Interpreting Collective Bargaining Agreements: Silence, Ambiguity, and NLRA Section 8(d)

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The judicial construction of section 8(d)'s mandatory-permissive item dichotomy has created a structural power imbalance between unions and management. This imbalance has made it increasingly difficult to bargain over express language restricting employer power exercises which avoid the collective bargaining agreement. Since this language may be left out altogether or couched in general terms, the interpretation of silence and ambiguity takes on an even more important role. This Article addresses the Board's and courts' treatment of silence and ambiguity in the collective bargaining agreement within the power-balancing context of the NLRA. This Article discusses the two major theories of contract interpretation—the management reserved rights theory and the implied obligations theory—as applied in the restriction of those economic weapons, or "power exercises" that defeat the contractual expectations of a party. The case law discussed indicates an uneven and inconsistent application of the rules of interpretation. This Article proposes a modified implied obligations analysis incorporating a contractual expectations approach with silence and ambiguity directed toward avoiding contractual forfeiture.

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Control of power exercises deemed deleterious to the public good is the currency of labor policy. Stripped of rhetoric and ritual, the collective bargaining process is a power confrontation, albeit of a complex form. The end product is a "special" contract creating reciprocal duties structuring an ongoing relationship. The public good is served by providing a framework within which the clash of interests occurs. This framework includes the collective bargaining process itself, arbitration, the National Labor Relations Board ("NLRB") and ultimately, the courts, against the backdrop of industrial custom, common law, and statutes. Whether from legislative mandate or judicial construction, the substantive aspects of particular duties within the collective bargaining agreement are direct products of the underlying construction and proce-
dural restrictions on power exercises.³

The National Labor Relations Act ("NLRA")⁴ influences the substance of collective bargaining agreements in three important ways: by delaying until impasse the use of some economic weapons; leaving some weapons to the discretion of the parties; and banning some specific weapons outright.⁵ Arguably, these power control mechanisms serve the national labor policy embodied in the NLRA. Except where legislatively mandated, sound labor policy requires uniform application of these power control mechanisms without regard to the union or employer status of a proponent. Since much substantive labor law in these areas is judicially created rather than legislatively mandated, serious questions are raised concerning the consistency of the Board's and courts' treatment of particular power exercises.⁶

Consider the implications of the Borg-Warner⁷ decision and its progeny. These cases divide collective bargaining items into three classes: mandatory, permissive, and illegal.⁸ The mandatory-permissive dichotomy is the most problematic. If the NLRB finds an item permissive, a party cannot bargain to impasse on it and cannot compel its inclu-

³. This truism recognizes the importance burdens of proof, presumptions, procedural rules and rules of evidence have on issue definition and the underlying constraints and assumptions structuring the dispute resolution forum. Although in a slightly different context, similar considerations arise when the focus shifts to issue definition in economic decisionmaking. See C. PERRROW, COMPLEX ORGANIZATIONS: A CRITICAL ESSAY (1972); H. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION MAKING PROCESS IN ADMINISTRATIVE ORGANIZATION (3d ed. 1976); (supporting the view that who makes a final decision is not nearly as important as the constraints and assumptions molding issue definition).


⁸. The majority in Borg-Warner held:

[Section 8(d)] establish[es] the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to "wages, hours, and other terms and conditions of employment . . . ." The duty is limited to those subjects, and within that area neither party is legally obligated to yield. As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree.

Id. at 349 (citation omitted); see also Brockway Motor Trucks v. NLRB, 582 F.2d 720, 725 (3d Cir. 1978) ("In practical terms, the elaboration of the identity of mandatory subjects of bargaining is crucial, for such matters must be discussed in bargaining sessions before any unilateral action with respect to them is taken."); infra notes 14 & 66-78 and accompanying text.
sion in the final agreement. Moreover, without an express restriction in the collective bargaining agreement, there is no good faith obligation to bargain during the contract term over permissive issues.\footnote{9} A party is not only permitted to take unilateral action on a permissive subject without violating the duty to bargain in good faith, but responsive action may itself be an unfair labor practice or a violation of the collective bargaining agreement.\footnote{10}

Although the mandatory-permissive bargaining item dichotomy is ostensibly neutral, in application the dichotomy structurally disadvantages labor’s bargaining power. Bargaining issues backed by the threat or use of economic power are more likely to be included in the collective bargaining agreement. To classify a bargaining item as permissive is to exclude it structurally from the mandatory reach of the collective bargaining process—a preemptive determination of substance in the collective bargaining agreement.

For example, a major source of employer power is control over the movement of bargaining unit work. The \textit{Borg-Warner} progeny, notably the Supreme Court’s \textit{First National Maintenance}\footnote{11} and the Board’s \textit{Milwaukee Spring Division of Illinois Coil Spring (II)}\footnote{12} and \textit{Otis Elevator}\footnote{13} decisions, have significantly broadened the category of permissive bargaining issues regarding the movement of bargaining unit work.\footnote{14} With

\footnote{9. See supra note 8.}
\footnote{11. First Nat’l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).}
\footnote{13. Otis Elevator Co., 269 N.L.R.B. 891 (1984).}
\footnote{14. In \textit{Otis Elevator} the Board limited the category of mandatory bargaining items regarding employer movements of bargaining unit work to a labor cost basis. Included within Section 8(d), however, in accordance with the teachings of \textit{Fibreboard}, are all decisions which turn upon a reduction of labor costs. This is true whether the decision may be characterized as subcontracting, reorganization, consolidation, or relocation, if the decision in fact turns on \textit{direct} modification of labor costs and not on a change in the basic direction or nature of the enterprise. \textit{Id.} at 893 (1984) (emphasis added).}

Whether this narrow focus will be adopted by the subsequent Board members is questionable. Nevertheless, it raises the importance of issue definition and verification since employers can easily tailor business judgment rationales to exploit the current Board’s narrow views on what constitutes mandatory bargaining items. \textit{See generally} Zimarowski, \textit{The Viability of the Collective Bargaining Process: Corporate Transformations as Unchanneled Bargaining Power}, 3 \textit{Hofstra Lab. L.J.} 137 (1986).

The concept of mandatory bargaining items has an uneven history reflecting the changing social and economic structure of employment in the United States. In the 1960s, even after \textit{Borg-Warner} and \textit{Fibreboard Paper Products} v. NLRB, 379 U.S. 203 (1964), the mandatory-permissive bargaining item dichotomy was not significant since most subjects were at least initially viewed as mandatory. A similar observation may be made regarding the \textit{Mackay} strike replacement doctrine. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938). Employers could not effectively replace skilled labor, thus muting the effect of a poorly conceived doctrine drawn from Court dicta. Fifty years later, however, the doctrine is rising in importance. \textit{See, e.g.}, Harter Equip., Inc., 280
many corporate decisions regarding the movement of work effectively excluded from the mandatory process, employees must look for protection in the language of the collective bargaining agreement and through potentially disruptive self-help.

The Board's and courts' roles as facilitators of the collective bargaining process have expanded beyond the mandatory-permissive determination to include the interpretation of specific contract language in the agreement. In deciding unfair labor practice and section 8(d) cases, the Board has adopted an increasingly literal approach in interpreting collective bargaining agreements. The courts have reached similar contract interpretation issues through appellate review of unfair labor practice cases and the enforcement of arbitration awards.

Whether from the direction of unfair labor practices or the arbitration process, courts and the Board are focusing upon the rights of a party to unilaterally exercise power and restructure the collective bargaining relationship. Initially, each tribunal examines the collective bargaining agreement for applicable contract language and, if applicable language is found, defines the scope of that language. This process raises, however, an equally significant but more subtle determination. This determination rests on the structural power imbalance resulting from the mandatory-permissive bargaining item dichotomy and the limitations on effective

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15. The Act does not include the violation of contract terms as an unfair labor practice. An earlier version of the Senate bill contained a § 8(a)(6) provision making it an unfair labor practice "to violate the terms of a collective bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration." Section 8(b)(5) contained a similar provision applicable to labor organizations. Both provisions were struck from the final Act. S. 1126, 80th Cong., 1st Sess. (1947), reprinted in 1 LEGISLATIVE HISTORY OF THE LMRA, supra note 1, at 109-11, 114. This does not imply that the Board and the courts are precluded from examining contract language, only that such inquiries are dependent upon unfair labor practice provisions or contract enforcement through § 301, 29 U.S.C. § 185 (1982).


