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THE DUTY OF AN EMPLOYER TO BARGAIN IN POSTCONTRACT NEGOTIATIONS

William Seagle†

The employer's duty to bargain also after he has signed a collective bargaining agreement has raised many problems as the scope of collective bargaining has been increasingly expanded. The solution of these problems has been rendered more difficult, however, by the adoption of the concept of waiver, and a disinclination to apply the ordinary principles of contract law. A return to contractualism is championed.

In the law of collective bargaining under the National Labor Relations Act, the problem of what is a mandatory subject of bargaining is not confined to precontract negotiations. It also may arise after an employer and a union have entered into a collective bargaining agreement. The only difference between the two situations is that before a contract has been entered into the duty of the employer to bargain is determined solely by reference to the requirements that are contained in section 8(d) of the statute,¹ while after a contract has been entered into the provisions of the contract itself must also be taken into consideration. Unfortunately, however, contracts are even less likely than statutes to be clear and unambiguous, particularly when the contract is a labor agreement, which, like a statute itself, is designed to regulate the relations of large and powerful groups. Many problems are discussed in the negotiations but the troublesome and vexatious issues are not, for various reasons of strategy, resolved in explicit and concrete terms. These are the problems that arise subsequently, as a rule, to plague the contracting parties, and they have become more acute as the scope of collective bargaining has been expanded. The expansions being often unanticipated, the problems multiply, and they have certainly multiplied since the National Labor

† Author of *The Quest for Law, Men of Law, Law: The Science of Inefficiency* and other works. Formerly an editor of the *Encyclopaedia of the Social Sciences*, an Assistant Solicitor of the United States Department of the Interior and a member of its Board of Contract Appeals, the author is now a Trial Examiner for the National Labor Relations Board. The views expressed by the author in the present article do not necessarily reflect the views of the Board.

¹ Section 8(d) of the National Labor Relations Act, 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964), provides in pertinent part as follows:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That . . . the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

Relations Board held in *Town & Country*² and in the second *Fibreboard*³ case that the elimination of unit jobs by subcontracting, although for economic reasons, was a mandatory subject of collective bargaining, for there are few contracts indeed in which the subject of subcontracting has been expressly covered.

The question of whether an employer is required to bargain with a contracting union with respect to subject matters discussed in precontract negotiations but not specifically covered in the resulting contract has involved many difficulties. The attempts to resolve these difficulties have produced a body of decisions and doctrines especially marked by obscurities and uncertainties, if not inconsistencies, and by not infrequent dissents and reversals.⁴

THE EARLY INTERPRETATION OF SECTION 8(d): THE "DISCUSSION" CONCEPT

To understand the nature of the problem involved, it is necessary to go back to the period just before the amendment of the original Wagner Act by the Taft-Hartley Act. It had been held in this period that the employer's duty to bargain continued even with respect to those matters as to which he had reached agreement with the contracting union and which were set forth in the terms of the written contract.⁵ In one of these cases collective bargaining was characterized as "a continuing and developing process."⁶ However, the requirement thus judicially established was supposed to have been set aside by the provision of the Taft-Hartley Act, which is now contained in section 8(d) of the act and which provides that the duty to bargain collectively shall not be construed "as requiring either party to discuss or agree to any modification of the terms and conditions *contained in a contract* for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract."⁷

In *Tidewater Associated Oil Co.*,⁸ the Board unanimously held that

² 136 N.L.R.B. 1022 (1962).

³ 138 N.L.R.B. 550 (1962).

⁴ It is a considerable time since this subject received extended theoretical discussion. The first time was in an article published shortly after the enactment of the Taft-Hartley Act. See Cox & Dunlop, "The Duty To Bargain Collectively During the Term of an Existing Agreement," 63 Harv. L. Rev. 1098 (1950). See also Wollett, "The Duty To Bargain Over the 'Unwritten' Terms and Conditions of Employment," 36 Texas L. Rev. 863 (1958).

⁵ See, e.g., *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939); *NLRB v. Newark Morning Ledger Co.*, 120 F.2d 262 (3d Cir. 1941), cert. denied, 314 U.S. 693 (1941); *NLRB v. Highland Shoe, Inc.*, 119 F.2d 218 (1st Cir. 1941); *Wilson & Co. v. NLRB*, 115 F.2d 759 (8th Cir. 1940).

⁶ *NLRB v. Newark Morning Ledger Co.*, supra note 5, at 267.

⁷ 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964). [Emphasis added.]

