an "order."265 Failure of the employer to act in accordance with the 10(k) award would also not be an unfair labor practice since it is not a violation of section 8. A cease and desist order may issue after a 10(k) proceeding, not because the union is violating the Board's award, but because noncompliance removes the bar to the prohibition of section 8(b)(4)(D). Furthermore, the successful employee group has no recourse under section 303 since that section only provides a damage action for employers. Congress apparently assumed that employers were generally neutral and would voluntarily comply with Board awards.266

President Truman in his veto message noted that Board determinations were ineffective against "parties to the dispute to whom the award might be unacceptable."267 The Board seems to have reached the same conclusion.268 Furthermore, the National Labor Relations Act had not contained any limitation on the employer's right to assign work.269

From the standpoint of labor policy, it has been argued that:

Compelling an employer to accept a Board determination that he assign specific work to one group rather than another would be a totally unwarranted infringe-
ment on the rights of management and would seriously undermine collective bargaining. Such a requirement would go far beyond the negative guarantees against unfair discrimination or a refusal to bargain in good faith in regard to work assignments and would encourage unions to ignore the normal collective bargaining channels and to seek instead the assignments desired directly from the Board.\textsuperscript{270}

Although enforcement of Board awards would qualify managerial prerogatives, enforcement would be consistent with the interest in protecting the public from inter-union conflict.

The only recourse open to the employee group, then, seems to be concerted activity. Yet, such action would be literally prohibited by section 8(b)(4)(D) since in enumerating the defenses to an 8(b)(4)(D) charge Congress made no reference to employee activity in support of a Board decision. Furthermore, section 303 provides a damage action for employers for the same conduct proscribed by section 8(b)(4)(D), but does not provide a defense based upon a 10(k) award.

Although union activity in support of a Board award is literally proscribed by the statute, there is no failure of compliance on the union’s part. It would not seem to be an abuse of discretion for the Board to refuse to proceed further than a 10(k) proceeding when the charged party is willing to comply. A complaint is usually not issued under section 8(b)(4)(D) unless a determination is not complied with, since a charge is sufficient to invoke the 10(k) procedure. The Board could not proceed under section 10(b) in the absence of a complaint issued by the General Counsel, who may in his discretion refuse to issue complaints where the employer is failing to abide by a voluntary settlement or a Board award.\textsuperscript{271} There is no bar, however, to a proceeding under section 10(b) following noncompliance with a 10(k) determination.

That the General Counsel or the Board may refuse to proceed is a devastating commentary on congressional thoroughness. It seems incongruous that the policy of settling jurisdictional disputes based upon the protection of the public and employers from work stoppages can only be enforced in some cases by permitting a strike which is literally prohibited by the act. In fact even this resolution is not satisfactory since the union may be too weak to force compliance. Thus, although it seems clear that no direct enforcement procedure against employers exists, even indirect pressures may be insufficient.

It would seem anomalous for the Board to recognize a union’s right to certain work and then deny economic coercion to obtain such work.

\textsuperscript{270} Farmer 695.
\textsuperscript{271} Manhattan Constr. Co. v. NLRB, 198 F.2d 320 (10th Cir. 1952).
Section 10(k) determinations thus would become little more than advisory opinions, seemingly contrary to the Supreme Court's assumptions in CBS. Yet it is not clear that the Board will dismiss an 8(b)(4)(D) charge when the employer refuses to comply. As mentioned earlier, the dismissal of a charge under section 10(k) is based upon “compliance” by the parties, and a 10(k) award is not expressly made a defense to an 8(b)(4)(D) unfair labor practice. Indeed, a 10(k) award is preceded by a finding of reasonable cause of an 8(b)(4)(D) violation; therefore, a 10(k) award does not necessarily mean that section 8(b)(4)(D) has been violated. Congressional intent and statutory language would then seem to require the Board to proceed with an unfair labor practice proceeding when the successful union in the 10(k) proceeding continues to strike. Such a harsh approach could be modified by refusing to proceed unless the employer demonstrates compliance272 or by giving the Board discretion based upon the grounds used in determining the dispute.273 Although most employers will probably comply with a Board determination, the lack of adequate enforcement machinery is a deficiency which should be corrected.