18. The control over unit work (including subcontracting, automation, consolidation, relocation, and closure) is a significant source of employer power. When exercised, bargaining unit employees' expectations in continued employment obviously are affected. The union's strike weapon and its derivatives of slowdowns, soldiering, low productivity, and poor quality control each restructure the relationship and affect the contractual expectations of the employer. Whether particular unilateral actions constitute a breach of an agreement is a central question in accommodating collective agreements with the policies of the NLRA. See Summers, supra note 2, at 537-48. Most of the above unilateral employee responses are subject to the employer's "industrial common law" remedies of discipline or discharge if the particular activity is outside the ambit of § 7. See Feller, supra note 2, at 774-804; Finkin, Labor Law by Boz—A Theory of Meyers Industries, Inc., Sears, Roebuck & Co., and Bird Engineering, 71 IOWA L. REV. 155 (1985); see also F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS, at ch. 15 (4th ed. 1985) ("Discharge and Discipline").
union power responses on permissive subjects. Since express language restricting significant power exercises has been classified as a permissive item, it has become increasingly difficult to bargain on this issue. Since this language may be left out altogether or couched in general terms, the tribunals are required to address the impact of silence and ambiguity, a "default position," in contract interpretation.

In an ongoing bargaining relationship, the party who commands the default position has the advantage. The party with the advantage can prevail on a particular issue by either excluding language unfavorable to its interests or by including language favorable to its interests. All institutions require operating rules. The bargaining over each rule, however, is not only inefficient, but would result in lengthy documents that remain incomplete as to all possible contingencies. Therefore, the interpretation of contract language and the default position must be limited to the significant issues of frustration or forfeiture of the parties' contractual expectations.

19. Principal among these are the statutory restrictions on secondary activity, hot cargo clauses and picketing; and case law allowing permanent replacement of economic strikers. Mackay Radio, 304 U.S. 333 (permanent replacement of economic strikers upheld). These factors tend to prevent effective solidarity with other labor groups, thereby often keeping localized a labor dispute against an organization national or international in scope. See generally Atleson, Reflections on Labor, Power and Society, 44 MD. L. REV. 841 (1985).


21. In the commercial transaction area, the default or silence position is partially settled through the use of statutory provisions in the Uniform Commercial Code. See, e.g., Article Two, Sales, U.C.C. (1978).

22. The concurring opinion by Justice Stewart in Fibreboard Paper Products v. NLRB, 379 U.S. 203 (1964), addressed the issue of frustration of the agreement by the subcontracting of unit work.

If the employer had merely discharged all its employees and replaced them with other workers willing to work on the same job in the same plant without the various fringe benefits so costly to the company... it would be... possible to regard the employer's action as a unilateral act frustrating negotiation on the underlying questions of work scheduling and remuneration, and so an evasion of its duty to bargain on these questions, which are concededly subject to compulsory collective bargaining.... Insofar as the employer frustrated collective bargaining with respect to these concededly bargaining issues by its unilateral act of subcontracting this work, it can be properly found to have violated its statutory duty under section 8(a)(5).

Id. at 224 (Stewart, J., concurring) (emphasis added, footnotes omitted). Of course, the employer also has underlying contractual expectations.

Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. ... This kind of subcontracting falls short of such larger entrepreneurial questions as what shall be produced, how capital shall be invested in fixed assets, or what the basic scope of the enterprise shall be.

Id. at 223, 225 (Stewart, J., concurring). Employers' interests surface prominently in the Court's decision in First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981):

Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business.... Nonetheless, in view of an employer's
It is obvious that the command of the default position affects the bargaining posture of the parties. The Board and courts bring preconceptions about the labor-management relationship to their interpretations of collective bargaining agreements. That is, the interpretations of collective bargaining agreements and case results are based on an unspoken conflict between the management reserved or residual rights theory and the implied obligations theory.

Under the management reserved rights theory, management retains all rights it does not explicitly bargain away. The implied obligations theory, by contrast, looks at the agreement as a whole to find both specific contractual rights and derivative implied obligations between the parties. A party's unilateral violation of an implied obligation breaches the contract in the same way as a violation of an explicit term.

This Article addresses the Board and court treatment of ambiguity and silence in the collective bargaining agreement. The case law indicated need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.

_id. at 678-79 (footnotes and citations omitted). There are numerous critiques of the Court's purported balancing of interests in First National Maintenance, including a sharp dissent by Justice Brennan. _Id. at 688-91; see also Litvin, Fearful Asymmetry: Employee Free Choice and Employer Profitability in First National Maintenance, 58 IND. L. REV. 433 (1983).

Employees also have interests and expectations in the employment relationship. Consider the Board's statement in Ozark Trailers, 161 N.L.R.B. 561 (1966):

[A]n employer's decision to make a "major" change in the nature of his business, such as the termination of a portion thereof, is also of significance for those employees whose jobs will be lost by the termination. For, just as the employer has invested capital in the business, so the employee has invested years of his working life, accumulating seniority, accruing pension rights, and developing skills that may or may not be salable to another employer. And, just as the employer's interest in the protection of his capital investment is entitled to consideration in our interpretation of the Act, so too is the employee's interest in the protection of his livelihood.

_id. at 566. It is with these larger issues of termination of significant portions of the bargaining unit work, such as the forfeiture of the agreement, that the analysis of contractual expectations must be operationally confined.

23. See _infra_ notes 108-10 and accompanying text.


25. Although similar issues arise in the context of interpretation of particular grievances in arbitration, the influence of the Board and the courts in defining the substance of contract language may have significant impact not only on arbitration decisions, but on the strategy of forum selection. If a Board's decision and an arbitrator's decision conflict, the arbitrator's decision must give way. International Longshoremen's Union, Local 32 v. Pacific Maritime Ass'n, 773 F.2d 1012 (9th Cir. 1985) (unfair labor practice to attempt to circumvent the Board processes through arbitration proceedings), _cert. denied_, 476 U.S. 1158 (1986). Certain contract violations are also violative of the NLRA. In processing unfair labor practice charges which also constitute contract violations, the Board's established policy is to suspend its proceedings to permit the claim to be put before an arbitration tribunal. United Technologies Corp., 268 N.L.R.B. 557 (1984); Collyer Insulated Wire, 192 N.L.R.B. 837 (1971) (upheld by _United Technologies_). If the party filing the charge is dissatis-
icates that tribunals have not clearly adopted either the management rights theory or the implied obligations theory as a principled justification for the results they reach.\textsuperscript{26} The failure to adopt a consistent approach has led to unpredictable results in the interpretation of silence and ambiguity in collective bargaining agreements.

This Article suggests a broader analytical approach to ambiguity and silence in collective bargaining agreements. By accommodating a mixture of contract principles, traditional employer-employee command-obedience concepts, and the policies of the NLRA, this Article rejects both the pristine management rights and implied obligations theories. Rather, the Article offers a modified implied obligations analysis. This analysis incorporates a contractual expectations approach, along with the modern concepts of good faith and fair dealing, unconscionableness, and a default position directed toward avoiding contractual forfeiture.

I

THE NLRA AND THE SUBSTANCE OF COLLECTIVE BARGAINING AGREEMENTS

A. The NLRA: An Institutional Perspective

It is folly to view the policies behind the National Labor Relations Act from solely an economic perspective. The Act demands a broader view. This Institutionalist view embraces not only economics but also power, conflict, and causation interacting in a dynamic societal system.\textsuperscript{27} The Act recognized the importance of stable employment to the individual.\textsuperscript{28} It also recognized that given the unequal power distribution believed with the resulting arbitration award, it may petition the Board for review to determine if deferral to the arbitration award or reactivation of the unfair labor practice claim is warranted. Olin Corp., 268 N.L.R.B. 573 (1984); Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955). The Board’s deferral policy is controversial. See Taylor v. NLRB, 786 F.2d 1516 (11th Cir. 1986) (Board cannot defer away its statutory obligation to protect statutory rights). See generally Peck, A Proposal to End NLRB Deferral to the Arbitration Process, 60 Wash. L. Rev. 355 (1985).

