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The Non-neutral Employer and Section 10(k) of the National Labor Relations Act

In *Plasterers Local 79 v. NLRB* the District of Columbia Circuit held that Section 10(k) of the National Labor Relations Act precludes the National Labor Relations Board (NLRB) from determining the merits of jurisdictional strikes when competing unions have agreed on a method for voluntary settlement. This decision, in effect, substitutes the Joint Board of the AFL-CIO (Joint Board) for the NLRB in resolving jurisdictional strikes when the employer involved is not a signatory of the Joint Board Agreement. The court in *Plasterers* rejected twenty years of NLRB precedent, *i.e.*, that the employer involved in a jurisdictional strike was a "party" to the controversy within the meaning of Section 10(k).

2. Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.


The National Labor Relations Act (Wagner Act) 29 U.S.C. § 151 (1964), was passed by Congress in 1935. The Labor Management Relations Act (Taft-Hartley Act), *id.* § 141, which was passed in 1947, substantially amended the Wagner Act. The Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act), *id.* §§ 153, 158-60, 164, 186-87, 401, which was enacted in 1959, supplemented and amended both the Wagner and Taft-Hartley Acts. These three statutes are collectively referred to as the National Labor Relations Act. [Hereinafter cited as Act].

3. "The term 'jurisdictional strike' means a strike against an employer, or other concerted interference with an employers' operations, an object of which is to require that particular work to be assigned to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another trade, craft, or class." H.R. 3020, 80th Cong., 1st Sess. (1947).

4. The Joint Board was established in accordance with the provisions of the Plan For Settling Jurisdictional Disputes Nationally And Locally, May 1, 1948, *as amended*, April 3, 1970. [Hereinafter cited as Joint Board Agreement]. See notes 15-18 and accompanying text, infra.

5. Prior NLRB decisions held that unless both the employer and the unions involved were bound by arbitration the NLRB had jurisdiction over the strike. *See, e.g.*, Carpenters Local 701, 184 N.L.R.B. No. 37, 74 L.R.R.M. 1423 (1970); Ironworkers Local 75, 184 N.L.R.B. No. 70, 74 L.R.R.M. 1440 (1970); Laborers Local 113, 184 N.L.R.B. No. 27 (1970); St. Paul Typographical Union 30, 184 N.L.R.B. No. 12, 74 L.R.R.M. 1463 (1970); Plasters Local 65, 152 N.L.R.B. 1609 (1965); IBEW, Local 26,
Although the *Plasterers* decision directly affects the dispute-prone construction industry, its ramifications will eventually be felt throughout the entire field of labor-management relations. This article will examine the *Plasterers* court's reasoning in reversing twenty years of NLRB precedent and analyze the decision's effect on the collective bargaining process in the construction industry. In order to appreciate the court's reasoning in *Plasterers* it will be necessary to discuss initially: (1) the various ways which a jurisdictional strike may arise, (2) the establishment of the Joint Board, and (3) the NLRB procedures prior to the *Plasterers* decision.

**Jurisdictional Strikes**

Jurisdictional strikes generally evolve in one of three ways. First, an employer will contract with Union A to perform a specific work assignment. Union B, which was not a party to the contract between Union A and the employer, will claim that the assigned work is not within the province of Union A. Second, an employer will contract with both Unions A and B to perform certain work. During the course of performance, Union A will claim that it is entitled to perform the work currently being accomplished by Union B. This is basically a contract dispute. Third, during the course of a job for which the employer has engaged more than one union, a new task will have to be accomplished. The employer makes an affirmative award of this new work to Union A. Union B will assert that the new job is within its domain rather than Union A's. Thus, a jurisdictional strike is not a strike which is directed at securing better wages or working conditions, but rather, it is one directed at obtaining the work assignment.

147 N.L.R.B. 1498 (1964); Metal Lathers Local 68, 142 N.L.R.B. 1073 (1963); Carpenters Local 964, 141 N.L.R.B. 1138 (1963); Newspapers and Mail Delivers' Union, 141 N.L.R.B. 578 (1963); Operating Eng'rs Local 825, 139 N.L.R.B. 1426 (1962); Operating Eng'rs Local 66, 135 N.L.R.B. 1392 (1962); Millwright Local 1102, 127 N.L.R.B. 26 (1960); Int'l Ass'n of Iron Workers, 125 N.L.R.B. 1035 (1959); Operating Eng'rs Locals 17, 17A & 17B, 99 N.L.R.B. 1481 (1952); Carpenters Local 581, 98 N.L.R.B. 346 (1952); Local 16, ILWU, 82 N.L.R.B. 650 (1949); Lodge 86, IAM, 81 N.L.R.B. 1108 (1949).

6. The building and construction industry is the only industry which has established binding arbitration procedures for the settlement of jurisdictional strikes.