JURISDICTIONAL DISPUTES IN THE COURTS
INJUNCTION PROCEEDINGS

Whenever a regional representative has reasonable cause to believe that conduct violating section 8(b)(4)(D) has occurred and a complaint should be issued, he may petition a federal district court for injunctive relief under section 10(l).274 In jurisdictional disputes the regional officer is authorized to seek injunctive relief only when "such relief is appropriate"; his action is not mandatory as in other 10(l) injunction proceedings. The court's function is limited to the question of whether, based upon the evidence, the petitioner has "reasonable cause to believe" that the charges are true;275 there is no requirement that the court decide whether a violation of the act has in fact been committed.276 The Board need not "conclusively show the validity of the propositions of law underlying its charge; it is required to demonstrate merely that the propositions of law which it has applied to the charge are substantial and not frivolous.277

272 McGuinn 124-25.
273 Farmer 696.
275 Douds v. International Longshoremen's Ass'n, 242 F.2d 808, 810 (2d Cir. 1957).
276 Madden v. International Organization of Masters, 259 F.2d 312 (7th Cir. 1958).
Although there is no statutory authorization for requiring initiation of a 10(k) proceeding before seeking a 10(l) injunction, nonetheless the district court in *Lebus v. Local 60, Plumbers Union*\(^{278}\) refused to enjoin union conduct because no 10(k) proceeding had been initiated. In that case the regional director had combined an 8(b)(4)(A) “hot cargo” charge with a jurisdictional charge in requesting the injunction. The court found no merit in the first charge and expressed doubt about the second. The court deemed a 10(l) injunction, pending a determination of the unfair labor practice under section 10(c), “at best, premature.”\(^{279}\) Whether the court’s approach will be followed in cases where only a jurisdictional charge is filed is unclear. In any event, the unfair labor practice is not determined under section 10(k). This determination is only reached if the respondent union refuses to comply with an adverse award, long after a 10(l) injunction is needed.

Furthermore, a conflict of decisions has arisen. In *McLeod v. Newspaper Deliverers Union*\(^{280}\) the court rejected a union defense that the dispute should be resolved internally through the union grievance and arbitration procedures. In *McLeod*, the competing union, the Mailers, had refused to submit the dispute to arbitration, and processing the dispute through the Deliverers’ administrative machinery alone would not resolve the dispute. The court, however, stated that even if all the parties had agreed to arbitration, “it would mean only that the Board would be precluded by section 10(k) from making a determination as to which union is entitled to the disputed work.”\(^{281}\) It would not preclude the Board from instituting this injunction proceeding.\(^{282}\)

The conflict between *Lebus* and *McLeod* is apparent. The *McLeod* court would issue an injunction when it finds that the petitioner has reasonable cause to believe that the respondent union is engaged in conduct violating 8(b)(4)(D) irrespective of whether the Board may quash notice of the 10(k) hearing because there was an agreed method of settlement. On the other hand, the court in *Lebus* attempted to tie sections 10(k) and 10(l) together, and, unlike the *McLeod* court, may have attempted to interpret the “appropriate” clause of section 10(l).

Another problem facing the courts is that of defining the scope of

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\(^{279}\) Id. at 394.
\(^{281}\) Id. at 440.
\(^{282}\) “It is well settled that a § 10(k) hearing and determination is not a prerequisite to the institution of § 10(l) proceedings.” *Ibid.*
section 8(b)(4)(D). It was noted above that the Board has narrowly defined jurisdictional disputes to exclude disputes between an employer and one group of employees. The same problem has been presented to the courts in 10(l) proceedings, and one court has denied an injunction because of the Board's rationale. In Penello v. Local 59, Sheet Metal Workers Ass'n the court decided that section 10(k) was an integral part of the policy expressed in section 8(b)(4)(D) and that both must be read together. Therefore, if there were no "dispute" which could be determined under section 10(k), there could be no violation of section 8(b)(4)(D). Conversely, if conduct were within section 8(b)(4)(D), it would present a dispute "cognizable by the Board in a Section 10(k) hearing."

The Penello court then interpreted the sections as requiring two rival and competing groups of employees. Like the Board, the court emphasized the language in CBS that "the dispute" under section 10(k) "can have no other meaning except a jurisdictional dispute under section 8(b)(4)(D) which is a dispute between two or more groups of employees over which is entitled to do certain work for an employer."

The court reasoned that section 8(b)(4)(D), as well as section 10(k), could not apply to a situation in which there were not two competing groups of employees. Since there is no enforcement procedure against an employer, a 10(k) determination in favor of the respondent union would not resolve the dispute but would merely take respondent's picketing out of the act's proscriptions. It is not inevitable that the respondent would be awarded the work, however, and the lack of enforcement procedures against an employer may only be congressional oversight. The statute's legislative history does not conclusively exclude from coverage a dispute between an employer and a single union, and the statutory language does literally include such disputes. Ironically, the Penello court, by denying the injunction because there was no violation of section 8(b)(4)(D) also takes the respondent's picketing out of the act's proscriptions.