26. See infra notes 123-31 and accompanying text.


This position has been implicitly attacked by the law and economics approach espoused by the “Chicago School.” See, e.g., R. Posner, Economic Analysis of Law (2d ed. 1977); Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960). For an application of these theoretical arguments to the collective bargaining process, see Schwab, Collective Bargaining and the Coase Theorem, 72 Cornell L. Rev. 245 (1987).

The Chicago School approach logically builds from the acceptance of assumed universal truths and antecedent conditions. The Chicago School assumes a radical free market posture. In their view, all activities are economically motivated to maximize resources and all societal relationships
tween labor and management, conflict is inevitable and likely to lead to disruptions in commerce that may affect the public good. In order to redress the power imbalance between employers and employees and to channel conflict through a dispute resolution forum, Congress established the parameters of the collective bargaining process. Congress's can be resolved exclusively through a simple bargaining transaction. As such, the Chicago School renders all complex social interactions subordinate to a myopic economic efficiency methodology. This theory is logically constructed if one accepts their universal truths. To concede these truths is to concede the argument. The acceptance of assumed universal truths is the heart of the conflict between the Chicago School approach, the neoclassical economists, and the Institutionalists. Simply put, the Chicago School is built upon simplistic and erroneous assumptions about conflict, power, and causation. Compare Kelman, Consumption Theory, Production Theory, and Ideology in the Coase Theorem, 52 S. CALIF. L. REV. 669 (1979); Liebhasky, Price Theory as Jurisprudence: Law and Economics, Chicago Style, 10 J. ECON. ISSUES 23 (1976); Liebsak, The Problem of Social Cost—An Alternative Approach, 13 NATURAL RESOURCES J. 615 (1973); Zimarsky, Public Purpose, Law, and Economics: J.R. Commons and the Institutional Paradigm Revisited, 90 W. VA. L. REV. 387 (1988); Zimarsky & Radzicki, Demystifying Law and Economics, Chicago Style, in Labor Law: What It Is—and Is Not 38 CATH. U.L. REV. (in press) (1989).


The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce. The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce by depressing wage rates and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

See also A. Cox, Law and the National Labor Policy (1960); C. Gregory & H. Katz, Labor and the Law (3d ed. 1979).


The object of this Act was . . . to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement.
intent was, in part, to channel economic conflict. But the Act and earlier courts also recognized a second area of employer-employee conflict—the command-obedience power relationship.\textsuperscript{31}

The modification of the command-obedience power relationship is often referred to as "industrial democracy" or "industrial due process."\textsuperscript{32} The concept of industrial democracy follows from the view that the democratic principle upon which the nation was founded should be extended to institutions and the industrial arena. Decisions and value systems imposed in the workplace are more likely to concern the worker than are legislative decisions. As stated by Professor Summers, "[d]emocratic principles demand that workers have a voice in the decisions that control their lives; human dignity requires that workers not be subject to oppressive conditions or arbitrary actions."\textsuperscript{33}

The conflict between industrial democracy and the authoritarian structure of industrial organizations is readily apparent. The breadth and scope of the commitment to the ideal of industrial due process through the collective bargaining process are not subject to frequent debate.\textsuperscript{34} Nevertheless, the concept of industrial democracy provides the intellectual basis for restructuring the command-obedience relationship in statutory as well as common law evolution.\textsuperscript{35}

\begin{footnotesize}
\begin{enumerate}
\item See J. Commons, Institutional Economics: Its Place in Political Economy 64-67 (1934) [hereinafter J. Commons, Institutional Economics]; Commons, The Problem of Correlating Law, Economics, and Ethics, 8 Wis. L. Rev. 3, 9-11 (1932) [hereinafter Commons, Law Economics, and Ethics]. Managerial transactions appear in the formation of employment relationships. In a conceptually fascinating area private authoritarian organizations are given, aided by the power of the legal order, the ability to command and discipline legally designated inferiors. At the same time, until the erosion of the employment-at-will doctrine, the inferior had little or no rights in the employment. See J. Commons, Legal Foundations of Capitalism, at ch. 8 (1924) [hereinafter J. Commons, Capitalism]; Commons, The Right to Work, 21 The Arena 131 (1899). In the creation of command-and-obedience relationships the social order makes a balance between liberty interests and property interests. See infra note 41.
\item Summers, Industrial Democracy, supra note 32, at 29.
\item In R. Freeman & J. Medoff, supra note 1, at chs. 1 & 6, the traditional economic perspective on labor unions was augmented by the "active voice" perspective. As such, the study attempted to integrate economic studies with behavioral concepts. The study is considered one of the most significant contributions to the industrial relations literature, spawning numerous symposiums and critiques. It challenges the position that unions do not add to the economy, only take, and therefore it is in the public interest to limit union power. Freeman and Medoff, however, raise an "active voice" face paralleling the concerns of industrial democracy. After summarizing a broad data base, they conclude that, on the whole, unions contribute more positive aspects than negative. See also Marshall, supra note 1; Summers, Past Premises, supra note 32.
\item This restructuring is exemplified by the erosion of the employment-at-will concept and the
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This restructuring of the command-obedience relationship is facilitated through the power control mechanisms of the Act. Recognizing that there can be no freedom of contract unless there is freedom to contract, the NLRA established statutory rights to facilitate the creation of institutional structures. The Act creates both rights to organize employees and representational duties. Moreover, the replacement of individual bargaining with collective bargaining resulted in some protection from economic coercion.

Contract interpretation rules for the "collective bargain" have an inherently contradictory lineage. They draw, in part, from at-will employment contracts (wage bargains) and, in part, from ordinary contracts (credit bargains). Contract interpretation rules for these collective bargains must distinguish between those serving the public purpose as broadly articulated in the NLRA and those interpretation rules that simply reinforce common law status and economic coercion. The Institutionalists view description of the processes involved as a necessary prerequisite to understanding and explaining contract interpretation rules. The writings on power and transactions in the social order by Professor John R. Commons, a major proponent of the Institutional methodology, provide conceptual insight. Such a perspective is necessary to expand one's view beyond the simple bargaining transaction construct and embrace more complex societal interactions.

In every conflict there are unequal distributions of physical, moral, and economic power. The scope and uses of power are influenced by the nature of the institutions and public policy manifesting in the form of legal and customary working rules and designated status. A common descriptive analysis between institutions exercising power is the "transaction." A vehicle of power exercises, transactions are encouraged or restrained by the social order's proportioning of inducements in further-

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37. National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967).
38. See infra note 31.
40. See J. Commons, Institutional Economics, supra note 31, at ch. 2; J. Commons, Capitalism, supra note 31, at ch. 4; Commons, Law, Economics, and Ethics, supra note 31, at 5-12.
ance of the public good.\textsuperscript{41} Thus, the law recognizes bargaining transactions as arms-length transactions between two parties deemed equals before the law. Bargaining transactions enlarge the public good through the transfer of wealth by voluntary agreement, persuasion if economic power is equal or coercion if economic power is unequal.\textsuperscript{42}

Commons argued that the simple bargaining transaction model was inadequate to describe the more complex interactions among societal members.\textsuperscript{43} As such, Commons modeled two additional transaction constructs: managerial transactions and rationing transactions. "Managerial transactions" are concerned with the production of wealth through the creation of command-and-obedience relationships. The law recog-

\textsuperscript{41} J. Commons, Capitalism, supra note 31, at 328. One function of law is to provide inducements and restrictions on scarce resources to advance the public good. Most importantly, the legislative enactments are concerned with the long term good for society, not necessarily the myopic goals and interests of individuals and employers. Professor Commons stated the proposition as:

\textit{The public is not any particular individual, it is a classification of activities in the body politic deemed to be of value to the rest of the public rather than a classification of individuals. . . . This \textit{[public purpose]} is the process of classification and reclassification according to the purposes of the ruling authorities, a process which has advanced with every change in economic evolution and every change in feelings and habits towards human beings, and which is but the proportioning and reproportioning of inducements to willing and unwilling persons, according to what is believed to be the degree of desired reciprocity between them. For, classification is the selection of a certain factor, deemed to be a limiting factor, and enlarging the field of that factor by restraining the field of other limiting factors, in order to accomplish what is deemed to be the largest total result from all. . . . Thus, when the hoped-for welfare of women and children comes to be believed to be a limiting factor in the national economy, their hours of labor are reduced or their minimum wages raised, by imposing new duties on employers or parents, under the belief that merely this new apportionment of freedom or collective power, regardless of other changes in the quantity of labor, or of national resources, or of individual efficiency, will increase the national welfare. So with all other legislative and judicial decisions which determine Freedom in one direction by imposing liability in the opposite direction. . . . It is often charged against legislation that the state does not create wealth---only private activity is wealth producing. The charge is, of course, true. Legislation only classifies activities and proportions the inducements to wealth-producers. Individuals do the rest. . . . But they may waste the commonwealth by bad proportioning, may enlarge it by good proportioning.}