⁸ 85 N.L.R.B. 1096 (1949).

this provision referred only to "terms and conditions which have been integrated and embodied in writing."⁹ The Board thus interpolated the word "written" in the phrase "contained in a contract," and held that the phrase meant that an employer could not, during the life of a contract, decline to discuss a bargainable issue unless it has been made a part of the agreement itself.

It might be supposed that this doctrine meant that an employer could be excused from bargaining only about such matters as were expressly covered by the terms of his written agreement with the contracting union. The subsequent history of the doctrine was to demonstrate, however, that in some circumstances an employer could still be excused from bargaining about a particular matter even though it was *not* covered expressly by the terms of his written agreement with the contracting union. In other words, he could justify a unilateral action by claiming a waiver by the union.

The first step in this direction seems to have been taken in the landmark decision in *Jacobs Mfg. Co.*,¹⁰ decided less than two years after *Tidewater*. The Board split badly in the *Jacobs* case, which involved the question whether the employer had to bargain with the union about pensions and insurance. Although neither of these matters was mentioned in the collective-bargaining agreement, a majority of the Board seems to have subscribed to the doctrine that mere discussion of a bargainable issue in contract negotiations excused subsequent bargaining concerning it. Since pensions had not been discussed in the negotiations, but the insurance program had been discussed and some changes made in it, the employer was held to have violated the act only in refusing to discuss pensions. Chairman Herzog sponsored a doctrine, however, that went beyond mere discussion. He held that before a matter could be said to have become nonbargainable it must have been not only "fully discussed" and "consciously explored" but also to have become a subject *on which agreement was reached although outside the written contract*. A majority of the Board, which included Chairman Herzog, in holding that the employer and the union were obligated to discuss those bargainable issues which had not been discussed during negotiations, and which were in no way treated in the contract, also declared: "And if the parties originally desire to avoid later discussion with respect to matters not specifically covered in the terms of an executed contract, they need only so specify in the terms of the contract itself."¹¹

⁹ *Tidewater Associated Oil Co.*, 85 N.L.R.B. 1096, 1099 (1949).

¹⁰ 94 N.L.R.B. 1214 (1951).

¹¹ *Id.* at 1220. They gave as an example a provision of a recent contract between the United Automobile Workers of America and General Motors Corporation reading as follows:

The most fundamentalist view in the *Jacobs* case was expressed by Member Reynolds, who, although he had concurred in the unanimous decision in the *Tidewater* case, now announced that, upon reconsideration, he had been convinced by a study of the legislative history of section 8(d) of the act that it imposed "no obligation on either party to a contract to bargain on any matter during the term of the contract except as the express provisions of the contract may demand."¹²

It would seem that a majority of the Board actually held in the *Jacobs* case that the mere discussion of a matter in negotiations preceding a contract is sufficient, without more, to excuse an employer from further bargaining. In *NLRB v. Jacobs Mfg. Co.*,¹³ the Second Circuit, in enforcing the Board's order, apparently construed the Board's decision in this way, for, in commenting on the decision of the majority that the respondent was not bound to bargain concerning the insurance program, the court expressly declared that "we do not intend to pass upon the effect, if any, on the duty to bargain, of mere *previous discussion of a subject* without putting any terms and conditions as to it into the contract."¹⁴ However, the Board has never expressly overruled the *Jacobs*

The parties acknowledge that during the negotiations which resulted in this agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this agreement. Therefore, the Corporation and the Union, for the life of this agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter not specifically referred to or covered in this agreement, even though such subjects or matter may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this agreement.

Id. at 1220 n.13. Clauses of this character will be referred to hereinafter as "coverage" clauses.

¹² Id. at 1231. This conclusion was based on the fact that § 8(d) had its origin in a definition of collective bargaining contained in § 2(11) of H.R. 3020, 80th Cong., 1st Sess. (1947), in which it was declared that it was not to be construed as requiring that either party "discuss modifications of an agreement except pursuant to the express provisions therefor," and on the further fact that the House report on the bill stated: "It does not require bargaining on any matter during the term of a collective bargaining agreement, except as the express terms of the agreement permit." H.R. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947). However, § 8(d), as finally enacted was based on S. 1126 80th Cong. 1st Sess. (1947), rather than H.R. 3020, which so far as concerns the substance of the provisions, was by no means identical with the language of § 2(11) of the House Bill. Nevertheless, in replying to critics of the provision, Senator Taft declared in the Senate that there was no basis for their contention that § 8(d) would deny to the parties an opportunity for further collective bargaining, and he explained: "the provision has no such effect. It merely provides that either party to a contract may refuse to change its terms or to discuss such a change to take effect during the life thereof without being guilty of an unfair labor practice. Parties may meet and discuss the terms of their contract and may agree to modifications on change of circumstances, but it is not mandatory that they do so." *Jacobs Mfg. Co.*, 94 N.L.R.B. 1214, 1231 (1951). Member Reynolds conceded that "it would be unrealistic to say that the language of the Section 8(d) proviso is unambiguous," id. at 1229, but he regarded the legislative history as tending to support his position.