7. See, e.g., Plasterers Local 65, 152 N.L.R.B. 1609 (1965); Operating Eng'rs Local 825, 139 N.L.R.B. 1426 (1962); Operating Eng'rs Local 66, 135 N.L.R.B. 1392 (1962).


10. I think the committee all agreed that those types [jurisdictional strikes] are in effect racketeering strikes. They are strikes which are not direct strikes to settle questions of wages or hours or better working conditions. They are strikes which are, in effect, attempts to bring indirect pressure on third parties, to get third parties to work in some way to bring about a result which may
Establishment of the Joint Board

Following the passage of the Taft-Hartley Act, the Building and Construction Trades Department of the AFL-CIO proposed a plan for the settlement of jurisdictional strikes. On May 1, 1948, various international unions and employer associations in the construction industry entered into an agreement which provided for binding arbitration of jurisdictional strikes. The procedures outlined in this agreement established the Joint Board as arbitrator.

The Joint Board is a nine member board composed of an impartial chairman, four representatives of labor, and four representatives of signatory contractor-employers. Any labor organization which is a signatory of the Joint Board Agreement may file a protest against a work assignment. The signatory contractor-employer is directed to make work assignments in accordance with the “agreements and decisions” contained in the “Green Book,” and to continue those assignments pending the Joint Board determination of the jurisdictional strike.

Since all contractor-employers are not signatories of the Joint Board Agreement, an employer involved in a jurisdictional dispute may be in any one of four different positions. First, he may be a member of a contractors’ association which is signatory of the Joint Board Agreement. An employer in this situation is bound by a Joint Board determination and such a decision ultimately be favorable to the one initiating the pressure, which has no direct relation to the work except perhaps with regard to the question of power.

93 CONG. REC. 3838 (1947) (remarks of Senator Taft).

11. The Taft-Hartley Act provided quick remedies to supplant the effects of jurisdictional strikes. Section 8(b)(4)(D), 29 U.S.C. § 158(b)(4)(D) (1964), outlawed all jurisdictional strikes except where an employer failed to conform to an NLRB order or certification. Section 10(1) empowers a regional officer of the NLRB to petition the federal district court where the jurisdictional strike occurred for injunctive relief when there is reasonable cause to believe that Section 8(b)(4)(D) has been violated.

12. Joint Board Agreement.

13. Id., art. III, § 4 which states that “[i]t shall be the duty of the Joint Board to consider and decide cases of jurisdictional disputes in the building and construction industry . . . .”


16. Joint Board Agreement, art. VI, § 1. The Joint Board Agreement and the decisions and agreements of record are all embodied in one volume referred to as the “Green Book.”

17. The Joint Board Agreement also provides for appeals in certain circumstances to the Appeals Board, and establishes various procedures to be followed in enforcing a Joint Board or Appeals Board award. Id., art. II, § 2.

18. In signing this stipulation, the undersigned agrees to be bound by the terms and provisions of the agreement effective May 1, 1948, as amended by agreement effective October 1, 1949 . . . . [T]he undersigned agrees to be bound by the provision of the agreement which states: ‘any decision or interpretation
can be enforced by either the Joint Board\textsuperscript{19} or the courts.\textsuperscript{20} Second, an employer may be completely neutral. A neutral employer is eager to have the dispute resolved and is willing to abide by any decision. Third, the employer may be neither a signatory of the Joint Board Agreement nor a member of a contractors' association which is a signatory of the Agreement. Fourth, the employer may be a member of a contractors' association which is not a signatory of the Joint Board Agreement. In each of these last two situations the employer may be directly affected by any determination made with respect to the disputed work. However, an employer in either of these positions is precluded from intervening in the Joint Board proceeding.\textsuperscript{21} This article is concerned with these last two situations.

The abstention provision of Section 10(k) prevents the NLRB from holding a hearing when all the parties have agreed to resolve their jurisdictional differences by arbitration. Thus, when the unions and the employer are signatories of the Joint Board Agreement, the NLRB may not hold a Section 10(k) hearing. The effect of the \textit{Plasterers} decision, however, is to deny the concerned non-signatory employer any voice in an arbitration proceeding which, as a practical matter, will be binding on him.

\textbf{NLRB Procedure}

The passage of the Taft-Hartley Act and the establishment of the Joint Board did not completely solve the problem of jurisdictional strikes, since not all unions and employers in the construction industry were signatories of the Joint Board Agreement. When a jurisdictional strike involved these non-signatory groups, the NLRB would determine the merits of the controversy. Prior to the \textit{Plasterers} decision the NLRB's procedures for resolving jurisdictional strikes were simple and equitable. The NLRB would hold a Section 10(k) hearing only when the parties, \textit{i.e.}, employers and unions, were neither

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\textsuperscript{19} PROCEDURAL RULES, § 1.

\textsuperscript{19} \textit{Id.} § E(d), Compliance Procedure. This section directs the appropriate contractors' association to use its authority and influence to force a contractor member to comply with a Joint Board decision.


