BYU Law Review

Volume 1983 | Issue 2 Article 4

5-1-1983

Arbitration of Representational Issues: A Critique of Carey

David G. Mangum

Follow this and additional works at: https://digitalcommons.law.byu.edu/lawreview

Part of the Dispute Resolution and Arbitration Commons, and the Labor and Employment Law Commons

Recommended Citation

David G. Mangum, *Arbitration of Representational Issues: A Critique of Carey*, 1983 BYU L. Rev. 349 (1983).
Available at: https://digitalcommons.law.byu.edu/lawreview/vol1983/iss2/4

This Comment is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

COMMENTS

Arbitration of Representational Issues: A Critique of *Carey*

I. INTRODUCTION

Section 203(d) of the Taft-Hartley Act declares that "[f]inal adjustment by a method agreed upon by the parties is . . . the desir[ed] method for settlement of grievance disputes arising over the application or interpretation of an existing bargaining agreement."[1] Since that congressional declaration of policy, the presumption in favor of arbitration as a dispute resolution mechanism has become a pervasive element of labor law. However, that presumption has been extended beyond its rational boundaries—it is no longer limited to the areas of "application or interpretation of existing collective bargaining agreements," the limits of the statutory justification for arbitration. Indeed, arbitration has become an accepted practice outside its conventional limitation: it is no longer limited to disputes within the expertise of arbitrators the resolution of which has been committed to an arbitrator upon the consent of all parties involved.[2] This trend is nowhere more alarming than in the resolution of representational disputes. In order to determine whether representation questions should be submitted to arbitration, this Comment first discusses the unique status of representational questions and then describes the current state of the law in this area by analyzing court decisions dealing with arbitration of representational questions. The Comment concludes that the current tendency to permit and even encourage arbitration of representational disputes is inconsistent with the purposes of arbitration and violates employee rights of self determination as

---

1. Labor-Management Relations (Taft-Hartley) Act § 203(d), 29 U.S.C. § 173(D) (1976).

2. Bernstein, *Nudging and Shoving All Parties to a Jurisdictional Dispute into Arbitration: The Dubious Procedure of National Steel*, 78 HARV. L. REV. 784, 785, 789 (1965).

HeinOnline -- 1983 BYU L. Rev. 349 1983

well as the primary jurisdiction of the NLRB over representational matters.

II. THE UNIQUE STATUS OF REPRESENTATIONAL QUESTIONS

Section 7 of the National Labor Relations Act provides that

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively *through representatives of their own choosing*, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall have the *right to refrain from any or all such activities.*[3]

This employee right of self-determination has been termed the "fundamental policy of the NLRA."[4] Representational issues inherently implicate this "fundamental policy" and are therefore handled with great care by the courts and the NLRB.

The courts have consistently held that the section 7 rights of employees cannot be limited by contract between a union and an employer.[5] *Florida Marble Polishers Health & Welfare Trust Fund v. Edwin M. Green, Inc.*[6] is indicative of the approach taken. In *Florida Marble Polishers* two pool construction companies—one union, the other nonunion—were owned by the same person.[7] The union brought suit claiming that both companies were bound by the union's collective bargaining agreement and that, as a result, it was entitled to fringe benefit contributions based on the work performed by the nonunion employees.[8] The United States Court of Appeals for the Fifth Circuit noted that even though the nonunion company clearly qualified as an "employer" under the collective bargaining agreement between the union and the union company for the purposes of requiring fringe benefit contributions,[9] the contractual provision was unenforceable since "the parties to the agreement ha[d] undertaken, in effect, to usurp not only the [nonunion] employees'

---

3. 29 U.S.C. § 157 (1976) (emphasis added).
4. Pilot Freight Carriers, Inc. v. International Bhd. of Teamsters, 495 F. Supp. 619, 640 (M.D.N.C. 1980), *vacated on other grounds*, 659 F.2d 1252 (4th Cir. 1981). *See also* Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 512, 521 (5th Cir. 1982).
5. *See, e.g.*, Sheraton-Kauai Corp. v. N.L.R.B., 429 F.2d 1352, 1357 (9th Cir. 1970).
6. 653 F.2d 972 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 2235 (1982).
7. *Id.* at 973.
8. *Id.* at 974-75.
9. *Id.* at 976.

HeinOnline -- 1983 BYU L. Rev. 350 1983

right of self-determination under section 7 of the NLRA . . . but also the authority of the NLRB under section 9(b) . . . to determine the appropriate bargaining unit for those employees."[10] The union, in essence, was denied the benefit of its bargain under the collective bargaining agreement because the court found more important the nonunion employees' right of self-determination.

Similarly, the NLRB has been reluctant to sanction accretions to bargaining units because of their impact on the section 7 rights of the accreted employees.[11] In *Melbet Jewelry Co.*,[12] the NLRB was called upon to determine whether employees of a newly opened store could be considered an accretion to a preexisting unit encompassing the employer's other stores in the same chain. The collective bargaining agreement between the employer and the employees at the previously opened stores contained an accretion clause which clearly covered the new store. The union and the employer agreed that the new store constituted an accretion to the old unit.[13] Nonetheless, the NLRB found the accretion inappropriate and held that the union and the employer had committed an unfair labor practice under section 8 of the NLRA by treating the employees as an accretion to the old unit.[14]

> Assuming that both a single store unit and a multistore unit were appropriate, it does not follow . . . that the Board should permit the employees of the single store to be subjected to a contract between their employer and a union without their having had the opportunity to determine for themselves whether or not they wish to be represented by the union.
>
> The concept of Section 9(b), the selection of an appropriate unit to assure employees the fullest freedom in exercising the rights guaranteed by the Act, is subordinate to Section 7 rights of organization, and is designed to serve the Section 7 rights. Allowing the extension of the contracts covering other stores to the employees in this single store would do serious violence to the mandate that employees' rights are to be protected and that appropriate unit findings under Section 9(b) must be designed to preserve those rights.[15]

---

10. *Id.* (citations omitted).
11. Boire v. International Bhd. of Teamsters, 479 F.2d 778, 795 (5th Cir. 1973).
12. 180 N.L.R.B. No. 24, 1969 NLRB Dec. (CCH) ¶ 21,453 (1969).
13. *Id.* at 27,445.
14. *Id.* at 27,446.
15. *Id.* at 27,445-46.

HeinOnline -- 1983 BYU L. Rev. 351 1983

The NLRB is generally more strict in deciding accretion issues than in making unit determinations because, in the latter, all affected employees are permitted to vote in selecting their bargaining representative, while in the former, an accretion finding forecloses a vote by the accreted employees.[16]

Despite express authority prohibiting unions and employers from infringing the section 7 rights of employees by contract, the courts have paradoxically been willing to allow those rights to be infringed by subjecting representational disputes to adjudication in bilateral arbitration proceedings to which the employees whose self-representation rights are being affected are not party.