¹³ 196 F.2d 680 (2d Cir. 1952).

¹⁴ Id. at 684. [Emphasis added.]

case, either in whole or in part. Indeed, the case has been cited on a number of recent occasions with evident approval.¹⁵

Nevertheless, it would seem that except for its reaffirmation of the construction of section 8(d) in the *Tidewater* case, the *Jacobs* case has been repudiated insofar as it stresses the importance of mere discussion itself. It would seem, actually, that the doctrine followed at least by a majority of the Board since the *Jacobs* case was decided is not based upon the view that the mere previous discussion of a subject is sufficient.

THE ADOPTION OF THE WAIVER CONCEPT

The Board now seems to hold not only that a subject matter must have been fully discussed or consciously explored in precontract negotiations but also that something else must have happened, although what this is would seem to be rather difficult to determine, for the Board seems never to have squarely adopted the view of Chairman Herzog that an oral agreement must have been reached with respect to the subject matter under discussion. The doctrine which the Board seems long to have espoused appears to have been most elaborately expressed in *The Press Co.*¹⁶ as follows:

It is well established Board precedent that, although a subject has been discussed in precontract negotiations and has not been specifically covered in the resulting contract, the employer violates Section 8(a)(5) of the Act if during the contract term he refuses to bargain, or takes unilateral action with respect to the particular subject, unless it can be said from an evaluation of the prior negotiations that the matter was "fully discussed" or "consciously explored" and the union "*consciously yielded*" or *clearly and unmistakably waived its interest in the matter*.

To hold that, without regard to the nature of the precontract negotiations, the *mere discussion of a subject not specifically covered in the resulting contract* removes the matter from the realm of collective bargaining during the contract term would be to place a premium (a) upon an employer's ability to avoid having the subject included in the contract, despite his knowledge of the union's position that it was a bargainable matter and not within his unilateral control; and (b) upon the union's ability to have the subject specifically referred to in the contract by engaging—if necessary—in *a strike*.

....

Adoption of such an inflexible approach to labor relations—which, in determining an employer's obligations, would look almost exclusively to whether a particular subject was specifically included in the contract—would be *tantamount to equating a trade agreement to an ordinary private commercial contract*. It would completely disregard *the familiar concept of collective bargaining as a continuing and developing process by which the*

¹⁵ See, e.g., *International Shoe Co.*, 151 N.L.R.B. No. 78 (1965); *Tucker Steel Corp.*, 134 N.L.R.B. 323, 338 (1961); *Proctor Mfg. Co.*, 131 N.L.R.B. 1166, 1170 n.3 (1961).

¹⁶ 121 N.L.R.B. 976 (1958).

relationship between an employer and the representative of his employees is to be molded.¹⁷ [Emphasis added.]

In this pronouncement the Board has expressed not only the philosophy of collective bargaining which underlies its interpretation of the present requirement of section 8(d) of the act but has also adumbrated a methodology for giving effect to this philosophy. So far as the philosophy is concerned, it can hardly be gainsaid that the interpretation of the effect of collective-bargaining agreements involves far more explosive issues than are involved in the case of private contracts, and that it is well always to keep this in mind. Doubtless the specter of the strike is worse than the nuisance of nonperformance, and affects far more people, and it is desirable to adopt a philosophy of interpretation that will minimize the danger of strikes. But it seems obvious that the amendment of section 8(d) by the Taft-Hartley Act was to put some limit on the free scope of collective bargaining which had prevailed prior to its enactment, and that the solution of the technical legal problems is not advanced by continuing to speak of collective bargaining as "a continuing and developing process" long after this dictum has been invalidated, at least in part, by the amendment of the legal provisions that produced it.¹⁸

As for the methodology, the guidelines provided do not seem to be of very much help in the solution of concrete problems. Assuming that mere discussion is not enough, how far must a discussion have gone before it can be said to have been "full"? It seems to me that actually protracted discussion or exploration is more likely to betoken a basic disagreement, and a failure to resolve it. Many a contract has been made, on the other hand, after what would seem to have been the most casual discussion.