\textit{Id. at 328-30 (1924).}

\textit{The proportioning of resources also includes the proportioning and reproportioning of power in a society and gives rise to the establishment of economic as well as political systems. See M. Tigar \& M. Levy, Law and the Rise of Capitalism (1977).}

Again drawing from the writings of Professor Commons:

\textit{There is no right [liberty] without its corresponding duty, no effective or actual right-and-duty of individuals without both a correlative power and responsibility of officials to come to the aid of the right by enforcing the duty. Every right has two corresponding duties, the duty of the opposite person and the duty of officials to exercise the collective power upon that person. For, not only is there no right if there is no remedy but there is no remedy if there is no power to hold officials responsible. The violation of a positive right brings into existence at once, by "operation of law," a remedial "right of action" which is none else than the official duty of the courts and executives to enforce the right.}

\textit{J. Commons, Capitalism, supra note 31, at 363; see also legal scholarship cited by Professor Commons, id. at 91 n.1. The standardization of expectations in organized society is achieved by the protection of rights and duties.}

\textsuperscript{42} J. Commons, Institutional Economics, supra note 31, at 59-64; Commons, Law, Economics, and Ethics, supra note 31, at 5-9.

\textsuperscript{43} See supra note 40.
nizes one party as superior to the other within limits set by common law, statutes, or constitutions. Thus, the "rules" pertaining to the employment relationship, agency, and fundamental organization law are created. The "rationing transaction" posits a relationship between legal superiors and legal inferiors which apportions wealth and power by an authority superior to them all in law. Of course, these complex transactions are interdependent. In these latter two areas fall the regulated organizations and the hybrid systems of quasi-private ordering.

With a recognition of the complex structure of underlying managerial transactions, collective bargaining is more than a mere economic bargaining transaction. Moreover, recognizing the structure and policy of the NLRA in apportioning wealth and power, collective bargaining is a rationing transaction embracing and modifying elements of bargaining and managerial transactions. Rules of contract construction, particularly regarding ambiguity, silence, and contractual expectations, which are suited for simple bargaining transactions should not be discarded out of hand. These rules must, however, be examined in the context of the power control and apportionment from industrial custom, common law and the statutory structure of the labor-management relationship.

B. The Nature of the Collective Bargaining "Contract"

Collective bargaining agreements are enforceable through NLRA section 301. Their unique character, however, is well recognized in case law. As Justice Douglas observed:

A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into contractual relationships they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is not between entering or refusing to enter into a relationship, for that in all probability preexists the negotiations. Rather it is between having the relationship governed by an agreed upon rule of law or leaving each and every subject matter to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces.

The unique nature of collective bargaining agreements and the primacy of the federal courts, under section 301, to enforce substantive content allows the courts to fashion new remedies and develop a federal
common law to govern collective bargaining agreements.\textsuperscript{49} Accordingly, the Court in \textit{Lincoln Mills} held:

We conclude that the substantive law to apply in suits under § 301(a) is federal law which the courts must fashion from the policy of our national labor laws. . . . The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie at the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.\textsuperscript{50}

There are few analyses comparing collective bargaining agreements with traditional contract law.\textsuperscript{51} Professor Clyde Summers' \textit{Collective Agreements and the Law of Contracts}\textsuperscript{52} offers an excellent comparative critique of collective bargaining agreements and the law of contracts. It can be argued that due to four central characteristics of collective bargaining agreements contract principles are inapplicable.\textsuperscript{53} First, by definition, collective bargaining agreements encompass multiple parties and multiple tiers of parties on each side of the bargaining relationship.\textsuperscript{54} Second, ambiguity is included by design rather than oversight.\textsuperscript{55} As Professor Summers notes, "[t]he end result is a document with broad rules, a miscellany of gaps, unclear language, and unsettled issues."\textsuperscript{56} Generally a third party arbitration forum is created for dispute resolution over interpretation and scope of the agreement. This process has the potential for significant alteration of the written agreement.\textsuperscript{57} Third, the bargaining relationship is involuntary.\textsuperscript{58} The parties are brought to the conference room by operation of law as well as economic coercion. And fourth, the collective bargaining agreements establish an ongoing relationship with renegotiations "not for the making of new agreements, but for the modifications of the old."\textsuperscript{59} Drawing from the underlying legal and structural aspects of the command-obedience relationships, past

\begin{thebibliography}{99}
\bibitem{} Id.
\bibitem{} Id. at 456-57.
\bibitem{} Id. at 528-34.
\bibitem{} Id. at 528.
\bibitem{} Id. at 529-30.
\bibitem{} Id. at 529.
\bibitem{} Id.
\bibitem{} Id. at 530-33.
\bibitem{} Id. at 533-34.
\end{thebibliography}
practices, and the concepts of equity and industrial due process, a broad spectrum of source material is employed in an attempt to define rights and duties and alleviate conflict.

These four central characteristics of collective bargaining agreements, however, are not rare in modern contractual relationships. They simply represent the diversity of duties created between the parties. Consider, to borrow Professor Summers' examples, the contractual nature of group insurance and pension plans, the various relationships created by cooperatives and associations, as well as the complexity of many requirements contracts, franchise agreements and sales or mergers of corporations. Few would deny the utility and enforceability of these complex agreements. As agreements evolve into larger and more complex forms, traditional contract analysis must yield to principles which will protect the enforceability of these complex contracts and achieve justice between the parties.

To do justice between the parties, the focus of collective bargaining agreements, like other complex contracts, should be on the enforceability of the contractual expectations. This approach requires an analysis extending beyond the four corners of the documents. The common law of contracts is also slowly reflecting this approach. Two related contract doctrines are supplementing the creation of contractual expectations and constraining the use of economic coercion: the concepts of "good faith and fair dealing" and "unconscionableness." Although the meaning of these terms in the employment law context is still unclear, both involve the concepts of equity and "industrial" due process.

Collective bargaining agreements do not easily lend themselves to an expectations approach, even when that approach is supplemented with the good faith and unconscionableness doctrines. Unlike many of the

61. This point is made throughout the Summers article, supra note 2.
   205. Duty of Good Faith and Fair Dealing
   Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.
   208. Unconscionable Contract or Term
   If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.
63. See cases cited and discussion in Individual Rights and Responsibilities in the Work Place, 2 LAB. LAW. 351, 351-56 (1986) (Committee Reports Issue, ABA Section of Labor and Employment Law); see also F. ELKOURI & E. ELKOURI, supra note 18, at 673-88; materials cited at supra note 32.
complex contracts cited above, collective bargaining agreements can have a diversity of contractual expectations. Parties color the rights and duties created between themselves with their own underlying interests. The expectations of the employer are organizational survival through profit maximization and maintenance of the command-obedience power structure. The expectations of the labor organization also involve organizational survival, both its own and that of the employer but through short term economic gains and long term job security for its constituency.

Another inherent problem with the broad contractual expectations approach is the potential interference with the bargaining process itself. The parol evidence rule is designed to limit extraneous prenegotiation material. Injecting equity considerations under the rubrics of good faith and fair dealing and unconscionableness cuts both ways. Such considerations may be necessary to ascertain the parties' expectations, but on the other hand, it may open an endless stream of litigation.64

The degree to which one party's contractual expectations must accommodate the other is a matter of public policy. Of course, public policy is drawn from reconciling the labor policy expressed in the National labor Relations Act with the public policy supporting the command-obedience relationships (Commons' managerial transactions) based in custom and common law. The creation of contractual expectations, however, cannot properly be viewed outside the power context in which they are created.

C. Power Distribution Under the NLRA

Power can be conceptualized as the ability to impose a cost of noncompliance or disagreement to secure one's particular interests.65 The greater the effectiveness and variety of costs of noncompliance in the arsenals of labor and management, the greater their respective power.

64. This could potentially open up the settlement to an argument of unconscionable exercises of economic power, and enter the good bargain/bad bargain quagmire.