III. Arbitration of Representational Questions

A. *The* Carey *Decision*

In the seminal case of *Carey v. Westinghouse Electric Corp.*,[17] the United States Supreme Court held that arbitration was appropriate in a jurisdictional dispute between two unions and an employer.[18] In its analysis the Court carefully distinguished between two types of jurisdictional disputes: (1) work assignment disputes, controversies over whether certain work should be performed by members of one union or another, and (2) representational disputes, controversies over which union should represent the employees performing the particular work.[19] However, in the final anaysis the Court determined that arbitration was appropriate regardless of the type of jurisdictional dispute involved.[20] The Supreme Court ordered arbitra-

16. *See Boire*, 479 F.2d at 796-98.
17. 375 U.S. 261 (1964).
18. *Id.* at 272.
19. *Id.* at 263.
20. *Id.* at 272.

In this aspect the Court's holding is somewhat surprising. One of the primary justifications for allowing arbitration in the majority opinion is the lack of machinery under the NLRA to resolve work assignment disputes short of a strike. *Id.* at 263-64. In addition, much of the majority's rationale for allowing arbitration even if the dispute were deemed representational is based on the inherent work assignment characteristics of all jurisdictional disputes. *Id.* at 268-70. Yet no one other than the Supreme Court and the union seeking to compel arbitration seemed to have much difficulty in concluding that the dispute was representational and thus subject to immediate resolution by the NLRB. *Id.* at 269-70, 274; Westinghouse Elec. Corp., 162 N.L.R.B. No. 81, 1967 NLRB Dec. (CCH) ¶ 21,019, at 27,248 (1967). In fact even the arbitrator of the dispute involved in *Carey* recognized that the dispute was representational. 1967 NLRB Dec. (CCH) at 27,248.

HeinOnline -- 1983 BYU L. Rev. 352 1983

tion of the dispute even though it recognized that the arbitration would not be likely to end the dispute since only one of the two warring unions was party to the arbitration.[21] In compelling arbitration the Court displayed unprecedented faith in the "pervasive, curative effect" of arbitration but tempered its deference with the reminder that the "superior authority of the Board [could] be invoked at any time."[22]

In dissent, Justice Black, joined by Justice Clark, recognized that authorizing bilateral arbitration of trilateral jurisdictional disputes would infringe the section 7 rights of the employees involved[23] and expressed fear that the presumption in favor of arbitration had been unduly extended:

> The Board can make final settlements of such disputes. Arbitration between some but not all the parties cannot. I fear that the Court's recently announced leanings to treat arbitration as an almost sure and certain solvent of all labor troubles has been carried so far in this case as unnecessarily to bring about great confusion and to delay final and binding settlements of jurisdictional disputes by the Labor Board, the agency which I think Congress intended to do that very job.[24]

Justice Black's fears were well founded. Arbitration is not a panacea. Indeed, the post-*Carey* development indicates that the cure of arbitration, at least in the context of representational disputes, is worse than the disease.

Two years after *Carey* the inevitable occurred. In *New Orleans Typographical Union No. 17 v. N.L.R.B.*,[25] the United States Court of Appeals for the Fifth Circuit was confronted with conflicting judgments by the NLRB and an arbitrator in a work assignment dispute. The arbitrator, not surprisingly, had awarded the work to the only union that was party to the bilateral arbitration, while the NLRB had awarded the work to the competing union.[26] The court, citing *Carey* as authority,[27] va-

---

21. 375 U.S. at 265.

22. *Id.* at 272.

23. *Id.* at 274 (Black, J., dissenting).

24. *Id.* at 276.

25. 368 F.2d 755 (5th Cir. 1966).

26. *Id.* at 761. The NLRB awarded the work to the union that the employer selected to represent the new employees originally. *Id.* at 759.

It has been argued that the NLRB almost exclusively rules in favor of the employer's preference in work assignment disputes. *See* Leslie, *The Role of the NLRB and the Courts in Resolving Union Jurisdictional Disputes*, 75 COLUM. L. REV. 1470 (1975). If this is true it is clear that the section 7 rights of new employees may be infringed as easily by the NLRB's rubber stamp of the employer's preference as by the arbitrator's award.

27. 368 F.2d at 763.

HeinOnline -- 1983 BYU L. Rev. 353 1983

cated the district court judgment enforcing the aribtrator's award and upheld the NLRB's assignment of the work.[28]

The Fifth Circuit's decision was undoubtedly consistent with *Carey*, but at the same time, it had the effect of expanding the *Carey* holding. In *Carey* the union had not instituted a strike to compel Westinghouse to assign the work to any particular union.[29] Consequently, section 8(b)(4)(D) of the NLRA was inapplicable and the NLRB had no jurisdiction over the dispute.[30] The resulting hiatus in the regulatory scheme was cited as authority for allowing arbitration of the jurisdictional dispute.[31] In *New Orleans Typographical Union*, on the other hand, arbitration commenced after the union had called a strike and the employer had invoked the authority of the NLRB.[32] The Fifth Circuit approved the lower court's order compelling arbitration during the pendency of the NLRB proceeding, even though it recognized that an inconsistent determination by the NLRB would take precedence. When the NLRB decided in favor of the competing union, the court vacated the arbitrator's award, thereby nullifying the entire court-ordered arbitration process. The appellate court found the *Carey* opinion controlling, explicitly refusing to recognize the factual difference in *Carey*: that no NLRB proceeding was pending or available. The court noted that the Supreme Court had said that the "superior *authority* . . . of the Board, not its procedures, [could] be invoked at any time."[33]

B. *The* South Prairie *Opinion*

In *South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers*,[34] a union representing employees of two highway construction companies wholly owned by the same parent corporation sought to have its collective bar-

28. *Id.* at 767-68.
29. *Carey*, 375 U.S. at 263.
30. *Id.* at 263-64.
31. *Id.* at 264.
32. *New Orleans Typographical Union*, 368 F.2d at 760-61.
33. *Id.* at 767 (emphasis in original). *Contra* International Bhd. of Boilermakers v. Combustion Eng'g, Inc., 337 F. Supp. 1349, 1351 (D. Conn. 1971) (*Carey* distinguished and suit to enforce arbitrator's award stayed pending outcome of NLRB proceeding).
34. 425 U.S. 800 (1976).

HeinOnline -- 1983 BYU L. Rev. 354 1983

gaining agreement with one company applied to the other. The NLRB denied the union's request since, in the Board's opinion, the two companies constituted separate employers.[35] The United States Court of Appeals for the District of Columbia Circuit set aside the Board's decision, holding that the Board's finding of separateness was not supported by substantial evidence.[36] Having determined that the Board had erred on this issue, the appellate court entered judgment that the two companies constituted an appropriate bargaining unit and that, therefore, the employers had committed an unfair labor practice by refusing to extend the collective bargaining agreement to the employees of both firms.[37]

The Supreme Court vacated that portion of the appellate court's judgment which related to the appropriateness of the dual-firm bargaining unit, holding that the court had invaded the statutory province of the NLRB by even reaching that issue.[38]

> In foreclosing the Board from the opportunity to determine the appropriate bargaining unit under [section] 9, the Court of Appeals did not give "due observance [to] the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution."[39]

The Supreme Court's reasoning in *Carey* conflicts with its reasoning in *South Prairie.* In *Carey* the Court allowed an arbitrator to decide a representational issue that the Court prohib-

---

35. *Id.* at 801-02.