It also seems to be of little help to be told that an employer is not free to take unilateral action unless the union "clearly and unmistakably" waived its interest in the matter. The cases in which the Board has stated that a waiver will not be lightly inferred and that the evidence that it has occurred must be "clear and unmistakable" or "clear and unequivocal" are many indeed, but this merely rationalizes the conclusion that has been reached after the specific facts have been considered. Obviously, the evidence cannot really be said to be "clear and un-

¹⁷ *Id.* at 977-79.

¹⁸ See text following note 6 *supra*. The "familiar concept of collective bargaining as a continuing and developing process" still makes its appearance in a case as recent as *Proctor Mfg. Co.*, *supra* note 15, at 1170. It also appears in *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, 337 U.S. 521, 525 (1949), but, although this case was decided in 1949, two years after the Taft-Hartley Act, the events that gave rise to the litigation occurred prior thereto.

mistakable" in cases in which the Board is less than unanimous,¹⁹ and the dissenters accuse their colleagues of having found an "implied" waiver.²⁰

THE BASIC TRENDS OF DECISION

(1) *The "Management Prerogative" Cases*

While the general theories of full discussion and clear and unmistakable evidence of waiver are of little help as guides to decision, the concrete facts of the decisions themselves do reveal some trends. Almost all the cases may be divided into two basic classes: (1) those involving unilateral action by an employer without consulting the union, and (2) those involving the refusal of information requested by the union.

In cases falling in the first class, the concept that seems to possess the most magic is that of "management prerogative." If an employer can persuade the Board, or a majority of the Board, that in the course of the bargaining he insisted on resolving the matter on which he took unilateral action as a management prerogative, he is likely to prevail, especially if the collective-bargaining agreement includes an express management rights clause, or some form of coverage clause or both.²¹

On the other hand, in what is perhaps the leading case involving the concept of management prerogative, *Beacon Piece Dyeing & Finishing Co.*²²—at least this seems to be the case in which the concept is most elaborately discussed—the respondent did not prevail when it unilaterally increased work loads after it had refused to discuss work loads in the negotiations. The majority of the Board drew a distinction between the opposition of an employer to a demand on the merits and his assertion of a right to take unilateral action as a management prerogative. It pointed out that "an employer will resist inclusion of a certain provision in a contract simply because he is opposed to the provision *on its merits*, and

¹⁹ See, e.g., *The Berkline Corp.*, 123 N.L.R.B. 685 (1959); *Beacon Piece Dyeing & Finishing Co.*, 121 N.L.R.B. 953 (1958); *International News Serv. Div.*, 113 N.L.R.B. 1067 (1955); *Jacobs Mfg. Co.*, 94 N.L.R.B. 1214 (1951).

²⁰ As the dissenters said in *International News Serv. Div.*, supra note 19, at 1075, "Obviously they would substitute what at best is an implied waiver from silence or ambiguous conduct for the judicially approved doctrine that nothing less than a 'clear and unequivocal' waiver will suffice."

²¹ See *Hughes Tool Co.*, 100 N.L.R.B. 208 (1952), which involved the issue of subcontracting. In the previous contract, which contained a management rights clause, decisions on subcontracting were—*mirabile dictu*—expressly reserved to the employer. While this provision was omitted from the current contract, the parties agreed on a clause in which they declared: "Company shall continue to have all of the rights which it had prior to the execution of this agreement except such rights as are relinquished herein." *Id.* at 209. The Board held: "The union thereby waived any right, it might otherwise have had, to require the Respondent to bargain concerning subcontracting during the term of the existing agreement." *Ibid.* In *The Borden Co.*, 110 N.L.R.B. 802 (1954), a coverage clause alone sufficed to uphold the respondent in discontinuing, unilaterally, Sunday deliveries of its milk products but it also appeared that in the negotiations the union had demanded a guarantee that there would be no deviation from 7-day deliveries.