\textsuperscript{21} Joint Board Agreement, art. II, § 1; art. III, § 1(a). These two sections should be read together. They provide that only signatories to the Joint Board Agreement are to be considered as members thereof, and that only "participating or stipulated employer national associations" may designate a representative to participate in resolution of a jurisdictional dispute. Notwithstanding these provisions, this author understands that on some occasions nonmember contractors are allowed to participate in the Joint Board proceedings. However, the criteria used for allowing such participation are nowhere established.
bound, nor desirous of being bound, by arbitration procedures.\textsuperscript{22}

In \textit{Lodge 1743, IAM},\textsuperscript{23} the NLRB stated the criteria it would follow when making an affirmative award in a Section 10(k) hearing.

The Board will consider all relevant factors in determining who is entitled to the work in dispute, \textit{e.g.}, the skills and work involved, certifications by the Board, company and industry practice, agreements between unions and between employers and unions, awards of arbitrators, joint boards, and the AFL-CIO in the same or related cases, the assignment made by the employer, and the efficient operation of the employer's business.\textsuperscript{24}

The unions involved were bound by a Section 10(k) award since this award would establish the basis of an unfair labor practice if the losing union reverted to picketing\textsuperscript{25} or failed to notify the Regional Director that it would abide by the decision.\textsuperscript{26} The employer, however, does not commit an unfair labor practice if he refuses to abide by the award. The \textit{Plasterers} court determined that this fact, \textit{i.e.}, that the employer did not commit an unfair labor practice by refusing to abide by a Section 10(k) award, had controlling significance.

\textbf{The Plasterers Decision}

The controversy involved in \textit{Plasterers} developed in the early 1950's between the Plasterers and the Tile Setters Unions. Prior to 1950, it was necessary to set new tile in a wet plaster bed. The application of this wet plaster bed was the work of the Tile Setters. During the mid-1950's a new method was devised for the setting of tile. This new method made it possible to set tile directly on a dry coat of plaster. The Tile Setters asserted that they alone should prepare this smooth plaster surface. The Plasterers contended that the Tile Setters were only entitled to apply their setting bed and not the smooth, dry plaster surface. This controversy culminated in a jurisdictional strike\textsuperscript{27}

\textsuperscript{22} See note 5, supra.

\textsuperscript{23} 135 N.L.R.B. 1402 (1962). These criteria were established subsequent to the Supreme Court's decision in \textit{NLRB v. Radio & Television Broadcast Eng'rs Local 1212, [CBS]}, 364 U.S. 573 (1961).

\textsuperscript{24} Lodge 1743, IAM, 135 N.L.R.B. 1402, 1410-11 (1962).

\textsuperscript{25} The Board's finding that a union had violated Section 8(b)(4)(D), 29 U.S.C. § 158(b)(4)(D) (1964), without first holding a Section 10(k) hearing was affirmed in \textit{NLRB v. Operating Eng'rs Local 825}, 410 F.2d 5 (3d Cir. 1969). "We cannot believe that Congress intended to require a Section 10(k) proceeding after a binding voluntary settlement of a dispute when the legislative scheme provides for the discontinuance of a Section 10(k) proceeding if such an adjustment shall occur during its pendency." \textit{Id.} at 9.

\textsuperscript{26} The Board has always required the losing union to notify the appropriate Regional Director whether it will refrain from forcing the employer to assign work to it. Failure to do so will result in an unfair labor practice charge being filed against the union.

\textsuperscript{27} The jurisdictional strike was of the second type discussed at note 10, supra.
The dispute was submitted to the Joint Board which awarded the work in dispute to the Plasterers. The Tile Setters refused to abide by this award and continued to perform the disputed work. This resulted in the Plasterers picketing two job sites where Tile Setters were employed. This unsettled controversy caused the NLRB to hold a Section 10(k) hearing.

Since the non-signatory employers involved were not bound by the Joint Board award and had not participated in the Joint Board determination, the NLRB “rejected the Plasterers contention that the hearing should be quashed because the unions had agreed on a method for voluntary settlement.”

The NLRB subsequently awarded the work to the Tile Setters. After the Plasterers refused to abide by this award, the NLRB held that the Plasterers committed an unfair labor practice, which the Plasterers appealed to the D.C. Circuit Court of Appeals.

The question presented to the D.C. Circuit was one of first impression. This question was “whether it was error for the [NLRB] to have conducted a 10(k) hearing after being timely advised that both unions had agreed to be bound by the decisions of the National Joint Board.” Its resolution was predicated on the court’s interpretation of the term “parties” in Section 10(k).