36. *Id.* at 802. The court of appeals identified the relevant criteria in determining whether the separate entities constituted a single employer—interrelation of operations, common management, centralized control of labor relations, and common ownership—and, after an independent review, concluded that the NLRB's finding was not warranted by the record. *Id.* at 802 n.3, 803.

37. *Id.* at 803.

38. *Id.* at 803-04. The Supreme Court emphasized that a finding that the two companies constituted a single employer did not establish that the employer-wide unit was appropriate. Whether the employer-wide unit was appropriate depended on the existence of a sufficient "community of interest" between the employees of the two firms. The Court held that this decision should be made initially by the Board. *Id.* at 805. The Supreme Court's decision in *South Prairie* reemphasizes the point made above that additional considerations are necessary when making decisions concerning the application of collective bargaining agreements to nonsignatories when representational issues are involved.

39. *Id.* at 806 (quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 141 (1940)).

HeinOnline -- 1983 BYU L. Rev. 355 1983

ited the court of appeals from even considering in *South Prairie.* There is no apparent basis for concluding that an arbitrator's invasion of the NLRB's province under section 9 is any less intrusive than a court's invasion. One could argue that the intrusion permitted by *Carey* is less severe given the Court's reminder that the arbitrator's decision was only temporary and that the "superior authority of the Board may be invoked at any time";[40] however, a court's decision on a representational matter could be made just as temporary and subject to the Board's superior authority.[41] Indeed, the net effect of the Fifth Circuit's decision in *New Orleans Typographical Union* was to give an NLRB decision precedence over a court decision on a representational matter.[42] It seems reasonable to conclude that more deference should be given to courts than to arbitrators in deciding representational questions since all interested parties may intervene in a court proceeding while arbitration proceedings are limited to only those who are party to the collective bargaining agreement.[43]

The conflict between *Carey* and *South Prairie* may be resolved in either of two ways: (1) *Carey* may be read as an arbitration exception to *South Prairie,* or (2) *South Prairie* may be read as a partial overruling of *Carey*—limiting *Carey* to arbitration of nonrepresentational questions. Unfortunately, the courts appear to have opted for the former. The selection of the first alternative seems to have been made by default since, subsequent to *South Prairie,* the courts have demonstrated an uncanny knack for ignoring the apparent conflict.[44]

40. *Carey,* 375 U.S. at 272.

41. For an opposing opinion see Computer Sciences Corp. v. N.L.R.B., 677 F.2d 804, 808 (11th Cir. 1982).

42. 368 F.2d at 767.

43. Representational questions are inherently multilateral while arbitration is bilateral. One author in particular has attempted to overcome this general defect in arbitration proceedings by proposing quasi-compulsory trilateral arbitration. *See* E. Jones, *On Nudging and Shoving the National Steel Arbitration Into a Dubious Procedure,* 79 HARV. L. REV. 327 (1965). For a critique of Professor Jones' handling of the National Steel Arbitration, see Bernstein, *Nudging and Shoving All Parties to a Jurisdictional Dispute Into Arbitration: The Dubious Procedure of National Steel,* 78 HARV. L. REV. 784 (1965).

44. A LEXIS search conducted January 21, 1983, revealed that the *Carey* case has been cited in 212 subsequent federal court cases, while *South Prairie* has been cited in 62 such cases; yet in only six subsequent federal court decisions have both cases been cited. Those cases are Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489 (5th Cir. 1982); Local Union 204, Int'l Bhd. of Elec. Workers v. Iowa Elec. Light & Power Co., 668 F.2d 413 (8th Cir. 1982); Local No. 3-193 Int'l Woodworkers v. Ketch-

HeinOnline -- 1983 BYU L. Rev. 356 1983

C. Subsequent Case Development

In *Retail Clerks Local 588, Retail Clerks International Association v. National Labor Relations Board*,[45] the United States Court of Appeals for the District of Columbia Circuit made it clear that the *Carey* doctrine had survived *South Prairie*. *Retail Clerks* involved an employer who operated food and drug stores on the same premises, but in separate buildings. The Drug Clerks Union obtained the right to represent the drug store employees when it prevailed over the Retail Clerks Union (which represented the food store employees) in an NLRB certification election.[46] In 1974, ten years after the election, the employer remodeled the stores so that the drug and food stores occupied the same building and shared a checkout area.[47] The Retail Clerks Union claimed the right to represent the drug store employees pursuant to a provision in their collective bargaining agreement with the employer which provided that the Retail Clerks would be the representative of any employees hired to work in any nonfood departments that the employer might institute.[48] The union requested arbitration of the dispute under the grievance mechanism outlined in the agreement.[49] The employer refused to arbitrate and filed charges with the NLRB alleging that the union's demand for arbitration constituted an unfair labor practice.[50]

The NLRB ruled that the Retail Clerks Union had committed an unfair labor practice by insisting that the employer bargain with a unit which the Board had previously found inappropriate.[51] The Board concluded that since it alone was authorized to finally decide unit disputes and since a union and an employer could not, absent a Board accretion determination, lawfully agree to expand a unit to include employees already represented by another union, "arbitration [could not] *fully* settle the

ikan Pulp Co., 611 F.2d 1295 (9th Cir. 1980); Waggoner v. R. McGray, Inc., 607 F.2d 1229 (9th Cir. 1979); Central Warehousemen & Helpers Local 767 v. Standard Brands, Inc., 579 F.2d 1282 (5th Cir. 1978), *cert. dismissed*, 443 U.S. 913 (1979); Pilot Freight Carriers, Inc. v. International Bhd. of Teamsters, 495 F. Supp. 619 (M.D.N.C. 1980), *vacated*, 659 F.2d 1252 (4th Cir. 1981).

45. 565 F.2d 769 (D.C. Cir. 1977).

46. *Id.* at 770.

47. *Id.* at 771.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 774.

HeinOnline -- 1983 BYU L. Rev. 357 1983

dispute [and] . . . even requesting the employer to go through the process is so coercive as to be an unfair labor practice."[52]

The D.C. Circuit set aside the NLRB's finding and ruled that arbitration was appropriate on the ground that the remodeling changes had "created a sufficiently different unit determination situation from that faced by the Board in its 1964 certification proceeding."[53] Thus, the court found arbitration appropriate even though the "superior authority of the Board" had been invoked when the employer filed the unfair labor practice charge.[54]

Retail Clerks clearly establishes that the presumption in favor of arbitration of representational questions continued after *South Prairie*. The court cited *Carey* as binding authority that arbitration was appropriate even though "the arbitration process . . . would not have included the rival union, . . . [and] would not necessarily have resolved all of the issues implicated by the dispute, and [even though] a more complete resolution of the issues might have followed a Board unit-clarification action under section 9(c)(1)."[55] The " '[pervasive] curative effect'[56] that often accompanies arbitration" was deemed to outweigh "the 'conjectural' 'hazard of duplicative proceedings.' "[57] Notably absent from the D.C. Circuit's analysis is any mention of the section 7 rights of the drug store employees that the Supreme Court recognized and sought to protect in *South Prairie*.[58]

In *Local No. 3-193, International Woodworkers v. Ketchikan Pulp Company*,[59] the United States Court of Appeals for the Ninth Circuit considered the Supreme Court's decisions in

---

52. *Id.* at 775 (emphasis in original).