²² 121 N.L.R.B. 953 (1958).

not because he is seeking the right to act unilaterally on the subject as a matter of 'management prerogative.'"²³ In the still more recent case of *Proctor Mfg. Co.*,²⁴ the employer was also held to have violated section 8(a)(5) of the act when after making a contract with the union containing a management rights clause he, unilaterally, established new production quotas and piecework rates. The management rights clause provided that the employer would not be deprived of his management rights "unless said interpretation is expressly required by the provisions of this Agreement."²⁵ The Board felt, however, that "the parties never came to grips with the concrete issue of whether the Union could insist on negotiating changes in specific piecework rates *following on changes in methods of production.*"²⁶

It would seem to be a reasonable deduction from such cases as *Beacon Piece Dyeing* and *Proctor* that they turn less on the question whether the subject under consideration was fully discussed than on the nature of the discussion, the positions taken by the parties, and whether the union, either by its silence, or by some positive manifestation "acquiesced" in the employer's position that a particular matter was to be a management prerogative. In *Beacon Piece Dyeing* the Board declared, in what appears to be an uncompromising rejection of traditional contractual concepts, that it had never found "a waiver of a bargaining right simply because a union had abandoned a bargaining demand in return for other concessions,"²⁷ and it may be inferred from *NLRB v. Gulf Atl. Warehouse Co.*,²⁸ that the mere fact that a demand was rejected in negotiations is not enough. There must be, therefore, something additional, and this would seem to be a determined attempt by the union to effect a change in a long-maintained position of the employer who has always treated the subject matter of the union's demand as a management prerogative justifying unilateral action on his part. The employer's prerogative is likely to be upheld particularly when the issue has been sharply focused by the union's presentation in writing of a general clause, the effect of which, either directly or by necessary implication, would have altered the employer's practice if he had agreed to accept it. Thus, in *Speidel Corp.*,²⁹ the rejection by the employer of a "Maintenance of

²³ Id. at 960.

²⁴ 131 N.L.R.B. 1166 (1961).

²⁵ Id. at 1168.

²⁶ Id. at 1170. [Emphasis added.]

²⁷ *Beacon Piece Dyeing & Finishing Co.*, 121 N.L.R.B. 953, 957 (1958).

²⁸ 291 F.2d 475 (5th Cir. 1961).

²⁹ 120 N.L.R.B. 733 (1958).

Privileges" clause proposed by the union, which would have required the employer to continue the payment of bonuses, which had always been regarded as voluntary, was held to have established a management prerogative justifying the employer in paying the bonuses without consulting the union. Thus a proposal which would have nullified management rights, and which was not embodied in the final contract, proved just as efficacious as an express management rights clause in the contract itself.

(2) *The Information Cases*

In the second class of cases, involving requests for information, employers have had comparatively little success in resisting such requests. Freedom of access to information is as basic to the functioning of industrial as it is to the functioning of political democracy. A union cannot adequately or successfully police or administer a collective-bargaining agreement or process grievances if it is denied access to necessary information, and such access has in fact infrequently been denied.

On the technical legal level the right of a union to information is also on a firmer footing than the right of an employer to take unilateral action. Section 8(d) of the act, which has put some limit on the scope of collective bargaining, was not intended to modify in any way the employer's obligation to furnish information.³⁰ There is, moreover, a basic difference between satisfying the right to bargain collectively and the right to have access to information. Since particular benefits can be obtained only if they are embodied in a collective-bargaining agreement, there can be no such thing as an independent statutory right to go on bargaining about them if they are covered by the contract. Once bargaining has occurred, the statutory duty to bargain about them has been discharged. There is, however, an independent statutory right to information which is not necessarily lost because the union has foreclosed itself from bargaining about the subject matter by the terms of the contract. As already indicated, the information may still be needed for the purpose of contract administration. It is only when the union is demanding information for the purpose of bargaining on a nonbargainable subject matter—nonbargainable because it is foreclosed by the terms of the contract—that the demand need not be met. In these circumstances no purpose would be served by requiring the information to be furnished.³¹

³⁰ See *Hugh J. Baker & Co.*, 112 N.L.R.B. 828 (1955).

³¹ See *The Berkline Corp.*, 123 N.L.R.B. 685 (1959); *International News Serv. Div.*, 113 N.L.R.B. 1067 (1955); *Avco Mfg. Co.*, 111 N.L.R.B. 729 (1955); *Hughes Tool Co.*, 100 N.L.R.B. 208 (1952).

THE THEORIES OF DECISION: "BARGAINING AWAY"

Despite the obvious differences between the cases involving unilateral action and the refusal of information, the concept of waiver seems to play an equal role in both classes of cases. It is not clear, however, precisely just what that role is, or whether it is exclusive.