65. The power balancing function of the NLRA is theoretically designed to mitigate disruptions in interstate commerce and facilitate the growth of industrial democracy. See supra notes 37-40 and accompanying text. The power function can be viewed as further limitations on particular aspects of economic coercion but, encompassing the broader concerns of industrial democracy, it has significant spillover effects on the traditional command-obedience relationships.

Conceptually, A's power over B is a function of B's relative costs of noncompliance and compliance with A's terms. Specifically, A's power will increase as B's cost of noncompliance increases, and will decrease as B's cost of compliance decreases. The costs can be both real or simply perceived, encompassing tangible and intangible concerns. Thus, the expression is not readily quantifiable and is broader in scope than mere economic utilitarianism. Moreover, power is always against some obstacle; it does not operate in a vacuum. The degree of A's power over B, therefore, is dependent upon B's power over A; and that depends on A's costs of noncompliance and compliance with B's terms. Drawn from the conceptualization by N. CHAMBERLAIN, COLLECTIVE BARGAINING, at ch. 10 (1951); see also Leap & Grisby, A Conceptualization of Collective Bargaining Power, 39 INDUS. & LAB. REL. REV. 202 (1986).
Bargaining items backed by a party's ability to impose significant costs of noncompliance on its opposition have a greater probability of inclusion in the collective bargaining agreement. The costs of noncompliance available to the parties in the collective bargaining process, however, are not treated equally. The costs of noncompliance and their relationship to particular bargaining issues can be viewed in three subsets. One subset of issues is channeled through the dispute resolution and mediating functions of the collective bargaining process (mandatory issues). A second subset involves those issues left to the unilateral exercise of the parties (permissive issues). The third subset concerns costs of noncompliance expressly barred under the NLRA.

Through section 8(d), "wages, hours, and other terms and conditions of employment" are channeled through the collective bargaining dispute resolution process. The Court in its seminal Borg-Warner decision created a distinction between mandatory bargaining items channeled through the collective bargaining process, and permissive bargaining items, which are left to the unilateral discretion of the parties. Such distinctions can be viewed as protecting both parties from an unconscionable exercise of power interfering with wholly internal organizational concerns. But the later treatment by the Board and the courts rejected the potential narrow categorization provided by the unconscionableness concept in favor of a broader permissive category. Drawing from both

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66. 29 U.S.C. § 158(d) (1982). Section 8(d) provides:
   (d) 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 ....

67. Section 8(d) specified good faith bargaining with respect to "wages, hours, and other terms and conditions of employment ... or any question arising thereunder." There are two ways such language could be interpreted. First, Justice Harlan's dissent in NLRB v. Wooster Division of Borg-Warner, 356 U.S. 342 (1958), forcefully argues that it merely describes the substantive matters open to discussion by the parties. Justice Harlan based his analysis upon the legislative history and policy of § 8(d) and, recognizing the preemptive impact of a mandatory-permissive bargaining classification, argued that the "Board possessed no statutory authority to regulate the substantive scope of the bargaining process insofar as lawful demands of the parties were concerned." Id. at 354 (Harlan, J., dissenting) (emphasis in original). The dissent argued that the policies of the Act demanded a retention of the legal-illegal distinction in bargaining items.

The second manner in which to view the language of § 8(d) is as words of limitation. Thus the majority in Borg-Warner held:

[These provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to "wages, hours, and other terms and conditions of employment .... The duty is limited to those subjects, and within that area neither party is legally obligated to yield .... As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree.

Id. at 349. With this approach the Borg-Warner Court created the poorly defined demarcation between mandatory and permissive bargaining items.

68. See supra note 22.
the traditional control of capital and the command-obedience relationship, they excluded a broader range of issues from the mandatory reach of the collective bargaining process.  

This approach has several problems. First, the NLRA only requires good faith bargaining as opposed to agreement, so that this broad mandatory-permissive dichotomy is unnecessary. Moreover, since it is a violation of the duty to bargain in good faith to take a conflict over a permissive issue to impasse, this distinction not only defines the substance of bargaining but also enforces its determination by denying the use of power to induce agreement or even discussion to impasse under penalty of Board sanction. Section 8(d) also affects the enforcement of an existing collective bargaining agreement. If the contract is silent with regard to a mandatory issue, no unilateral action can be taken prior to bargaining to impasse. If the contract "contains" a "specific" clause addressing that subject matter, section 8(d) will preclude modification for the term of the agreement. Thus, interpretation of the contract to ascertain what is "contained" in the agreement and the role of silence and ambiguity are not merely academic ruminations.

Placing the mandatory-permissive dichotomy in its practical context, a strong argument can be made that powerful employers or unions can link mandatory and permissive bargaining issues backed by costs of noncompliance, and thereby negate the impact of the dichotomy, at least at the bargaining table. This argument follows from the technique of packaging individual bargaining items during negotiations rather than bargaining on each item separately. This argument, however, ignores the position of weaker employers or unions. Historically, one function of law is to protect the weak from improper exercises of power by the strong. Weaker employers and unions are denied access to Board processes and subject to potentially improper exercises of economic coercion undermining the mediating effects of the collective bargaining process. The ability to exploit the mandatory-permissive dichotomy will encourage deception in articulating issues.

69. See supra notes 11-14 and accompanying text.
72. Id.; see also NLRB v. Katz, 369 U.S. 736, 743 (1962) (refusal to negotiate in fact of subject within § 8(d) an unfair labor practice).
74. It can be argued that weak unions and employers cannot achieve satisfactory accommodation on mandatory items let alone permissive items. As such, the classifications are not as important as the bargaining power and the willingness of a party to inflict a cost of noncompliance. The argument has a Darwinesque appeal but ignores the mediating effects of the collective bargaining process in easing the undercurrent of unredressed conflict.
The dichotomy does, however, have a practical effect during both negotiations and the term of the agreement. Items deemed permissive by the Board and courts require no good faith bargaining to impasse prior to unilateral action nor are notice and information access readily available. The notice and information distinctions between mandatory and permissive items should not be discounted lightly. Control over information and notice are significant weapons. By controlling information and timely notice, a party can effectively preempt a significant and perhaps costly response from its opposition. The current Board has made significant distinctions between information access and notice requirements based on the mandatory-permissive dichotomy. Case law trends suggest a restrictive approach to information access on permissive items.

The concept of mandatory bargaining is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole. This will be true, however, only if the subject proposed for discussion is amenable to resolution through the bargaining process. Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business.

Id. at 678-79 (footnotes and citations omitted); cf. J. Atleson, Values and Assumptions in American Labor Law, at ch. 7 (1983); Litvin, supra note 22.

The issue of which collective bargaining "clauses" are permissive and which are mandatory is unsettled. Distinctions have been made on decision directed clauses (constraining the decisionmaking process before unilateral final decision) vis-a-vis effects directed clauses (constraining the decision implementation after unilateral final decision). See Zimarowski, Employer Evasion of the Collective Bargaining Process: Policy Directions and the Reagan NLRB, 37 Lab. L.J. 50 (1986); see also Lone Star Steel v. NLRB, 639 F.2d 545 (10th Cir. 1980); infra notes 214-17 and accompanying text.


To be meaningful, the notice must be given sufficiently in advance of any unilateral action. Notice, however, is power and by controlling or limiting notice a party can foreclose an opponent from preparing an adequate response or from marshalling other forces for retaliation. Thus, it is in the interests of a party to attempt to limit notice to improve one's bargaining position and power. Such attempts to limit notice are inapposite the policy of the Act. But a party without the incentive of swift and adequate remedy will maximize its individual power and position through limited notice and information access.