53. *Id.* at 774.

54. *Carey*, 375 U.S. at 272. This reading of the D.C. Circuit's opinion in *Retail Clerks* may be significantly limited since the employer arguably used the wrong device to invoke the Board's authority. The employer presented the issue in an unfair labor practices proceeding, while *Carey* presumed that the NLRB's authority would be invoked through a unit clarification petition. It is obvious that different standards are applied in making unit clarifications than are used in deciding whether a party has committed an unfair labor practice. *See Retail Clerks*, 565 F.2d at 776-78.

55. 565 F.2d at 777.

56. *Id.* (quoting *Carey*, 375 U.S. at 272).

57. *Id.* (quoting *Carey*, 375 U.S. at 273 (Harlan, J., concurring)). The "pervasive curative effect" of arbitration even in representation cases was also recognized in Retail Store Employees Union, Local 400 v. Great Atl. & Pac. Tea Co., 480 F. Supp. 88 (D. Md. 1979) (arbitration deferred to despite recognition of implication of section 7 rights of other employees).

58. 425 U.S. at 804-05.

59. 611 F.2d 1295 (9th Cir. 1980).

HeinOnline -- 1983 BYU L. Rev. 358 1983

Carey and *South Prairie* and recognized *Carey* as an arbitration exception to *South Prairie*.[60] The Ninth Circuit's analysis in *Ketchikan* graphically demonstrates the analytical problems encountered in attempting to distinguish between the appropriateness of arbitral and judicial resolution of representational disputes. In *Ketchikan* the collective bargaining agreement between the union and the employer provided that the union would be recognized as the bargaining representative for "all production, booming and rafting, cookhouse, construction and maintenance employees of the Ketchikan Pulp Company in its logging operations in Southeastern Alaska."[61] The agreement contained no arbitration provision. The employer operated only one logging operation at the time the collective bargaining agreement was executed.[62] Ketchikan subsequently obtained several other logging operations but refused to recognize the union as the representative of the employees in those operations.[63] The union brought suit seeking to enforce the collective bargaining agreement; neither party sought relief from the NLRB.[64]

The federal district court, recognizing the section 7 interests of the employees at the newly acquired operations, dismissed the suit for failure to join indispensable parties.[65] On appeal, the Ninth Circuit, with no argument from either party, held that the district court erred in dismissing for failure to join an indispensable party. However, the court did adjudicate a jurisdictional issue presented on appeal—whether the district court lacked jurisdiction under section 301 since the question presented was representational rather than contractual.[66]

The employer argued that "in the light of *Carey* . . . if arbitrators have the right to consider representation issues, a district court has the same power in an action under Section 301 when the collective bargaining agreement contains no arbitration clause."[67] Thus the court was confronted with the question posed above: should an arbitrator be allowed to decide an issue that a court cannot? The Ninth Circuit did not answer the question. The court merely distinguished *Carey* on the ground that

60. *See id.* at 1298-1300.
61. *Id.* at 1296.
62. *Id.* at 1297.
63. *Id.*
64. *Id.* at 1296-97.
65. *Id.* at 1297.
66. *Id.* at 1297-98.
67. *Id.* at 1298.

HeinOnline -- 1983 BYU L. Rev. 359 1983

"a decisive factor in the *Carey* case was the very strong policy favoring the invocation of arbitration to resolve all kinds of labor disputes under collective bargaining agreements providing for arbitration."[68] The court offered no supporting rationale for this "strong policy." Quite the contrary, the court's opinion gives sound reasons for deferring all representation questions to the NLRB for primary determination.

> [T]here is a critical difference between an unfair labor practice charge and the basic policy of the National Labor Relations Act vesting primary (if not exclusive) jurisdiction in the NLRB in two decisive areas of labor-management relations: (1) the designation of an exclusive bargaining agent, and (2) identification of an appropriate collective bargaining unit under Section 9 of the Labor Management Relations Act. . . . The Fifth Circuit . . . has proclaimed NLRB jurisdiction to be exclusive, citing [the Supreme Court's opinion in] *NLRB v. Cabot Carbon Co.* . . . . We cannot read *Cabot Carbon* as supporting this conclusion, particularly in the light of *Carey* . . . which recognizes arbitration as an appropriate alternative process for the resolution of representation issues.[69]

The Ninth Circuit gave no justification for the *Carey* holding. In *Ketchikan*, the union and the employer had not agreed to submit their disputes to arbitration. As a result, the Ninth Circuit found *South Prairie*'s

> declaration of the strong policy of judicial deference to initial determination by the NLRB of representational issues [determinative]. . . . In the present case the Union is attempting an end run around Section 9 of the Act and under the guise of contract interpretation wants to avoid self-determination of a bargaining agent by a substantial number of employees and determination of an appropriate bargaining unit by the NLRB, which has primary authority in this area. This cannot be countenanced. Although we have disagreed with the District Court that these difficulties can properly be solved under the rubric of "indispensable parties," we do agree with the reasoning that led him to that conclusion. The proposition that this large number of employees in dispersed logging camps may properly be incorporated into the Thorne Bay Bargaining unit *vi et armis* and without voice in the matter is absolutely

68. *Id.*
69. *Id.* at 1298-99 (citations omitted).

HeinOnline -- 1983 BYU L. Rev. 360 1983

untenable.[70]

Understandably, no explanation is given why arbitration of representation issues is any less of an "end run . . . under the guise of contract" around the section 9 authority of the Board and the section 7 rights of the affected employees. The Ninth Circuit apparently thought that *Carey* was binding authority whenever the collective bargaining agreement contained an arbitration provision, and that *South Prairie* was controlling in the absence of such a provision.

In a later district court opinion, *Couchigian v. Rick*,[71] an employer operated two electric companies, one union and the other nonunion. The union alleged that the two companies constituted a "single employer" and that therefore the nonunion company was bound by the collective bargaining agreement between its sister corporation and the union.[72] The agreement contained no arbitration provision. Shortly after the NLRB refused to issue an unfair labor practice complaint based on the same allegations because the charge was not timely filed, the union filed a section 301 action alleging that the nonunion corporation was bound by the agreement.[73] Citing *South Prairie* as authority, the United States District Court for the District of Minnesota held that "[w]hether or not two employers constitute an appropriate bargaining unit is a factual question within the exclusive jurisdiction of the Board."[74] This declaration is clearly inconsistent with the Supreme Court's decision in *Carey*. The Court in *Carey* authorized arbitration of representational questions. As long as that decision stands, the jurisdiction of the NLRB is clearly not "exclusive."

Couchigian is noteworthy, however, because of its attempt to distinguish *Carey* on grounds other than arbitration. The court reasoned that the dispute in *Couchigian* was distinguishable from *Carey* since "the very existence of the collective bargaining agreement with respect to the [nonunion company's employees was] at issue."[75]

The court does not here attempt to delineate the boundaries

70. *Id.* at 1299-1300.
71. 489 F. Supp. 54 (D. Minn. 1980).
72. *Id.* at 56.
73. *Id.*
74. *Id.* at 56-57.
75. *Id.* at 57.