Instead of adopting contractualism as a firm basis of decision—the regime of offer and acceptance, the requirement of a consideration, and the ordinary rules of contract interpretation—the Board has experimented with a considerable variety of concepts. In some of the cases, the Board speaks of the "bargaining away" rather than the "waiver" of the union's rights. "Bargaining away" seems to carry with it at least some aura of contractualism but this is more apparent than real, for what is meant when this locution is employed is not that the union has bargained away some demand, such as a demand for higher wages, or vacations with pay, or fringe benefits but that it has bargained away the right to bargain itself. Since the right to bargain is a statutory rather than a contract right, what has been bargained away is a right under the statute.³² However, in two cases the concept of waiver did not constitute the ground of decision at all, although the matters in issue were not expressly covered by the contracts themselves.³³ There are also two cases,

³² There seems to be only one case in which this is clearly expressed. In *Nash-Finch Co.*, 103 N.L.R.B. 1695 (1953), in which the company had unilaterally terminated certain fringe benefits, the Board found that the union had agreed that it was to be free of any contractual obligation to maintain these benefits but held nevertheless that it was not free to alter the benefits without consulting the union, despite rejection in the negotiations of a Maintenance of Standards clause proposed by the union. The Board declared that "the Union's signing of this contract did not constitute a waiver of its statutory right that Respondent bargain with it regarding any change in these conditions of work." *Id.* at 1697. In *NLRB v. Nash-Finch Co.*, 211 F.2d 622 (8th Cir. 1954), the court declined to enforce the Board's order on the ground that it had departed from the terms of the contract, which was intended to cover completely the obligations of the parties. "The respondent, we think," declared the court, "may not be convicted of an unfair labor practice for doing no more and no less for its union employees than its collective-bargaining agreement with them called for." *Id.* at 627. A puzzling aspect of the history of this case is that in *Speidel* the Board not only seems to accept the court's decision but to quote what it said with evident approval, despite its seeming inconsistency with the rationale of *Tidewater and Jacobs*. Since the benefits were not expressly covered by the terms of the written contract, it would seem that under the doctrine of these cases they were at least bargainable.

³³ These two cases are *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680 (2d Cir. 1952), and *Avco Mfg. Corp.*, *supra* note 31, in which the Board upheld the refusal of the employer to furnish merit increase data not necessary to the determination of an individual grievance solely on the ground that it was not required by the contract, although the contract itself did not expressly cover the demand for the information. Thus the Board declared:

The additional data which the union demanded had no significance whatsoever in rating an employee under the agreed system. Indeed, to require the Respondent to furnish such additional material in connection with these grievances would, in effect, return the entire merit system to the bargaining table despite the Union's contractual acceptance of the present system.

Id. at 732-33. The word waiver occurs in the *Avco* case only in the summary of a provision of the agreement to the effect that it was:

[T]o constitute a settlement generally of all demands and issues subject to collective

the *International News Serv.*³⁴ case and *The Berkline Corp.*³⁵ case—in which, although there is some talk about waiver, it is really surplusage, for the true basis of the decision in each of these two cases is that there were agreements—written in the first case and oral in the second—that the employer was to be exempt from furnishing the very type of information being requested by the union.³⁶ However, in *The Berkline Corp.* case, it would seem that although the Board majority speaks primarily in terms of contract, it rejects the requirement which ordinarily prevails in the law of contracts, that a waiver of any substantial contract right requires a consideration to be effective, for it is declared in this case that “although a *quid pro quo* may be indicative of a waiver, it is not a prerequisite to finding a waiver.”³⁷ Finally, there are two cases in which the decisions turn on the concept of equitable estoppel rather than on the concept of waiver, although the cases could just as readily have been disposed of in terms of the latter, as the doctrine of estoppel itself rests on waiver.³⁸

To some extent at least the conceptual analysis to be found in any given decision in this field depends on the form of the respondent's contention. If the respondent is contending that the union “waived” its rights, the analysis will proceed in terms of “waiver.” If the respondent is contending that the union is “equitably estopped” to assert its rights, the analysis will proceed in terms of “equitable estoppel.” If the respondent is

bargaining, and the waiver of the obligation to bargain concerning any matter subject to collective bargaining whether or not referred to in the contract.

Id. at 731. During the negotiations for the contract the union had been denied the very type of information which it subsequently sought.

³⁴ *International News Serv. Div.*, supra note 31.

³⁵ Supra note 31.

³⁶ In both cases the respondents were upheld by the Board majority in denying information to the union, although it was claimed to be necessary for the purpose of contract administration. In the *International News Serv.* case, the majority, after pointing out that “this agreement was in fact written into the express terms of the bargaining contract the parties executed,” declared:

Where, as here, the parties have themselves decided the issue at the bargaining table, the issue has been taken away from the Board and there is no need for it to interfere.