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8. See, e.g., Otis Elevator Co., 269 N.L.R.B. 891, 894 (1984). In Otis Elevator, the Board denied the union access to a consultant's report upon which the rationale for the consolidation of operations was based. The Board held that the report went to the decision and not the effects of the planned consolidation and therefore, the union was not entitled under § 8(a)(5) to information access. One can easily argue that such information was necessary to verify the employer's purported rationale particularly in a situation where, as here, there were unfair labor practice charges addressing both decision bargaining and effects bargaining. In fact, the Board simply accepted the employer's contention that the reason for the relocation and consolidation was economic efficiency and economies of scale. The case does not indicate any independent verification of the information and the document that could possibly verify the statement was declared outside the information access of effects bargaining. See also Bohemia, Inc., 272 N.L.R.B. 1128 (1984); General Dynamics Corp., Quincy Shipbuilding Div., 268 N.L.R.B. 1432 (1984). See generally, Kohler, Distinctions Without
The mandatory-permissive dichotomy would be nothing more than an interesting anomaly in the law if not for the fact that a significant employer's cost of noncompliance—the control over the movement of unit work—has been defined as chiefly a permissive issue. If such employer power exercises are outside the mediating effects of the collective bargaining process, a structural imbalance is created. Labor's principal costs of noncompliance, the strike weapon and related work stoppage activities, are mandatory bargaining items and channeled through the process. Moreover, the NLRA bars certain secondary pressure activities, such as boycotts, picketing, and hot cargo agreements. Consequently labor is limited to only one effective weapon—the internal work stoppage—a mandatory bargaining item. In contrast, the employer costs of noncompliance are left virtually unchecked. The result of the Board's and courts' construction is a preemptive determination of the substance of agreements. Clearly such a classification allows the employer to defeat the major contractual expectation of labor—that of stable employment and job security during the term of the agreement. Such an effect of the mandatory-permissive dichotomy has the potential of rendering the collective bargaining process a shallow ritual devoid of major areas of employee concerns and signaling the return to unchanneled economic coercion.

D. Teamsters v. DeSoto: A Tale of Two Clauses

In theory, the Board is not to redress perceived imbalances in bargaining power nor can it dictate the substantive terms of the collective bargaining agreement. The Board may interpret contract language


79. See supra note 14.
80. The dynamics of the employment relationship have muted the effectiveness of the traditional strike weapon. As such, labor's strategy and tactics often involve work stoppage activities short of a full strike. Hence, partial strikes, absenteeism, slowdowns, sabotage, employee soldiering, and employee work-to-rule tactics are used.
82. The NLRB has been admonished by the Court for attempting to dictate the substance of the collective bargaining agreement to the parties. H.K. Porter v. NLRB, 397 U.S. 99 (1970). The Court addressed the related issue of the lockout as a channeled cost of noncompliance in American Ship Building Co. v. NLRB, 380 U.S. 300 (1965):

[The Act also contemplated resort to economic weapons should more peaceful measures not avail. Sections 8(a)(1) and 8(a)(3) do not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power. . . . "When the Board moves in this area . . . it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands. It has sought to introduce some standard of properly 'balanced' bargaining power, or some new distinction of justifiable and unjustifiable, proper and 'abusive' economic weapons into . . . the Act. . . . We have expressed our belief that this amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced."
only as necessary to determine an unfair labor practice.\textsuperscript{83} The courts may interpret contract language through unfair labor practice actions or through compelling arbitration, enforcing or modifying arbitration awards, or as necessary to determine a duty of fair representation issue.\textsuperscript{84}

The interpretation of contract language without a consistent analytical framework can produce diverse results and encourage forum shopping. Consider the recent series of decisions in \textit{Teamsters Union Local No. 115 v. DeSoto, Inc.},\textsuperscript{85} where the Board and the circuit court reached squarely contradictory conclusions. \textit{DeSoto} involved the exercise of an employer cost of noncompliance. The company relocated and consolidated a bargaining unit's work, a decision which led to the closing of a New Jersey plant.\textsuperscript{86} DeSoto's purported rationale for the movement of unit work was excess productive capacity among DeSoto's multiplant operation.\textsuperscript{87} The major focus of the controversy concerned two contract clauses. One clause restricted the employer's right to relocate the plant; the other clause granted the employer the right to allocate "products among the various plants of the company."\textsuperscript{88} Ironically, identical language in the agreement was used to justify two distinct, and contradictory, rulings on the propriety of DeSoto's movement of the unit work.

The union sought and obtained an injunction prohibiting disposal of company property pending arbitration. The arbitrator held in favor of the union drawing from the language prohibiting plant relocation.\textsuperscript{89} Ac-


As argued in this Article, however, the Board does dictate the substance of collective bargaining agreements and influences the power exercises of the parties through the mandatory-permissive bargaining item dichotomy and the granting of the default position in agreement interpretation.

85. 725 F.2d 931 (3d Cir. 1984). The circuit court opinion was not a review of the Board's decision but a § 301 action to enforce an arbitration decision. At the Board the case was cited as DeSoto, Inc., 278 N.L.R.B. 788 (1986), addressing the § 8(a)(5) and 8(d) issues. Both tribunals drew from the same factual base.
86. 725 F.2d at 933.
87. \textit{Id.} at 935.
88. The contract clauses in question read:
\begin{verbatim}
Article XXV—Plant Location
The Company shall not move its plant from the present location beyond the radius of twenty-five (25) miles without the consent of the Union, but the Union shall not withhold its consent for arbitrary and capricious reasons.
\end{verbatim}
\begin{verbatim}
Article XXVI—Subcontracting
The Employer will not subcontract or transfer work which results in a layoff of its employees, except that this limitation on subcontracting or transferring out shall not be applicable to business peaks or valleys or to the allocation of products among the various plants of the Company for business reasons.
\end{verbatim}
\textit{Id.}
89. The arbitrator "reasoned that the parties would not have intended that the company be allowed to 'allocate the plant out of existence' by transferring all work elsewhere." \textit{Id.}
Accordingly, the arbitrator ordered the plant reopened. The district court denied enforcement of the arbitrator’s award. Instead, it remanded for a reformulation of the plant reopening remedy. The modified arbitrator’s award deleted the plant reopening remedy while retaining the backpay provisions.

The Third Circuit held that the arbitrator’s interpretation did “draw its essence” from the contract and was therefore entitled to enforcement. The Third Circuit also upheld, but for different reasons, the modified remedy deleting the plant’s reopening. After more than two years in litigation, the plant reopening portion of the original arbitration award was deemed futile and economically wasteful. The end result was a backpay award from the date of plant closing to the expiration of the collective bargaining agreement.

While the case was in the courts, the union filed unfair labor practice charges with the Board and again sought the reopening of the plant. The focus of this dispute, as with the arbitration issue, was on the two contract clauses. The Board majority held there was no violation of 8(a)(5) and 8(d). Upholding limited notice and information access, the majority characterized the move in unit work as a permissive bargaining item requiring only effects bargaining. In dismissing the 8(d) argument, the Board held inapplicable the clause prohibiting plant relocation. In contrast to the arbitrator, the Board focused on the allocation language and found that no “specific” clause in the contract had been modified. In dissent, Member Dennis directed her attention to the relocation clause and argued that, since such changes modified a “specific” term in the contract, the unit work changes were improper under 8(d).

The focus on language is instructive. Identical language resulted in

90. Id. at 933.
91. Id.
92. Id.
93. Id. at 935.
94. Id. at 939-42.
95. Id.
96. Id. at 942. Procedurally, it took two years, two arbitration awards, several district court hearings and a favorable circuit court opinion.
97. Id. at 934.
99. Id.
100. Id. at 788.
101. Id. at 789.
102. Id. For a discussion of § 8(d)’s application in both the bargaining and enforcement contexts of the collective bargaining agreement, see supra text accompanying notes 71-72.
103. Id. at 789-80 (Dennis, Mbr., dissenting). Procedurally, the time frame for the Board proceedings covered a period from March 1983 to February 1986. The entire proceedings began in February 1982 and ended in February 1986. It is little wonder that any plant reopening remedy would be viewed as a futile and economically wasteful remedy. 725 F.2d at 939-42.
two distinct interpretations. The determination of the parties' contractual expectations exceeds a literal seek-and-find process for supportive language to predisposed positions. A major issue in *DeSoto* was the characterization of the nature of the action taken. Did *DeSoto* "allocate" production or "relocate" the plant? Simply latching on to one clause over another does not resolve disputes in a way that will be perceived as consistent and even-handed over time.

The case analyses of these issues demonstrate the conflicting nature of the policy considerations involved. These policy considerations are reflected in the form of a strict interpretation or management rights theory vis-à-vis a broader implied obligations theory. As discussed in the following sections, these two theories are inadequate to fully embrace the competing interests. As stated by Professor Summers, in describing the needed policy orientation, the determination of these duties should be governed by what will do "justice between the employer, the union, and the employees, aid the continuing relations of the parties, promote the statutory purposes of collective bargaining, and protect the social interest in labor peace."