HeinOnline -- 1983 BYU L. Rev. 361 1983

> between section 9(b) of the NLRA and section 301 of the LMRA. The court holds only that where, as here, the existence of a collective bargaining agreement is at issue, and that issue rests solely upon a factual determination concerning the appropriate bargaining unit, that section 9(b) of the NLRA is controlling, thereby vesting exclusive jurisdiction in the Board.[76]

The court's distinction of *Carey* is unpersuasive. Most representational disputes, especially accretion cases, involve the question whether a certain collective bargaining agreement "exists" or applies to a given group of employees. *Carey* itself required a determination whether the union's contract could be applied to other employees. Additionally, the representational issue in *Carey* depended entirely upon a factual determination concerning which union was the appropriate representative for the employees in question. Thus, the prerequisities for exclusive NLRB jurisdiction, articulated in *Couchigian*, were satisfied. *Couchigian* simply demonstrates the analytical difficulties courts encounter in attempting to reconcile the rationales articulated by the Supreme Court in *Carey* and *South Prairie*. Given the tension, even inconsistency, between the two cases, it is not surprising that court decisions often ignore one or the other.[77]

Four recent opinions from the federal courts of appeals indicate that the confusion continues.[78] In two of the cases the respective courts held that they lacked jurisdiction under section 301 over representational questions.[79] In the third case the court declined to exercise its jurisdiction,[80] while, in the fourth, the court held that a federal district court could make an appropriate unit determination in a 301 action under certain limited circumstances.[81] None of the cases involved a collective bargaining

---

76. *Id.*

77. The federal district court's reasoning in *Couchigian* suggests, although apparently unwittingly, a poignant criticism of the Supreme Court's holding in *Carey*. Proceedings to interpret contractual provisions, whether arbitral or judicial (under section 301), are necessary only after one determines who is covered by the contract. This threshold decision seems peculiarly within the province of the NLRB, given its unique statutory claim to representational issues. (This criticism is developed further *infra*.)

78. Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489 (5th Cir. 1982); Brotherhood of Teamsters, Local No. 70 v. California Consolidators, Inc., 111 L.R.R.M. (BNA) 2785 (9th Cir., Nov. 2, 1982); Computer Sciences Corp. v. N.L.R.B., 677 F.2d 804 (11th Cir. 1982); Local Union 204, Int'l Bhd. of Elec. Workers v. Iowa Elec. Light & Power Co., 668 F.2d 413 (8th Cir. 1982).

79. 111 L.R.R.M. (BNA) at 2786-87; 668 F.2d at 416-20.

80. 677 F.2d at 807-09.

81. 690 F.2d at 522.

HeinOnline -- 1983 BYU L. Rev. 362 1983

agreement providing for arbitration. *South Prairie* was cited as controlling authority in both of the cases which found that the federal courts lacked jurisdiction over representational questions.[82] Of these cases, the opinion of the United States Court of Appeals for the Eighth Circuit in *Local Union 204, International Brotherhood of Electrical Workers v. Iowa Electric Light & Power Co.*[83] is unique because of its attempt to harmonize the doctrines of *Carey* and *South Prairie.*

In *Iowa Electric*, an employer refused to recognize a union as the bargaining representative of the Quality Control Inspectors in a nuclear plant even though the NLRB had ruled that the inspectors were "employees" within the meaning of the contract and the union had prevailed in a certification election conducted by the Board.[84] The employer maintained that the inspectors were managerial and supervisory personnel, and therefore not properly included in the bargaining unit.[85] The union filed suit under section 301 claiming that the employer had breached the collective bargaining agreement by failing to comply with the union's wage demands which allegedly had become part of the agreement as a result of the company's failure to bargain.[86] The district court granted the union's motion for summary judgment.[87] The United States Court of Appeals for the Eighth Circuit reversed. The court held that representational matters within the NLRB's jurisdiction under section 9 of the Labor Management Relations Act constitute an exception to the general rule of concurrent jurisdiction between the federal district courts and the NLRB over matters that qualify both as unfair labor practices within the Board's jurisdiction and as violations of collective bargaining agreements within the jurisdiction of the federal courts under section 301 of the LMRA.[88]

The Eighth Circuit's opinion casts doubt on the "dicta" of *Carey* that "the existence of a remedy before the Board for an unfair labor practice does not bar [a suit] for breach of a collective bargaining agreement."[89] The court stated that

---

82. 111 L.R.R.M. (BNA) at 2785-86; 668 F.2d at 416-18.

83. 668 F.2d 413 (8th Cir. 1982).

84. *Id.* at 415.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 416. The court cited *South Prairie* and *Ketchikan* in support of this proposition. *See id.*

89. *Id.* at 417.

HeinOnline -- 1983 BYU L. Rev. 363 1983

> subsequent decisions have substantially narrowed the scope of [the language in *Carey*]. In *South Prairie* . . . the Court reiterated the important federal labor law policy of deference to NLRB determinations of representational issues . . . .
>
> In light of *South Prairie* the Ninth Circuit in . . . *Ketchikan* . . . concluded that "Congress did not intend by enacting Section 301 to vest in the courts initial authority to consider and pass upon questions of representation and determination of appropriate bargaining units," under the guise of interpreting the collective bargaining agreement . . . [and] concluded that representational issues are at least within the primary jurisdiction of the NLRB.[90]

The Eighth Circuit was unable to completely distinguish *Carey*, however, without relying on the distinction adopted in *Ketchikan*—"the 'very strong policy favoring the invocation of arbitration to resolve all kinds of labor disputes under collective bargaining agreements providing for arbitration.' "[91] The appellate court, like the Ninth Circuit in *Ketchikan*, chose not to assess the rationale behind that "very strong policy."[92]

In *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*[93] the United States Court of Appeals for the Fifth Circuit limited the Supreme Court's holding in *South Prairie* and held that a federal district court may decide representational issues in 301 actions. In *Pratt-Farnsworth*, two construction unions brought suit against two contractors, one union, the other nonunion, only one of which had signed the collective bargaining agreement. The unions alleged that the two employers were part of a conspiracy to channel construction work to the nonunion contractor, which in effect nullified the multiemployer bargaining agreement between the unions and the signatory contractors. The unions argued that the union and nonunion contractor should be treated as a single employer or as alter egos, and that, as a result, the nonunion employer should be bound by the collective bargaining agreement between the union employer and the unions.[94]

---

90. *Id.* at 417-18.

91. *Id.* at 418-19.

92. The Eighth Circuit reversed the district court on the additional ground that "NLRB representation determinations . . . are ordinarily not directly reviewable in federal court." *Id.* at 420.

93. 690 F.2d 489 (5th Cir. 1982).