To hold otherwise is to encourage one party to a bargaining agreement to resort to the Board's processes to upset the terms of a contract which the other party to the agreement had every good reason to believe had been stabilized for a definite period.

International News Serv. Div., 113 N.L.R.B. 1067, 1071-72 (1955). In *The Berkline Corporation* case, after finding “an effective oral waiver by the Union,” the Board majority go on to declare: “Here the union, having agreed that Respondent need not codify its rules, may not, at its own option, disavow such agreement at some future date, still within the waiver's term, because it has become dissatisfied with its bargain.” *The Berkline Corp.*, 123 N.L.R.B. 685, 688 (1959).

³⁷ Id. at 687; 56 Am. Jur. “Waiver” § 16, at 116-17 (1938); 5 Williston, Contracts, § 678, at 239 (Jaeger ed. 1961), where it is also said: “Waiver is a troublesome term in the law. . . . It is used with different meanings and there are, therefore, necessarily conflicting judicial statements as to its requisites.”

³⁸ See *Tucker Steel Corp.*, 134 N.L.R.B. 323 (1961); *General Tel. Co.*, 144 N.L.R.B. 311 (1963). In the first of these cases the respondent won a Pyrrhic victory while in the second the respondent went down to total defeat.

contending that the union's demand is inconsistent with the terms of the contract between the parties, the requirements of the contract may be discussed at least in part.

A CALL FOR AN EXCLUSIVE CONTRACTUALISM

It may seem that to quarrel with the choice of terminology is to lose oneself in semantics. Actually, the choices go much deeper, and affect the result that is reached in any given case. Psychologically, the parties when engaged in bargaining are never thinking in terms of waiver or equitable estoppel; they are engaged in hammering out the terms of a bargain, and have no thought about the relinquishment or forfeiture of known rights; and the Board's reinterpretation of what they said and did in negotiating with each other in terms of waiver distorts their true intentions. The process of reinterpretation proceeds, moreover, on the basis of standards which would not obtain in the construction of ordinary contracts. To refuse to find a waiver unless the proof is "clear and unmistakable" is to put upon the party seeking to establish a waiver a far heavier burden than he would have to meet to prove the making of an ordinary contract. In the flight from contract the realities are left far behind.

Although this flight was preordained by the doctrine of *Tidewater* and *Jacobs* that bargaining is precluded only with respect to those subject matters that are covered in the written contract, it takes place even when not required, strictly, by the demands of the doctrine. In most of the cases—if not in almost all of them—in which the employer has taken unilateral action and in which a waiver has been found, the decision actually has had a simple basis, although this basis seems never to have been clearly articulated. This basis appears to have been that the *written* contract itself, *properly interpreted*, required the recognition of the prerogative of management to deal with the subject matter unilaterally. What obscures the basis of decision is that the subject matter was not *explicitly mentioned* in the written contract but had to be deduced from one of its general provisions. There is the story told somewhere by Justice Holmes about the justice of the peace before whom a suit was brought by a farmer for damage to a churn. The justice of the peace looked in the index to his code book for the entry "churns," but, not finding it, he gave judgment for the defendant. But this is hardly a method of interpretation that would recommend itself to the sophisticated jurist. The general language of a written contract, like the general language of a statute, must be interpreted to give effect to the intentions of the parties gathered from the circumstances that led to the

making of the contract. As general language is always ambiguous, the parol evidence rule is not violated by receiving evidence concerning these circumstances. This is really what is done when a management prerogative clause or a coverage clause or some other clause of a general nature is interpreted in accordance with the intentions of the parties. But this interpretation is none the less the interpretation of the requirements of a written contract. Further bargaining on the subject covered by the written contract is, then, foreclosed not by reason of the fact that one of the parties has waived any right but by reason of the fact that the other is entitled to the right under the terms of the written contract, which, because of section 8(d) of the act, cannot be reopened.

The real difficulties begin when the question arises whether an employer may take a unilateral action on a subject matter which cannot be said to be covered by any specific or general provision of a written contract. He is then asserting a right which can be said to exist, if at all, only by virtue of an oral contract. There are always greater difficulties, of course, in proving an oral than a written contract. But, since the Taft-Hartley Act, an oral collective-bargaining agreement would seem to be perfectly valid.³⁹ By holding in some cases that the union has "bargained away" its right to bargain collectively on a particular subject, the Board has really given effect to contemporaneous oral understandings, despite the logic of *Tidewater* and *Jacobs*. It has, thus, really applied in at least a few instances the contractualism which Chairman Herzog alone espoused in the latter case. It has done so, however, under the far more burdensome standard of proof involved in the waiver theory.