In holding that the non-signatory employer was not a party to a jurisdictional strike, Judge Leventhal writing for the majority examined dicta from various Supreme Court cases and the “refusal of Congress to bind the em-

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29. The alleged unfair labor practice was a violation of Section 8(b)(4)(D); 29 U.S.C. § 158(b)(4)(D) (1964). This section states that:
   
   It shall be an unfair labor practice for a labor organization or its agents . . .
   
   to engage in, or to induce or encourage any individual employed by any person engaged in commerce . . . to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or . . . to threaten, coerce or restrain any person engaged in commerce or in any industry affecting commerce, where in either case an object thereof is . . . forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work . . . .

30. “Since there is no independent review of Section 10(k) work assignments, the only stage at which the [union] can contest the work award is on review of the Section 8(b)(4)(D) unfair labor practice order. If the Section 10(k) order fails, the unfair labor practice order falls with it.” NLRB v. Local 991, ILA, 332 F.2d 66, 71 (5th Cir. 1964).
32. Id.
ployer to the Board's determination of a jurisdictional strike.\textsuperscript{34} The majority found guidance in the Supreme Court dicta in \textit{NLRB v. Radio and Television Broadcast Engineers Union [CBS]},\textsuperscript{35} which stated that "a jurisdictional dispute . . . is a dispute between two or more groups of employees over which is entitled to do certain work for an employer."\textsuperscript{36} The majority also examined the legislative history of Section 10(k) and stated "[t]hat history forcefully supports the conclusion that Congress intended in Section 10(k) to encourage disputing unions to establish inter-union machinery for settling jurisdictional disputes and to afford them an opportunity to exhaust this machinery."\textsuperscript{37} The majority in \textit{Plasterers} concluded that the statutory scheme, the legislative history, and the Supreme Court dicta required the interpretation of the term "parties" to include only the unions involved in the jurisdictional strike.

Judge MacKinnon dissented from the majority on two of its three conclusions. He agreed that a non-signatory employer was not a party to a jurisdictional dispute, but concluded that such an employer became a "party" when the unions involved him in a jurisdictional strike under Section 8(b)(4)(D).\textsuperscript{38} The dissent pointed out that the majority's use of congressional statements was not helpful since they referred to the original House version of Section 10(k) and not the later version that was subsequently enacted.\textsuperscript{39} The dissent did not address itself to the fact that a non-signatory employer does not commit an unfair labor practice by refusing to abide by a Section 10(k) award.

The majority and dissent disagree on whether the non-signatory employer has standing to participate in a jurisdictional strike. While the majority holds that Congress intended that the non-signatory employer could never be a party to a Section 10(k) hearing, the dissent concludes that Congress did intend the non-signatory employer to be a participant when the unions involved him in the jurisdictional dispute.

Although neither the majority nor the dissent thoroughly analyzed the non-neutral employer's position, both would exclude the non-neutral employer from participating in any determination of a jurisdictional strike if the unions did not involve him.

\textsuperscript{34} Plasterers Local 79 v. NLRB, Civil No. 22,073 (D.C. Cir., June 30, 1970).
\textsuperscript{35} 364 U.S. 573 (1961).
\textsuperscript{36} \textit{Id.} at 579.
\textsuperscript{37} Plasterers Local 79 v. NLRB, Civil No. 22,073 (D.C. Cir., June 30, 1970).
\textsuperscript{38} \textit{Id.} The dissent attempts to distinguish between jurisdictional disputes and jurisdictional strikes. Judge MacKinnon states that a jurisdictional dispute is a dispute solely between two unions which does not involve the employer in any manner. He further states that a jurisdictional strike causes the employer to become involved in the union's dispute by picketing or other force exerted on the employer.
\textsuperscript{39} \textit{Id.}
Analysis of Plasterers

The Plasterers court’s reliance on the Supreme Court dicta in NLRB v. Radio and Television Broadcast Engineers Union [CBS] is misplaced. The question presented in CBS was whether following a Section 10(k) hearing the NLRB should make an affirmative award of the disputed work. Since the Columbia Broadcasting Company was completely neutral with respect to which union performed the work, the Supreme Court did not analyze the employer’s position. Therefore, CBS does not stand for the proposition that a non-signdary employer is not a party to a jurisdictional dispute.40

Throughout the congressional hearings and debates on Section 10(k), reference was made to the employer as the “innocent victim” of the jurisdictional strike.41 The employer was characterized as being neutral and willing to award the work in dispute to either union, or in some instances to both unions.42 Admittedly, Congress did not consider the non-neutral employer, i.e., one who consciously awards employment to one union rather than to another for reasons of cost, efficiency, or quality production, in drafting Section 10(k). Viewed in this context, the conclusions derived from the legislative history by the majority in Plasterers are correct but incomplete. The question presented, therefore, is how the term “parties” should be interpreted when the jurisdictional strike involves a non-neutral employer. This question may be resolved in one of two ways. First, Section 10(k) can be considered in relation to other provisions of the Taft-Hartley Act. Second, the accurateness of a restrictive interpretation of the term “parties” can be determined by analyzing the effects that such an interpretation will have on a non-neutral employer.