94. *Id.* at 498-99. For an in-depth analysis of the circumstances under which nonsignatories may be bound by a collective bargaining agreement, see Anderson, *Suits to Bind*

HeinOnline -- 1983 BYU L. Rev. 364 1983

The district court dismissed the claims against the nonsignatory, nonunion employer on the ground that it had "no authority to determine that [the two contractors] were a single employer or alter egos without also determining the appropriate bargaining unit of their employees which it held, would be an impermissible invasion of the jurisdiction of the National Labor Relations Board."[95] The district court based its holding on the Supreme Court's decision in *South Prairie*.[96] The Fifth Circuit reversed. In holding that a determination of the appropriateness of a bargaining unit by a district court in a 301 action would not be an invasion of the exclusive province of the NLRB, the court of appeals severely limited *South Prairie*. The court emphasized that *South Prairie* involved *appellate court review* of an administrative determination made by the NLRB, not an *initial determination* made by a *district court* within the context of a 301 action.

> We do not think that [*South Prairie*] stands for the proposition . . . that the Board has exclusive jurisdiction to decide appropriateness of the bargaining unit issues. We think instead that the court in [*South Prairie*] was applying a time-honored principle relating to appellate review of an agency determination. When an agency, in order to grant relief in the case before it, must as a matter of statute find that both factual or legal conclusion A (e.g., single employer status) and factual or legal conclusion B (e.g., appropriateness of the bargaining unit) have been established, but concludes that A has not been established and therefore declines to consider whether B has been established, a reviewing court that reverses the conclusion that A has not been established must remand to the agency to permit it to consider in the first instance whether B has been established.
>
> Section 9(b), which is the source of the Board's responsibility in an unfair labor practice context to make a determination of the appropriateness of the bargaining unit . . ., directs the Board to "decide *in each case* whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the NLRA], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof . . . ." Clearly section 9(b)

Nonsignatories to Collective Bargaining Agreements Under Section 301: The Emerging Federal Common Law, 1983 B.Y.U. L. REV. 241.

95. 690 F.2d at 499.

96. *Id.* at 509.

HeinOnline -- 1983 BYU L. Rev. 365 1983

> refers only to *cases pending before the Board under the NLRA*. Neither section 9(b) nor the Supreme Court's decision in [*South Prairie*] stands for the proposition that a federal court with jurisdiction under section 301 of the LMRA to decide cases alleging a breach of a collective bargaining agreement by related employers does not have jurisdiction to determine whether a bargaining unit comprising the employees of such employers is appropriate where such a determination is necessary to a resolution of the breach of contract issue that is consistent with national labor policy.[97]

Having successfully "negotiated the shoals"[98] of *South Prairie*, the Fifth Circuit held that the substantive law to be applied by the federal district courts to representational issues arising in the context of suits under section 301 of the Labor-Management Relations Act should be the law developed by the NLRB and the federal appellate courts under the National Labor Relations Act.[99]

> We recognize that the Board, in an unfair labor practice proceeding involving, e.g., single employer status, is operating under a statutory mandate (in section 9(b) of the NLRA) to determine whether the resulting unit is an appropriate unit and thereby to protect the section 7 rights of the employees involved. But we agree with the district judge that a district court in a section 301 case, although not operating under a specific statutory mandate such as section 9(b), should be similarly concerned about the section 7 rights of the employees. One of the principal policies of the national labor laws—that embodied in section 7—is the protection of the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment. If, as the Supreme Court said in *Lincoln Mills*, we are to fashion the law under section 301 from the policy of our national labor laws, we cannot fail to honor and effectuate a policy so basic to those laws as the policy of protecting workers' rights of free association.[100]

Pratt-Farnsworth is thus clearly inconsistent with the opinions of the other circuits discussed above. *Pratt-Farnsworth* is the only case that tries to limit *South Prairie*. The Fifth Circuit

97. *Id.* at 514-15 (citations omitted) (emphasis in original).
98. *Id.* at 511.
99. *Id.*
100. *Id.* at 511-12 (citations omitted).

HeinOnline -- 1983 BYU L. Rev. 366 1983

itself recognized the conflict with the other courts and either criticized or distinguished many of the cases discussed above.[101] The court, however, limited its holding by suggesting that the outcome might have been different had either party invoked the authority of the NLRB.[102] Furthermore, because neither party had raised the issue, the court refused to decide whether the traditional administrative theory of primary jurisdiction required the district court to stay its hand pending a proceeding before the Board.[103] Paradoxically, this same limitation—restraining jurisdiction when the authority of the NLRB has been invoked—is not applied to prevent arbitration of representational issues pending before the Board.[104]

Carey, South Prairie, and their progeny demonstrate that permitting federal district courts to adjudicate representational issues, despite the potential authority of the NLRB, is more justified than subjecting those same issues to arbitration since, as discussed below, courts, unlike arbitrators, are authorized to interpret and implement statutory policy, and are able to bring all interested parties before the forum.

IV. A Critique of the Prevailing Approach

As noted above, cases subsequent to the Supreme Court decisions in *Carey* and *South Prairie* have been unable to reconcile the apparent conflict in the basic policies underlying those opinions. It is clear, however, that the general approach taken by the courts is to treat *Carey* as an arbitration exception to the doctrine of *South Prairie*. With the limited exception of *Pratt-Farnsworth*, the jurisdiction of the NLRB over representational issues has been deemed to preclude the jurisdiction of the federal courts under section 301 in cases in which the collective bargaining agreement fails to provide for arbitration, while arbitrators are permitted to decide representational issues, despite the Board's primary jurisdiction in the area, whenever arbitration is provided under a relevant collective bargaining agreement. The courts attempt to justify this approach by invoking the pre-

101. *See, e.g., id.* at 509 n.9 (*Couchigian* criticized); *id.* at 517 n.12 (*Iowa Electric* distinguished); *id.* at 519-21 (*Ketchikan* criticized); *id.* at 521 (*Florida Marble Polishers* distinguished).

102. *Id.* at 515.

103. *Id.* at 515 n.11.

104. *See* New Orleans Typographical Union No. 17 v. N.L.R.B., 368 F.2d 755, 767 (5th Cir. 1966).

HeinOnline -- 1983 BYU L. Rev. 367 1983

sumption in favor of arbitration articulated in *Carey*, yet no court has justified the presumption on policy grounds or explored the historical roots of the presumption as it might apply to representational disputes.

This Comment contends that the presumption is unjustified because (1) it extends the use of arbitration beyond the bases which make it a preferred mechanism for dispute resolution; (2) it causes critical representational issues to be adjudicated in proceedings that are ill-suited for protecting such statutory rights and to which the employees whose rights are being determined are not party; and (3) it fails to provide the claimed "curative effect" of the "therapy of arbitration."

A. Bases of the Presumption Favoring Arbitration

Two bases are traditionally given to justify a presumption in favor of arbitration as a dispute resolution mechanism: (1) the consensual nature of the mechanism[105] and (2) the expertise of the arbitrator in resolving labor disputes.[106] Neither of these bases is applicable to representational disputes.

1. The consensual nature of arbitration

The statutory basis for the courts' historical deference to arbitration expressly conditions that deference on the prerequisite that the "method [be] agreed upon by the parties."[107] Courts and scholars alike have recognized this statutory prerequisite.[108] The United States Court of Appeals for the Fifth Circuit has noted that

> [in order for an arbitrator's award to be legitimate], there *must*

---

105. Bernstein, *supra* note 2, at 285, 767, 797.

106. *Id.* at 789.