Nevertheless, the signs are multiplying that a change is under way, and that the Board is moving towards contractualism even if in a round-about way. This change has been particularly manifest in the cases involving subcontracting of work by employers—the class of cases in which the problems of bargaining in postcontract negotiations had become particularly acute. The Board had retreated from the absolutism

³⁹ It had been held in *Gatliff Coal Co. v. Cox*, 152 F.2d 52 (6th Cir. 1945), and in *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941), that the original act contemplated that collective-bargaining agreements would be in writing, although it did not so expressly provide. However, the Taft-Hartley Act also contained the provision, now incorporated in § 8(d) of the act, which required the execution of a written contract only "if requested by either party," and this provision has been held to validate, by implication, oral collective-bargaining agreements. See *Hamilton Foundry & Mach. Co. v. Molders & Foundry Workers*, 193 F.2d 209 (6th Cir. 1952); *NLRB v. Scientific Nutrition Corp.*, 180 F.2d 447 (9th Cir. 1950); *United Shoe Workers v. LeDanne Footwear, Inc.*, 83 F. Supp. 714 (D. Mass. 1949). When the *Tidewater* and *Jacobs* cases were decided, it does not seem to have been considered, however, whether the validation of oral agreements at the same time that employers were excused from bargaining with respect to subject matters "contained in a contract" did not require that any distinction between oral and written agreements be eliminated, so far as collective bargaining was concerned.

of *Town & Country* and of *Fibreboard* even before the United States Supreme Court had cast doubt upon the doctrine of these cases in reviewing the *Fibreboard* decision.⁴⁰ The retreat had begun in *Shell Oil Co.*,⁴¹ and *Shell Chemical Co.*,⁴² and has been proceeding steadily ever since then. In the greater realism and more refined conceptualism that mark the most recent cases the Board has refused to find employers guilty of violations of section 8(a)(5) of the act when it appeared that the subcontracting (1) caused no substantial detriment to the employees in the bargaining unit who might have performed the subcontracted work, and (2) had long been practiced with the acquiescence of the union, so that it could not be said that the additional subcontracting really affected the existing terms and conditions of employment.⁴³ In giving great weight to this latter factor, the Board has really embraced at least one of the major elements of contractualism, for the acquiescence of the union has been manifested in precontract negotiations, or in the terms, express or implied, contained in the contract which it ultimately accepted. Particularly significant is the absence from the most recent cases of any pursuit of that elusive concept known as "management prerogative."⁴⁴ Indeed, in one of these cases, the *Westinghouse Electric*⁴⁵ case, the Board seems to have all but bidden goodby to the even more treacherous concept of waiver, for it has declared in this case that "it is wrong to assume that, *in the absence of an existing contractual waiver*, it is *per se* an unfair labor practice in all situations for an employer to let out unit work without consulting the unit bargaining representative."⁴⁶ Since *Westinghouse* involves subcontracting rather than the right to information, the decision is all the more significant. The Herzog heresy of a decade and a half ago may yet become the orthodoxy of today and tomorrow. Although it may be too early to declare that the theory of waiver is dead, it has certainly been dealt a grievous blow.

⁴⁰ See *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

⁴¹ 149 N.L.R.B. 283 (1964).

⁴² 149 N.L.R.B. 298 (1964).

⁴³ See *Westinghouse Elec. Corp. (Mansfield Plant)*, 150 N.L.R.B. No. 136 (1965); *American Oil Co.*, 151 N.L.R.B. No. 45 (1965); *General Tube Co.*, 151 N.L.R.B. No. 89 (1965); *Central Soya Co.*, 151 N.L.R.B. No. 161 (1965).

⁴⁴ The concept is invoked in only two of the recent cases, *The Fafnir Bearing Co.*, 151 N.L.R.B. No. 40 (1965), and *International Shoe Co.*, 151 N.L.R.B. No. 78 (1965). In both of these cases, however, the Board merely endorsed the Trial Examiner's Decision and provided no commentary of its own.

⁴⁵ *Westinghouse Elec. Corp. (Mansfield Plant)*, *supra* note 43.

⁴⁶ *Id.* (Trial Examiner's Decision). [Emphasis added.]