The Penello holding has not gone unchallenged. The Eighth Circuit has held that the jurisdictional dispute provisions are applicable when

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284 Id. at 464.
285 Id. at 466, quoting 364 U.S. at 579.
286 "Picketing in such a situation [where the picketing union is not a party to the 10(k) proceeding] is not proscribed by § 8(b)(4)(D) because it does not involve a dispute between rival groups of employees over particular work." Id. at 471.
Indeed, the conduct held not to be a jurisdictional dispute by the Board in *Safeway* was enjoined by a district court after the decision in *CBS*. The respondent union in *Safeway* had moved to dissolve an injunction issued prior to *CBS*. The court rejected the union's claim, a contention later accepted by the Board, that *CBS* defined "dispute" as a controversy between two competing employee groups. The court correctly pointed out that the question before the Supreme Court in *CBS* was not whether the controversy was covered by section 8(b)(4)(D), but rather concerned the functioning of the Board in 10(k) hearings. Jurisdictional disputes involving a neutral employer, who probably will be more amenable to any Board award, may offer greater likelihood of final settlement and industrial peace. It is not clear, however, that all other jurisdictional disputes are excluded from section 10(k) and, therefore, from section 8(b)(4)(D).

**SECTION 303**

Employers may bring suits in federal courts for damages caused by union activity which violates section 8(b)(4)(D). By referring to 8(b)(4)(D), section 303(a) incorporates the standards necessary to a determination that section 8(b)(4)(D) has been violated. A 10(k) award is not expressly made a defense to a 303 action, so the Board could conceivably permit what a court declared unlawful. Even if the award were a defense, however, the incongruity remains because a 10(k) proceeding is not a prerequisite to a damage action. Thus an employer, by bypassing Board procedures, insures that the defense can never be raised. Moreover, parallel actions before the Board and a district court raise the possibility of inconsistent results, though some inconsistency must be expected whenever parallel actions are permitted.

To resolve this apparent inconsistency, courts could defer to the administrative competence of the Board. Since the employer need not initiate an 8(b)(4)(D) charge, however, there may be no proceeding to which to defer decision. Moreover, deferral would have no

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287 *Local 978, Carpenters v. Markwell*, 305 F.2d 38, 47 (8th Cir. 1962).
relevance unless a 10(k) award is to have some effect upon the outcome of the damage suit. As a matter of policy, it may be wise for courts to give substantial weight to a Board decision, but there is no statutory language making this mandatory. Furthermore, as pointed out earlier, a 10(k) award does not decide whether an unfair labor practice was committed, and a union which is successful in a 10(k) proceeding may have violated section 8(b)(4)(D). The only practical solution is to limit section 303(a), as well as section 8(b)(4)(D), to section 10(k). The Board has held that section 8(b)(4)(D) is not “violated” until there is noncompliance with a 10(k) award. Similarly, there may be no violation of section 303 until a 10(k) proceeding is held. Thus, if respondent union is successful in a 10(k) proceeding, there would be no violation of either section 303(a) or section 8(b)(4)(D). Here again, however, there is no statutory reason why a court cannot proceed with a damage action in the absence of a 10(k) determination.

An assumption implicit in the above discussion is that inconsistent results are to be avoided. However, such inconsistencies as may exist do not stem from different interpretations of the parallel provisions, but only from the fact that section 10(k) is a necessary step in the protection afforded by section 8(b)(4)(D) but not in that afforded by section 303(a). As pointed out, it is not inevitable that a 10(k) award will be considered a defense to an action under section 8(b)(4)(D). Such a determination may be regarded as a mere advisory opinion which may be rejected by the employer, or as no more than a procedural bar to further Board action on behalf of a noncomplying employer. It is evident that Congress desired an independent tribunal to pass on the legality of concerted activity in support of jurisdictional claims, and was not primarily concerned with providing a symmetrical framework.

The Supreme Court has already answered part of this dilemma. In International Longshoremen's Union v. Juneau Spruce Corp., the Court held section 10(k) to be an administrative limitation upon the Board but not upon a court. Although the case stands for the narrow prop-

203 In a complaint proceeding the standard is “preponderance of the evidence.” See International Longshoremen's Ass'n, 142 N.L.R.B. 257 (1963) (National Sugar Ref. Co.), where the Board found that the trial examiner erred in a complaint proceeding after a 10(k) award in failing to evaluate the evidence independently and by concluding that he was bound by a prior 10(k) proceeding. The error was harmless, however, as the Board based its findings on a de novo review of the record.