107. Labor-Management Relations (Taft-Hartley) Act § 203(d), 29 U.S.C. § 173(d) (1976).

108. *See, e.g.*, Retail Store Employees Union, Local 400 v. Great Atl. & Pac. Tea Co., 480 F. Supp. 88, 91 (D. Md. 1979).

Two scholars in particular, Professors Bernstein and Jones, have debated the necessity of this consensual basis. Professor Bernstein espouses the traditional viewpoint that consent is "the indispensible element of arbitration," Bernstein, *supra* note 2, while Professor Jones takes the position that arbitration is a hybrid of consent and compulsion, E. Jones, *On Nudging and Shoving the National Steel Arbitration Into a Dubious Procedure*, 79 HARV. L. REV. 327 (1965). Professor Bernstein's position is better supported by history and by statutory language; but, Professor Jones' Article is an admirable attempt at explaining *Carey*'s apparently indefensible deference to bilateral arbitration of multilateral disputes. *See id.* at 340.

HeinOnline -- 1983 BYU L. Rev. 368 1983

> *be*: (1) an agreement to arbitrate and the parties must be covered by that agreement; (2) an award which draws its "essence" from the agreement and does not exceed the scope of the issues presented to the arbitrator; and (3) an award which is not "repugnant" to the NLRA.[109]

The first two prerequisites for legitimate arbitration focus respectively on the existence of consent by the parties and the extent of that consent. Arbitration of representational issues violates both of these prerequisites.

Representational issues inherently involve a determination whether certain parties are covered by a particular collective bargaining agreement. Accordingly, the threshold prerequisite that "the parties must be covered by [the] agreement" *before* arbitration is appropriate is not satisfied. Determining the appropriate bargaining unit and selecting the proper representative are preconditions for collective bargaining. Surely an arbitrator cannot appropriately decide issues which must be resolved prior to the negotiation and execution of the collective agreement from which his authority springs.[110] Member Brown of the NLRB recognized this paradox in his concurring opinion in *Collyer Insulated Wire*.[111]

> In my opinion deferral [to arbitrators' awards] would serve only a limited purpose in representation cases. I have serious reservations about applying the same standards to representation cases as I would apply to unfair labor practices cases. . . . Representation proceedings generally involve the very questions of whether there will be a collective-bargaining arrangement and, if so, to what extent the standards for Board determinations of units are to assure employees the fullest freedom in exercising the rights guaranteed by the Act. Public interest considerations in the determination of the boundaries of the bargaining unit precludes, in my view, surrender of this function to private parties.[112]

Arbitration awards in representational disputes likewise do not "draw their essence" from the collective bargaining agree-

---

109. General Warehousemen & Helpers Local 767 v. Standard Brands, Inc., 579 F.2d 1282, 1292 (5th Cir. 1978), *cert. dismissed*, 443 U.S. 913 (1979).

110. Comment, *The NLRB and Deference to Arbitration*, 77 YALE L.J. 1191, 1196-98 (1967-68).

111. 19 N.L.R.B. 837 (1971).

112. *Id.* (Brown, M., concurring) (quoted in COX, BOK & GORMAN, CASES AND MATERIALS ON LABOR LAW 652 (9th ed. 1981)).

HeinOnline -- 1983 BYU L. Rev. 369 1983

ment. Arbitrators lack authority to adjudicate noncontractual disputes.[113] As noted above, representation questions inherently precede the agreement. Certainly, an issue that must be decided before the agreement can validly be entered into cannot be said to "draw its essence" from that same agreement.

2. Lack of arbitrator expertise

Arbitrators are ill-suited to make decisions affecting the statutory rights of employees. Representational issues are governed by sections 7 and 9 of the National Labor Relations Act. The arbitrator's authority to adjudicate labor disputes, on the other hand, is derived from the collective bargaining agreement. The arbitrator's task is to interpret the agreement; he is not even authorized to construe legislation.

> As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply the agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties.[114]

When rights conferred by statute conflict with the contractual provisions of the collective bargaining agreement, the arbitrator must ignore the statute and enforce the contract.[115] That the section 7 rights of employees to choose their bargaining representative, which has been termed the "fundamental policy of the NLRA," would be made subject to adjudication by a decisionmaker who is required to subordinate statutory rights to contractual provisions defies reason. Yet this is precisely what *Carey* requires.

Judicial deference to arbitral opinions is based on the arbitrator's unique experience with and knowledge of the "common law of the shop."[116] *Carey*, by legitimizing the use of arbitration in representational matters, unduly extends the traditional presumption in favor of arbitration beyond its legitimate scope. The arbitrator's knowledge of industrial relations practices has very little application to statutory questions regarding appropriate units for representation which, as noted above, are outside the

113. Comment, *supra* note 110, at 1199.
114. Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974).
115. *See, e.g., id.* at 57.
116. United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960).

HeinOnline -- 1983 BYU L. Rev. 370 1983

arbitrator's authority and inherently precede any collective agreement from which the arbitrator could derive contractual authority.

It is well settled that it is an unfair labor practice for an employer to bargain with an inappropriate bargaining unit or representative and that this rule applies even though the employer may have bound himself by contract to so bargain.[117] Yet *Carey* appears to compel an employer to arbitrate with a potentially inappropriate unit representative—one which has not been determined to represent a majority of the employees within the unit.

B. Inadequate Protection of Section 7 Rights

Employees' rights of self-determination under section 7 cannot be limited by contract between a union and an employer;[118] yet, this is precisely what occurs when representation issues are decided by arbitration.

> The arbitral process although encouraged, ultimately does not protect the rights of workers affected by an accretion clause. The arbitrator's primary function is to interpret the parties' contract; ordinarily, he has no duty to abide by the NLRA. And he inevitably considers the rights of allegedly accreted workers as secondary to the contract rights of the employer and union.[119]

Thus, a forum capable of considering the interests of all relevant parties in one proceeding is supplanted by arbitration, a procedure inherently piecemeal in its approach and limited to only two interested parties.

> The NLRB provides a better forum for the settlement of jurisdictional disputes. It has jurisdiction over all the parties, it is neutral, and it can enforce its decision through court order. To the extent that jurisdictional disputes overlap representation issues, the Board can insure that statutory standards for defining bargaining units are not sacrificed. Furthermore, its processes are comparatively rapid in this area: the Board gives special priority to jurisdictional disputes.[120]

---

117. Smith Steelworkers v. A.O. Smith Corp., 420 F.2d 1, 8 (7th Cir. 1969).
118. *Ketchikan*, 611 F.2d at 1301.
119. Pilot Freight Carriers, Inc. v. International Bhd. of Teamsters, 495 F. Supp. 619, 634 (M.D.N.C. 1980), *vacated on other grounds*, 659 F.2d 1252 (4th Cir. 1981).
120. Comment, *supra* note 110, at 1203.

HeinOnline -- 1983 BYU L. Rev. 371 1983

Section 7 of the National Labor Relations Act confers the right upon individual employees "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and . . . to refrain from any or all such activities."[121] As noted above, arbitrators are improper decisionmakers when statutory interpretation is required. This is particularly the case when the statutory rights of individuals are implicated.