II

**THE UNSPOKEN CONFLICT: MANAGEMENT RESERVED RIGHTS VS. IMPLIED OBLIGATIONS**

The balance suggested by Professor Summers' policy orientation is complex and a strong argument can be made that the balance is or should be struck differently if the issue is facilitating the arbitration process instead of redressing unfair labor practices. This Article takes the opposite position. Regardless of the forum, the inquiry remains the same. Express contract language or the default position is used to support a party's exercise of economic weapons. When this occurs, the procedural differences between forums with concurrent subject matter jurisdiction are subsumed to the promotion of the statutory purposes of collective bargaining. If the analysis is confined to the major costs of

104. 725 F.2d at 935.
106. Compare the presumption of arbitrability expressed in *AT&T Technologies v. Communication Workers*, 106 S. Ct. 1415 (1986), with the implicit creation of a presumption against the finding of mandatory bargaining item status of partial plant closure in *First National Maintenance v. NLRB*, 452 U.S. 666 (1981). One can argue that arbitration involves "contract" rights while unfair labor practice actions involve "statutory" rights. Contract rights, as duties created between the parties, should be given a liberal jurisdictional interpretation while statutory rights, backed by the threat of Board intervention, should be focused narrowly to avoid unnecessary Board interference. Due to the overlapping of the activities and issues involved, the Board and arbitration forums complement each other, rather than create clear lines of jurisdictional demarcation. Moreover, the Board's view must be controlling. The Board cannot defer away its statutory obligation to protect statutory rights. *See Taylor v. NLRB*, 786 F.2d 1516 (11th Cir. 1986).
107. For discussion of statutory purposes, see *supra* notes 29-30.
noncompliance, judicial views on the management reserved rights theory and implied obligations theory can be gleaned from case law. The courts and the Board have addressed the management reserved rights and implied obligations approaches to contract language in two identifiable contexts: the control over the unit work and the regulation of the strike weapon.

A. The Theories of Management Rights and Implied Obligations

The pristine view of management reserved rights holds that management's authority is supreme in all matters except those expressly conceded in the collective bargaining agreement or those that violate the law. The management rights view is drawn from the traditional concepts of the command-obedience relationship and the liberty to avoid at-will employment contracts, both anchored in status and superior economic power. This approach necessitates a strict interpretation of contract language. As such, management commands the default position with silence and ambiguity resolved in its favor.

The inherent limitation of language renders this position suspect, particularly in regard to the planned role of ambiguity in contract creation. Moreover, one could argue a pristine management rights view fails to consider the policy rationales of the industrial democracy and power balancing fundamental to the NLRA. With this view, labor is again reduced to a mere economic factor of production with the traditional command-obedience concepts prevailing over statutory policy. At best, the pristine management rights view is outdated public policy failing to accommodate the NLRA; at worst, it is merely economic coercion passing as legal policy once again.

The pristine view of the implied obligations theory holds that both the express and implied contractual expectations of the parties must be identified and protected. This theory overcomes the literalist limitation of the reserved rights approach looking beyond the four corners of the document. The source material for the implied obligations approach includes the contract, equity considerations, past practices and industrial custom. The default position, therefore, is not clearly in favor of either party.

Two major limitations suggest restraint in the use of the implied obligations approach. First, the interpretation must draw its essence

109. See supra text accompanying notes 55-57.
110. See supra notes 27-35 and accompanying text.
111. See generally F. ELKOURI & E. ELKOURI, supra note 18, at ch. 12. Nor are the sources significantly different from ordinary contracts. See RESTATEMENT (SECOND) OF CONTRACTS §§ 219-23 (1979) (ch. 9).
from the contract and not simply represent a view of the forum's ideal of
equity. Specific language governs over general language and general lan-
guage, in most circumstances, governs over industrial customs. Second, the lack of expertise by a forum and the diversity of industrial custom and past practice renders the implied obligations approach diffi-
cult to apply in a predictable and consistent manner. In fact, such
concerns are the policy rationale for the preferred role of arbitrators in
labor-management dispute resolutions.

The "canons" of contract interpretation in collective bargaining
agreements are a mixed blessing. Both the management rights and
implied obligations theories can seek and find rules supporting their par-
ticular view. Such selective examination, however, must be viewed with
the statutory purposes of collective bargaining in the forefront. Confine-
ing the inquiry to the exercise of costs of noncompliance, it is more ap-
propriate to look to the "canons" of contract interpretation common to
both "special" and ordinary contracts that address the avoidance of con-
tact obligations.

At least three fundamental and interdependent concepts are com-
mon to the canons of traditional contract interpretation and the canons
of collective bargaining agreement interpretation. First, courts, or arbi-
tration forums, enforce contractual promises. Simply because a party's
benefit of the bargain is a "bad" deal or is no longer profitable does not
justify the release of contractual

Second, contracts are not
read in a piecemeal fashion, but rather as a whole in favor of contract
enforcement and the avoidance of contract forfeiture. And third, the
reading of conditions, particularly conditions subsequent, address the is-
sues of when a party's contractual obligations can be terminated during
the term of an agreement. In one context, the exercise of economic
weapons during the term of the agreement can be prompted by the oc-
currence of particular events during the contract term, such as new man-
agement, rising labor costs, and new technology. The Second
Restatement of Contracts supports the view that doubts as to contract
interpretation should be resolved in favor of contract enforcement and

112. See United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584-85 (1960);
cf. Restatement (Second) of Contracts, § 203 (Standards of Preference in Interpretation);
U.C.C. § 2-208 (Course of Performance or Practical Construction).
113. This problem is unavoidable and arises any time a forum attempts to inject concepts of
fairness, good faith, and reasonableness into the decisionmaking process.
114. See Warrior & Gulf, 363 U.S. at 581.
115. F. Elkouri & E. Elkouri, supra note 18, at ch. 9 (Standards for Interpreting Contract
Language); cf. Restatement (Second) of Contracts §§ 200-230 (The Scope of Contractual
Obligations).
117. Id. at 352-54, 356-57.
118. Restatement (Second) of Contracts § 227.
avoidance of contract forfeiture. Adoption of this view would seem to necessitate a strict interpretation approach restricting those costs of non-compliance (movement of bargaining unit work or work stoppage) that frustrate or destroy the underlying agreement. This approach would apparently deny the default position to a party and require the courts to identify particular language in an agreement either as supporting or waiving the right. The courts have yet to address this concept directly. The issues of contract avoidance and frustration, however, are part of the management rights and implied obligations theories.

Court views on the management rights and implied obligations theories can be drawn from the dicta of the Steelworkers' Trilogy and the recent reaffirmation of Steelworkers' principles in AT&T Technologies, Inc. v. Communications Workers. In Warrior & Gulf, the Court addressed a section 301 action to compel arbitration over management's decision to subcontract out a portion of bargaining unit work. Management argued the dispute was not arbitrable under a clause which read that "matters which are strictly a function of management shall not be subject to arbitration." Thus, the Court addressed three issues relevant to the management rights/implied obligations discussion: (1) the scope of the "strictly a function of management" language; (2) the relationship between contractual duties and the costs of noncompliance; and (3) the sources of the contractual rights and duties in a collective bargaining agreement.

The "strictly a function of management" language was expressly limited "to that over which the contract gives management complete control and unfettered discretion." This limited view was drawn, in large part, from labor's surrender of its major cost of noncompliance: the work stoppage.

Collective bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from the performance

119. Id.

227. Standards of Preference with Regard to Conditions

(1) In resolving doubts as to whether an event is made a condition of an obligor's duty, and as to the nature of such an event, an interpretation is preferred that will reduce the obligee's risk of forfeiture, unless the event is within the obligee's control or the circumstances indicate that he has assumed the risk.

(3) In case of doubt, an interpretation under which an event is a condition of an obligor's duty is preferred over an interpretation under which the non-occurrence of the event is a ground for discharge of that duty after it has become a duty to perform.

120. See generally supra note 22.


123. 363 U.S. 574.