204 Farmer 690-91; McGuinn 124-25.


206 Id. at 243-45.
A cease and desist order is not a prerequisite to the recovery of damages under section 303, it is evident that the Court felt that a 10(k) determination also was not necessary. The practical result of the decision, then, is that conflicting decisions are possible.

Even though conduct may "violate" section 8(b)(4)(D), however, there may be no 10(k) proceeding. The Board, for example, will quash notice of a 10(k) hearing if the parties have voluntarily adjusted the dispute or submitted evidence of agreed-upon methods of settlement. There is no reason to assume that section 303 was not intended to compensate for damages suffered during the strike, even though no 10(k) award is made.297

In light of the Board's limited pre-CBS conception of its duty under section 10(k), it is arguable that the CBS decision and its directive to render affirmative awards will require a reconsideration of Juneau Spruce. Although the Court in CBS held that "substantive symmetry" between the sections was not necessary, it did not at that time have to decide the effect of a 10(k) award upon section 303(a). The Court's view of "independence" should be relaxed so that there could be no liability in damages before a 10(k) determination. Damages could lie, however, for actions contrary to a 10(k) award prior to an unfair labor practice adjudication under section 10(c). Thus, the union would be further induced to comply with the award. Similarly, a section 303 action could be denied to an employer who refuses to be bound by the 10(k) determination. An opposite approach would not only dilute the effectiveness of the 10(k) proceeding but would weaken private arbitration as well, because the employer, despite an arbitrator's adverse award, could recover damages for a strike caused by an assignment which violated traditional jurisdictional lines or area practice. Limiting the scope of section 303(a), on the other hand, would continue to give the employer the protection of section 8(b)(4)(D) and, at a later time, section 303 as well.298

CONCLUSION

Certainly problems arise whenever decisions are based upon the existence and the balancing of a list of criteria. Not only must the criteria be found, but they must be accorded values or weights. Accepting these problems as inevitable, nonetheless a review of NLRB decisions suggests that criteria have been shuffled and shifted to justify a preordained re-

298 See id. at 136-39 (1961); Farmer 690-93; McGuinn 126-27.
There can be little quarrel with most of the factors set forth in the *Jones* opinion. Although the Board’s decisions will not parallel those of private arbiters such as the Joint Board, perfect symmetry, even if possible to achieve, is probably unwise. The Board’s traditional arbitration standards must be applied with a recognition of the Board’s statutory role as administrator of the entire act. Especially important in light of the significance of the antidiscrimination principle of sections 8(a)(3) and 8(b)(2) are the Board’s efforts to look to the particular workers affected and not to their unions. Although the Board’s attempt to avoid the thrust of the antidiscrimination sections is not entirely satisfactory, the Board seems to be making the best of an extremely difficult situation.

Furthermore, recent cases demonstrate that the Board is willing to look beyond the employer’s assignment. In two such cases it has overturned the employer’s assignment in the absence of an inter-union agreement, solely on the basis of the *Jones* criteria. Both awards were based upon the nature of the work, the particular productive process and the skills required.

An area of serious concern is the effect of Board decisions upon private methods of settlement. Surely, the premium given to employers’ assignments has not encouraged resort to private arbitration, at least on the part of employers and the employee groups assigned the disputed work. The existence of alternative forums with different standards will inevitably induce a party to choose one forum over another. The Board, however, by its disregard of prior Joint Board awards has not improved the situation.

Statutory conflicts in addition to those discussed in this article plague the Board. For example, the relationship of section 8(b)(4)(D) to section 8(b)(4)(B) has been troublesome. Although the Board’s position that the sections are mutually exclusive may be retained, a redefinition of secondary boycott, at least in light of the particular characteristics of the construction industry, is probably required. While this conflict of standards, forums and statutes cannot be justified by referring to the

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301 See O’Donoghue 334-37.
302 See *Ibid*. See also Local 5, United Ass’n of Journeymen and Apprentices of the Plumbing Indus., 145 N.L.R.B. No. 157 (1964) (Arthur Venneri Co.).
“evils” of jurisdictional disputes, popular support and political considerations in 1947 were not conducive to thorough legislative examination. It seems justifiable to point out, as has Professor Mann, that the legislation has “suffered from too many friends and not enough critics.”

203 Mann 59.