In *Barrentine v. Arkansas-Best Freight System, Inc.*,[122] the United States Supreme Court was called upon to determine whether a suit alleging violation of the minimum wage provisions of the Fair Labor Standards Act was barred because of the plaintiff's failure to prevail on a similar claim presented to a joint grievance committee pursuant to the provisions of a collective bargaining agreement. The United States Court of Appeals for the Eighth Circuit had held that the suit was barred because of the national labor policy encouraging arbitration of labor disputes and the plaintiff's voluntary submittal of the grievance to arbitration.[123] The Supreme Court reversed, noting that

> [t]wo aspects of national labor policy are in tension in this case. The first, reflected in statutes governing relationships between employers and unions, encourages the negotiation of terms and conditions of employment through the collective-bargaining process. The second, reflected in statutes governing relationships between employers and their individual employees, guarantees covered employees specific substantive rights.[124]

The Court rejected the respondents' argument that the national "labor policy encouraging collective bargaining" required specific enforcement of the contractual provision that "any controversy" between the union and the employer be resolved through the contractual grievance procedures.[125]

> Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective bargaining agreement, differ-

121. 29 U.S.C. § 157 (1976).
122. 450 U.S. 728 (1981).
123. *Id.* at 734.
124. *Id.*
125. *Id.* at 736-37.

HeinOnline -- 1983 BYU L. Rev. 372 1983

ent considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.[126]

Analogously, individual employees' rights to self-determination arise from section 7 of the NLRA, not from the collective bargaining agreement. "They devolve on [employees] as individual workers, not as members of a collective organization."[127] Arbitration of representational questions is inappropriate because the section 7 rights being adjudicated do not arise from the collective bargaining agreement and are therefore beyond the authority and competence of the arbitrator.

That judicial deference to arbitration of representational questions is unjustified is further evidenced by the NLRB's resort to extraordinary measures in order to prevent the enforcement of arbitral awards affecting the representational rights of employees. Section 10(*1*) of the Labor Management Relations Act authorizes the NLRB to petition any United States district court for appropriate injunctive relief pending the Board's final adjudication of an unfair labor practices charge.[128] *Boire v. International Brotherhood of Teamsters*[129] is indicative of NLRB efforts to use injunctive relief to prevent enforcement of an arbitration award in order to protect the Board's jurisdiction. In *Boire* a representational question was brought for adjudication almost simultaneously in an arbitration proceeding, a Board unit clarification proceeding, and an unfair labor practice proceeding.[130] The arbitration proceeding terminated first and the NLRB brought an action to enjoin the enforcement of the arbitration award.[131] An injunction would have obviously been unnecessary were it not for *Carey*'s authorization of arbitration of representation issues.

Section 10 of the National Labor Relations Act provides a mechanism whereby the Board can circumvent *Carey* and the arbitral award, preserve its jurisdiction over representational matters, and, most importantly, protect the section 7 rights of the affected employees. However, invocation of this remedy requires an extraordinary showing. Injunctive relief is generally

---

126. *Id.* at 727.
127. *Id.* at 745.
128. 29 U.S.C. § 160(*1*) (1976).
129. 479 F.2d 778 (5th Cir. 1973).
130. *Id.* at 783.
131. *Id.* at 784.

HeinOnline -- 1983 BYU L. Rev. 373 1983

unavailable absent a showing of irreparable injury.[132] Protection of fundamental rights such as the section 7 right to self-determination should not be required to depend on such an extraordinary procedure. In addition, the affected employees will probably have to rely on the NLRB or one of the parties to the arbitration to even invoke the extraordinary procedure to protect their rights since they are not party to the arbitration.[133] In the representational context, the section 10(*l*) injunction provides an artificial, extraordinary measure to circumvent an arbitral process, deference to which was unwarranted in the first place.

C. *The Curative Effect of Arbitration: A Myth in Representation Cases*

The United States Supreme Court in *Carey*, after recognizing that arbitration could not resolve all the issues involved in a representational dispute, nonetheless compelled arbitration in order to invoke the "therapy" and "pervasive, curative effect" of arbitration.[134] An examination of several subsequent applications of the *Carey* doctrine leads one to conclude that the "therapy of arbitration" resembles shock treatment when applied in a representational context. This conclusion is plainly supported by the subsequent history of the *Carey* dispute itself. Upon examining the facts in *Carey*, the arbitrator concluded that the issue involved was representational rather than one relating to work assignments.[135] Like Solomon, the arbitrator suggested a surgical solution to the dispute: he ordered that the group of workers be split, with one half to be represented by each warring union.[136] Understandably, the NLRB decided not to defer to the arbitrator's decision, and assigned all the workers to one union.[137] The "therapy" of arbitration, even in the case which gave it life, resulted in nothing but conflicting judgments and delay in resolution of the dispute. The NLRB postponed hearing on Westing-

---

132. *Id.* at 788. The courts have tended to make injunctive relief more easily available to the NLRB. *See id.* at 790-91.

133. *See, e.g.*, New Orleans Typographical Union No. 17 v. N.L.R.B., 368 F.2d 755, 767 (5th Cir. 1966) (language indicating that duplicative proceedings and injunction avoided if parties willing to submit to arbitration).

134. *Carey*, 375 U.S. at 272.

135. Westinghouse Elec. Corp., 162 N.L.R.B. No. 81, 1967 NLRB Dec. (CCH) ¶ 21,019, at 27,248 (1967).

136. *Id.*

137. *Id.* at 27,249, 27,251.

HeinOnline -- 1983 BYU L. Rev. 374 1983

house's motions for a unit clarification and an election by the employees pending the outcome of the arbitration.[138] Thus, the "superior authority of the Board," which according to *Carey* could be invoked at any time, was postponed to allow the therapy of arbitration to run its course.

The dubious nature of the "pervasive, curative effect" of arbitration in representational disputes is further evidenced by the fact that an employer is not immunized from subsequent unfair labor practice charges even though he committed the allegedly illegal acts in compliance with a court order enforcing an arbitrator's award.[139] The employer is faced with a Hobson's choice: If he ignores the arbitrator's ruling and the NLRB later disagrees with him, he is subject to damages under section 301. If he complies despite his doubts and the NLRB later decides that his doubts were justified, he is liable for having committed an unfair labor practice. That this no-win situation results from imposition of a process presumed to have a "pervasive, curative effect" surely indicates the extent to which *Carey* misdescribes the actual consequences of arbitrating representational disputes.

V. Conclusion

The traditional presumption in favor of arbitration as a method of dispute resolution has been extended beyond its rational scope. Its application in the representational context has resulted in arbitration outside the boundaries of consent and the expertise of the arbitrator. More importantly, arbitration of representational disputes circumvents both the fundamental right of employees to self-determination and the primary jurisdiction of the Board over representational matters. This infringement is not likely to end until *Carey* is overruled.

David G. Mangum

138. *Id.* at 27,247.

139. Pilot Freight Carriers, Inc. v. International Bhd. of Teamsters, 495 F. Supp. 619, 640 (M.D.N.C. 1980), *vacated on other grounds*, 659 F.2d 1252 (4th Cir. 1981).

HeinOnline -- 1983 BYU L. Rev. 375 1983