40. In CBS the Columbia Broadcasting Company had assigned the lighting work for a hotel telecast to the Theatrical Union, Local 1. When the protesting of the Radio & Television Broadcast Engineers Union, Local 1212 against this work assignment proved unsuccessful, they refused to operate the cameras for the program thereby forcing its cancellation. The question of remote lighting, which caused the dispute, had extended over a number of years. The Columbia Broadcasting Company was completely neutral with respect to which union performed the work. Consequently, the employers position was not relevant to the Court’s determination.

For a general discussion of jurisdictional strikes prior to the CBS decision see Garmer & Powers, The Role of the National Labor Relations Board In Resolving Jurisdictional Disputes, 46 Va. L. Rev. 660 (1960).

41. “The provisions protect employees more than they do the employers, although obviously employers often are innocent victims, the secondary victims, so to speak, of such practices.” 93 Cong. Rec. 5014 (1947) (remarks of Senator Ball). “Consequently, there have been numerous jurisdictional disputes in which the employer is entirely innocent and yet he and the public have been made to suffer . . . .” Id. at 4288 (remarks of Senator Smith). When Congress was considering this legislation, there were a number of unresolved jurisdictional strikes. Id. at 4131-32 (remarks of Senator Ellender). President Truman directed Congress to adopt legislation which would settle these existing strikes and prevent future strikes from occurring. Id. at 136.

42. 93 Cong. Rec. 3227-8 (1947) (remarks of Mr. Lucas).
The court determined that the paramount purpose of the Taft-Hartley Act was to protect only neutral employers.\textsuperscript{43} Since the Taft-Hartley Act defines certain practices of unions to be unfair labor practices,\textsuperscript{44} an employer involved in some of the various situations in Section 8(b), such as featherbedding, cannot be classified as a "neutral employer."\textsuperscript{45} The Taft-Hartley Act gives the non-neutral employer an opportunity to protect his interests, either directly through his own initiative or indirectly through the NLRB. Such an employer is given the right to file unfair labor practice charges,\textsuperscript{46} petition the NLRB for an election,\textsuperscript{47} or file suit in federal court for injuries sustained as a result of a union's unfair labor practice.\textsuperscript{48} In each of these situations the employer has a definite interest in the outcome of the dispute.

The statements of Senator Morse\textsuperscript{49} and the minority views expressed in the Senate Report on the Taft-Hartley Act,\textsuperscript{50} are characteristic of the effect desired by Congress of Section 10(k). Although Congress expected that unions would establish machinery within their own organizations to resolve jurisdictional strikes, the exclusion of interested employers from these proceedings

\begin{footnotes}
\item[45] Section 8(b)(6), 29 U.S.C. § 158(b)(6) (1964), states that:
\begin{quote}
[I]t shall be an unfair labor practice for a labor organization or its agent[s]—
to cause or attempt to cause an employer to pay or deliver or agree to pay or
deliver any money or other thing of value, in the nature of an exaction, for
services which are not performed or not to be performed . . . .
\end{quote}
An employer who is subjected to featherbedding practices is interested and concerned in curtailing these practices and their deleterious effects upon him. "I am against requiring an employer to submit to other featherbedding practices, thereby running up the cost of his product for the consuming public to pay." 93 CONG. REC. 3641 (1947) (remarks of Mr. Keating).
\item[47] Id. § 159(c)(1)(B).
\item[48] Id. §§ 185(a),(b).
\item[49] [P]robably one of the greatest benefits that will come from the adoption of such amendments to the Wagner Act as I am proposing this afternoon will be action on the part of the unions themselves to see to it that it does not become necessary, unless in exceptional cases, to resort to the machinery which I have proposed in these amendments . . . because the unions themselves will proceed to establish within their own organizations machinery capable of settling such disputes short of economic action.
\item[50] Section 10(k) in effect provides for compulsory arbitration of jurisdictional disputes . . . . We believe this provision of the bill to be sound, and are pleased to note that full opportunity is given to parties to reach a voluntary accommodation without governmental intervention if they so desire. We are confident that the mere threat of governmental action will have a beneficial effect in stimulating labor organizations to set up appropriate machinery for the settlement of such controversies within their own ranks, where they properly should be settled.
\end{footnotes}

was not necessarily anticipated. The Joint Board recognized this fact and provided that employer representatives participate in jurisdictional determinations.\footnote{Joint Board Agreement, art. II, § 1.}

The Joint Board further recognized that any signatory employer who was directly affected by a jurisdictional strike should have an opportunity to present his case and protect his interests.\footnote{"It shall be the duty of the Joint Board to consider and decide cases of jurisdictional disputes in the building and construction industry, which disputes are referred to it by . . . any employer directly affected by the dispute . . . ." \textit{Id.}, art. III, § 4.}

Congress was as perceptive as the ALF-CIO in attempting to protect the employer's interest. Although "Congress just did not address themselves to the point"\footnote{Plasterers Local 79 v. NLRB, Civil No. 22,073 (D.C. Cir., June 30, 1970).} of non-neutral employers, it did provide, through the term "parties," the aggrieved non-neutral employer with a forum to protect his interests.

Section 10(k) states that:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen . . . .

Section 8(b)(4)(D) states that it is an unfair labor practice for a union to force an employer to assign work to one union rather than another. The usual force exerted by a union during a jurisdictional strike is picketing. There are, however, other means that unions can employ to pressure an employer. One method is to have the unions agree between themselves which will perform certain work for an employer. Thus, not only picketing but also any force exerted on the employer which precludes him from awarding employment to one union rather than another involves him in a jurisdictional strike.

The term "person" as used in Section 10(k) is defined in Section 2(1)\footnote{29 U.S.C. § 160(k) (1964).} which states that: "The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."\footnote{\textit{Id.} § 152(1).} The use of the term "person" in Section 10(k) undeniably refers to labor unions, since no other category delineated in Section 2(1) can violate Section 8(b)(4)(D). In enacting Section 10(k) Congress did not direct the NLRB to hear and determine jurisdictional strikes between the "persons" involved, but rather between the "parties" involved.

\footnote{\textit{Id.}}
Words and phrases which were to be given special meaning in the Taft-Hartley Act were explicitly defined by Congress. Since Congress did not specifically define the term "parties," it should be accorded its normal interpretation, i.e., "[t]he persons who take part in the performance of any act, or who are directly interested in any affair . . . ." Since the non-neutral employer is directly affected by the work assignment, an interpretation of the term "parties" which excludes the non-neutral employer is inconsistent with the purpose of the Taft-Hartley Act, i.e., to protect employers from devastating labor tactics.

The Plasterers court isolated Section 10(k) in its interpretative analysis. The court looked only to Section 8(a) to inquire whether an employer who refused to abide by a Section 10(k) award committed an unfair labor practice. The court correctly concluded that he did not. The lack of provisions for enforcement by the NLRB led to the majority's restrictive interpretation of the term "parties." The court, therefore, rejected the NLRB's interpretation since it believed that a Section 10(k) award could not be enforced against a non-neutral, non-signatory employer. The court, however, did not consider the relationship between Sections 10(k) and 301 of the Taft-Hartley Act.

**Taft-Hartley: Sections 10(k) and 301**

The Plasterers court considered only the original House version of Section 10(k), from which the present law is derived. The court, however, did not consider the effect of the modified version of Section 10(k) that was enacted into law. Under the original House version, Section 10(k) authorized the NLRB to appoint an arbitrator who would determine the merits of a jurisdictional strike. The award of this arbitrator was to have the effect

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60. Id. § 185.
61. The original House version of Section 10(k) stated that:
Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen or to appoint an arbitrator to hear and determine such dispute, unless within 10 days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or the arbitrator appointed by the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.
of an NLRB order. When this provision was subsequently deleted, Senators Morse and Murry strongly objected because the effect of this deletion was to interject the NLRB as the arbitrator of jurisdictional strikes.

Prior to the enactment of Section 301, enforcement of arbitration provisions in labor contracts was generally controlled by either common law or state statutes. At common law an executory agreement to arbitrate could be revoked prior to the rendering of an award. The party who breached the arbitration agreement was liable for damages, but the agreement could not be specifically enforced. However, once arbitration pursuant to an agreement had been completed, the parties to the agreement were legally bound by the decision. The United States Arbitration Act made a distinction between commercial and labor controversies. This Act allowed federal courts to enforce executory agreements to arbitrate in commercial disputes while specifically excluding employment contracts. Because of this exclusion courts had not applied the Arbitration Act to union contract cases. The enactment of Section 301 in 1947 significantly changed the law with respect to arbitration of labor disputes. Section 301 gave the federal courts the power to: (1) enforce union contracts, (2) compel arbitration proceedings in accordance with the contract terms, (3) entertain suits involving awards issued under the arbitration clauses of such contracts, and (4) specifically enforce the award.

The Plasterers majority concluded that a non-signatory employer could not be a party to a Section 10(k) proceeding since he was not legally bound by the award. The language of Section 10(k) reveals, however, that the law implies a provision for resolution of jurisdictional strikes in every labor contract. The NLRB has jurisdiction to determine the merits of a jurisdictional strike unless the "parties" have provided for other means of settlement. Thus, the

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62. Id.
63. 93 CONG. REC. 6452 (1947) (remarks of Senator Morse); Id. at 6506 (remarks of Senator Murray).
65. Id.
66. Id.
67. 9 U.S.C. § 1 (1964). "[B]ut nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Id.
68. Id.
69. See, e.g., Warehouse Workers Local 19 v. Buckeye Oil Co., 236 F.2d 776 (6th Cir. 1956); Elec. Workers Union v. Miller Metal Prods., 215 F.2d 221 (4th Cir. 1954); Tenney Eng'r, Inc. v. Elec. Workers Local 437, 207 F.2d 450 (3d Cir. 1953); Mercury Oil Refining Co. v. Oil Workers, 187 F.2d 980 (10th Cir. 1951).
73. Id.
The Non-neutral Employer

NLRB has jurisdiction to determine every jurisdictional strike by the language of Section 10(k). It can only relinquish this jurisdiction if the "parties" have agreed on a private method of determination. Unions and employers have not sought judicial enforcement of Section 10(k) awards because of their contracts. Under Section 10(k), the NLRB would have a Section 10(k) award because would be implied as a matter of law. The employer is legally bound by a

neutral Employer

Joint procedure of the Joint Board is the intent behind Section 10(k). The non-signatory employer's situation since he was not bound to an agreement by the Joint Board. This procedure allows the Joint Board to determine if the needed unions are signatories of collective bargaining agreements. The analysis of the criteria employed by the Joint Board in resolving jurisdictional disputes is a matter for study. The Board shall utilize the following

Joint Board in resolving jurisdictional disputes. An examination of the criteria employed by the Joint Board indicates a

Joint Board Agreement, art. III, § 4. NLRB v. Local 25, IBEW, 396 F.2d 591 (2d Cir. 1968). The court stated that "It appears that this Joint Board gives little weight to considerations of economy, and that past practice is usually held determinative." Id. at 594.

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These decisions range in dates from May 1904 through January 1968, with over half coming before 1924. The "established trade practice" or "prevailing practice in the locality" are spurious standards since both of these criteria have evolved within the boundaries of the appropriate agreements or decisions. In reality, therefore, the Joint Board resolves jurisdictional disputes by using standards that are approximately 40 years old, although the methods and materials used in the construction industry have advanced during this time span. A signatory employer may award a work assignment to a particular union because: (1) it may have more expertise with a particular method or material, or (2) it may have sufficient expertise to adequately perform the work, but accepts a lower wage scale. This employer, however, may be precluded from making this work assignment by an agreement which may be 68 years old.

Thus, the situation of the employer who is a signatory of the Joint Board Agreement, either directly, or indirectly through a contractors' association, is not an enviable one. However, the position of the employer who is not a signatory of the Joint Board Agreement is even less enviable.

Usually, non-signatory employers sign separate contracts with individual labor organizations for the performance of work assignments. However, a non-signatory employer who signs contracts with signatory unions is denied the opportunity for meaningful participation in the arbitration process. This employer is either precluded from or unwilling to submit to a Joint Board determination. Consequently, the arbitration provisions of his contracts are rendered hollow. Placed in this position an arbitrator would declare the issue between the employer and either union non-arbitrable based on the lack of participation of both unions in the proceeding. The arbitrator would then adjourn the hearing pending the Joint Board determination. The arbitrator would reconvene the proceeding after the Joint Board had issued its award to determine, on the basis of the award, whether the employer had complied with his contract. Thus, the arbitration provisions have lost their value to the non-signatory employer.

The court in Plasterers determined that a non-signatory employer who de-

81. Id.
82. In Plumbers Local 55, 184 N.L.R.B. No. 105, 74 L.R.R.M. 1678 (1970), the Joint Board issued an award to the plumbers based on a 1926 agreement. The NLRB reversed the Joint Board for its failure to explain the factors relied on in making the award. The mere existence of a 1926 agreement was not determinative.
84. Id.
85. Id.
86. Id. at 1022.
The Non-neutral Employer

clines or is denied the opportunity to participate in a Joint Board proceeding is not legally bound by the award. However, the circumstances in the building and construction industry are such that a non-signatory employer is bound, as a practical matter, by a Joint Board award. Admittedly, an employer who is not a party to an arbitration proceeding is not legally bound by the decision. In *Retail Clerks Local 770 v. Thriftmart, Inc.*, Judge Traynor held that due process prohibits enforcement of an arbitration award against a non-participating party. Judge Traynor quoted with approval *Retail Clerks Local 428 v. L. Bloom Sons Co.*, which stated that:

Appellant is, in effect, urging the patently absurd proposition that two parties can by contract effectively stipulate for the mode of determination of the rights of a third party who has not only not assented to such a mode of determination but who also is not even accorded an opportunity to participate in such determination.

A non-participating employer's options must be carefully analyzed to determine the practical effect of this award. The employer may not offer the disputed work to the losing union, for the victorious union could have its award specifically enforced. The employer could solicit other unions to perform the disputed task, if they had the requisite expertise. This, however, would only result in another Joint Board or Section 10(k) proceeding. Eventually the employer would be forced to deal with the victorious union.

88. *Id.* at 423-24, 380 P.2d at 655-56, 30 Cal. Rptr. at 15-16.
90. *Id.* at 703, 344 P.2d at 52-53. See also Beinstein, *Nudging and Shoving All Parties to a Jurisdictional Dispute into Arbitration: The Dubious Procedure of National Steel*, 78 HARV. L. REV. 784 (1965). Mr. Bernstein emphasizes the importance of both parties to an arbitration proceeding agreeing on the choice of an arbitrator. He disagrees with Mr. Jones, see note 86, supra, because the effect of a motion in the nature of interpleader in an arbitration hearing would be to force a party to participate in the proceeding without assenting to the selection of the arbitrator. The court in *Plasterers* has gone one step further. The court does not allow the employer to select the arbitrator, or to participate in the proceedings. The court states that voluntary arbitration procedures should not be frustrated simply because of employer non-participation. Conversely, voluntary arbitration procedures, which are geared to the protection of only the unions involved, should not be allowed to render an award without employer participation, which will, as a practical matter, be binding on the employer. The employers interests must be protected by someone. If the employer and the unions can not agree on the choice of an arbitrator, the courts should not choose one for them. This is the function of the legislature and it has performed this function by appointing the NLRB as arbitrator.
91. The determination of a jurisdictional dispute is only applicable to the two unions who are signatories of the Joint Board Agreement. Thus, disputes are determined on a case by case basis, unless a national decision is requested and decided in accordance with article III, Section 2 of the Joint Board Agreement.
92. It is conceivable that an employer would eventually be able to deal with a union that he favors even though it lost. The employer would have to repeatedly offer the disputed work to unions he selected until one was accepted by the Joint Board. The time involved in this, however, could be prohibitive.
The employer could attempt to contract non-union employees to perform the disputed work. However, of the more than three million men employed in the construction industry in the United States, only 65 thousand are not union members. Therefore, as a practical matter, the employer is bound by a Joint Board arbitration award—an inequitable and unsatisfactory result. Since the criteria employed by the Joint Board excludes considerations of economy and efficiency, non-neutral employers prefer NLRB determinations. Under the rule pronounced by the NLRB 20 years ago this employer would have a forum in which to present his case and have it determined fairly. However, if a non-neutral employer was dissatisfied with an NLRB award, his options would be exactly the same as under a Joint Board award, i.e., none. The only difference is that the employer has a right to be present during the NLRB hearing while he is precluded from participating in the Joint Board hearing. Thus, the jurisdictional controversy was settled fairly, with all the parties being afforded an opportunity for active participation, thereby accomplishing the Act’s purpose.

Conclusion

The Supreme Court in Boys Markets, Inc. v. Retail Clerks Union, stated that: “As labor organization grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes.” Congress, in enacting the Taft-Hartley Act, stated that one of its purposes was “... to provide orderly and peaceful procedures for preventing the interference by [employees and employers] with the legitimate rights of the other ...” The decision in Plasterers is not consistent with either statement. It was not the intent of Congress to allow the Joint Board, using antiquated and biased criteria, to dictate employment practices to contractor-employers. Nor is

93. U.S. DEP’T OF LABOR, HANDBOOK OF LABOR STATISTICS, July, 1969, BULL. NO. 1630. This statistic was arrived at by comparing Tables 36 and 136.
95. The employer would also be able to petition an appropriate court for judicial review. 5 U.S.C. §§ 556(d), 558(b) (Supp. V, 1970).
96. 29 U.S.C. § 151(b) (1964) states that:
   Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another’s legitimate rights ... It is the purpose and policy of this Act, ... to prescribe the legitimate rights of both employees and employers in their relations affecting commerce ... 
98. Id. at 251.
it consistent with the principles of due process to deny an employer, whose rights may be adversely affected, an opportunity to participate in the determination of a jurisdictional dispute. And it is contrary to the interests of the public to frustrate arbitration methods or collective bargaining processes of settling jurisdictional strikes. Yet, these are the effects of the Plasterers decision, through which the D.C. Circuit, by judicial fiat, has appointed an arbitrator for the non-signatory employer contrary to his desires and has substituted the powers of the Joint Board for those of the courts in enforcing arbitration awards. The ramifications of this decision in the field of labor-management relations are such that they alone would warrant re-appraisal of the decision. For until other equitable provisions and criteria are adopted by the Joint Board, the NLRB is the only forum which provides the procedural safeguards for a just and final determination of a jurisdictional strike.101

Arthur M. Brewer

100. Another problem presented by this decision is the effect produced on NLRB certification. It is conceivable that the Joint Board could render a decision which conflicts with an NLRB certification, although construction unions are rarely certified. The courts would then be presented with the problem of determining which decision to enforce, i.e., either the NLRB’s certification of a union through an appropriate bargaining unit or the Joint Board’s award which could destroy the appropriateness of the bargaining unit.