124. Id. at 583.

125. Id. at 584 (emphasis added).
of them. Management hires and fires, pays and promotes, supervises and plans. All these are part of its function, and absent a collective bargaining agreement, it may be exercised freely except as limited by public law and by the willingness of employees to work under the particular, unilaterally imposed conditions. A collective bargaining agreement may treat only with certain specific practices, leaving the rest to management. When, however, an absolute no-strike clause is included in the agreement, then in a very real sense everything that management does is subject to the agreement, for either management is prohibited or limited in the action it takes, or if not, it is protected from interference from strikes.\textsuperscript{126}

The source of the prohibitions and limitations upon labor and management is not necessarily confined to the collective bargaining contract. After restating the public policy behind labor arbitration, the Court added, "[t]he labor arbitrator’s source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it."\textsuperscript{127} Justice Brennan, in a concurrence joined by Justices Harlan and Frankfurter, added still another implied obligations dimension to the analysis. They viewed an implied covenant of good faith and fair dealing to prevent the destruction of the underlying collective bargaining agreement by the contracting out of all the unit work.\textsuperscript{128}

The lower courts in \textit{Warrior & Gulf} had relied upon the “strictly a function of management” language to fully embrace, at least in dicta, the pristine management rights approach.\textsuperscript{129} By rejecting this approach and viewing with approval a broad source of contractual duties, the Court has rejected the pristine view of management rights. In \textit{Warrior & Gulf}, the Court provides a hierarchy of contract language. If express language is found, such language governs. If general language is found, a presumption of arbitrability governs.\textsuperscript{130} Since under the \textit{Trilogy} the substantive aspects of arbitration decisions are viewed with great deference,\textsuperscript{131} one can infer that the Court’s approval of a broad scope of contract interpretation for arbitrators would apply with equal force to the determination of contract language by the Board. Thus, an implied obligations approach, particularly in regard to issues approaching the frustration of the agreement, potentially could be viewed with approval.

These issues can be viewed in two contexts. Protecting labor’s contractual expectation would involve restrictions on the movement of bar-

\textsuperscript{126} \textit{Id.} at 583 (emphasis added).
\textsuperscript{127} \textit{Id.} at 581-82.
\textsuperscript{128} \textit{American Mfg.}, 363 U.S. at 572 (Brennan, Frankfurter & Harlan, JJ., concurring).
\textsuperscript{129} \textit{Warrior & Gulf}, 363 U.S. at 577, 583; see also 168 F. Supp. 702 (S.D. Ala. 1958); 269 F.2d 633 (5th Cir. 1959).
\textsuperscript{130} 363 U.S. at 584-85.
\textsuperscript{131} \textit{American Mfg.}, 363 U.S. 564.
gaining unit work during the term of the agreement. Protecting the employer's contractual expectations would involve restrictions on the use of the strike weapon and related work stoppage activities during the term of the agreement. Case law does offer some guidance in interpreting silence and ambiguity with regard to these issues. But the case law, discussed in the remainder of this Article, indicates an uneven treatment.

B. Exercising the Strike Weapon During the Term of the Agreement

No-strike pledges, seen in most collective bargaining agreements, limit the situations in which the union can engage in a work stoppage. Labor unions, however, have been termed one-trick ponies. After the no-strike pledge is secured, the union is left with few costs of noncompliance. Since the no-strike pledge is the union's most effective bargaining chip, the union will seek substantial management concessions (in the form of job security and compensation) in exchange for making the pledge.

An express no-strike pledge in a collective bargaining agreement is enforceable through section 301, and since it is a mandatory bargaining item, it is also enforceable through the Board's unfair labor practice actions. The Board action is generally unnecessary because the employer can discipline or discharge workers engaged in unprotected activity. Moreover, the remedies through section 301 may include a damage award against the labor union as an entity, or if the issue precipitating the stoppage is arbitrable, injunctive relief. These remedies are usually far more efficient and attractive than protracted Board procedures.

If the agreement does not contain an express no-strike clause, the notion of an implied obligation not to strike arises in three ways. First, through whether a no-strike obligation can be implied from the presence of a collective bargaining agreement. Second, by determining what the union's obligations are in regard to unauthorized wildcat work stoppages. And third, by ascertaining the scope of obligations contained in

132. The major reporting services of labor issues compile yearly statistics on which clauses are included in collective bargaining agreements. Some type of no-strike clause is included in a vast majority of agreements. See e.g., Bureau of National Affairs, Strikes and Lockouts, in COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS, BASIC PATTERNS, CLAUSE FINDER 77:1 (1986).

133. Labor unions have other costs of noncompliance, including political action, pension fund investment, and consumer boycotts. However, these other economic weapons often cannot be exercised in a timely fashion sufficient to induce concessions on the part of management.


137. A wildcat strike may be defined as a work stoppage by a group of employees, generally spontaneous in character, which is in violation of an express or implied no-strike clause in the collective bargaining agreement and/or in violation of an authorization from orders, bylaws, or constitution of the union.
a broadly worded no-strike clause and related contract language. The implied obligations analysis cannot be properly viewed without the labor-management and union-member contexts established by labor law policy. As such, the implied obligations analysis is significantly affected by the limitations imposed by the union as a democratic institutional entity, limitations on the use of labor injunctions, requirements that collective statutory rights be expressly waived, and the preferred position of arbitration in NLRA policy. The Supreme Court's treatment of the implied obligation not to strike is illustrated in the following cases.

In Teamsters v. Lucas Flour, the labor union struck the employer over the discharge of a union member. The discharge was an arbitrable issue under the collective bargaining agreement. However, the collective bargaining agreement did not contain an express no-strike clause. The Court held the presence of the arbitration clause and the arbitrable dispute supported an implied no-strike pledge. "To hold otherwise," wrote the Court, "would obviously do violence to accepted principles of traditional contract law." One can assume the accepted principles of contract law referred to by the Court include the sanctioning of costs of noncompliance which bypass contract dispute resolution procedures. Lacking express conditions subsequent, a party is protected from unilateral actions which avoid and frustrate the underlying contractual expectations.

The Court did, however, add a caveat. Accommodating the protected status afforded the strike weapon and the preferred position arbitration occupies in the NLRA, the Court expressly declined to endorse the view that the existence of the collective bargaining agreement is ipso facto a no-strike pledge. The focus of inquiry, wrote the Court, was upon the nature and scope of the particular contractual obligations, not the generic presence of an agreement.

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138. See infra notes 179-200 and accompanying text.
143. 369 U.S. 95 (1962).
144. Id. at 97.
145. Id. at 105-06.
146. Id.
147. Id.
148. Id. at 105.
149. Id. at 106.
150. Id. Justice Black, in a strong dissent, would read the scope of obligations and the applicable bargaining history as specifically excluding the no-strike obligation. Therefore, argues Justice Black, to imply a no-strike obligation creates a promise discussed and excluded by the parties. What
The implied obligation to refrain from striking in the presence of an arbitrable grievance, without an express no-strike clause, arguably preserves the integrity of the collective bargaining agreement and the process of collective bargaining. In effect, the labor union cannot thwart the agreed upon dispute resolution process by unilaterally exercising a cost of noncompliance. *Lucas Flour*, however, was an action to recover strike damages. Unlike injunctive relief, strike damages do not offer the timely relief sought by employers to terminate a labor dispute. In *Gateway Coal Co. v. UMW*, the implied no-strike clause was extended to support a *Boys Markets* injunction against a labor dispute during the term of the collective bargaining agreement. In addition, since a work stoppage under such circumstances is unprotected activity, the employer may discipline or discharge individual strikers—an effective exercise of an employer cost of noncompliance.

The labor union as a separate democratic entity from its member-employees presents a limitation on the implied obligations analysis regarding wildcat work stoppages. In *Carbon Fuel Co. v. UMW*, the Court held that labor unions are not liable for damages caused by unauthorized wildcat work stoppages except under section 301’s agency principles. The Court declined to follow a “mass action” theory of imputed liability or an implied approach requiring the union leadership to use “all reasonable means” to end the unauthorized strike. Only the union, as an entity, can be held liable for strike damages and then only if the union authorized, ratified or participated in the strike. Although the employer may discipline and discharge wildcat strikers, the Court in *Complete Auto Transit* denied the employer a damages cause of action against individual wildcat strikers.

management failed to achieve at the bargaining table they regained in the courts. *Id.* at 107-09 (Black, J., dissenting).

152. *See supra* note 136 and accompanying text.
153. 414 U.S. at 381.
154. *See definition of wildcat work stoppage supra* at note 137.
156. *Id.* at 216-18.
157. *Id.* at 217.
158. *Id.*
160. *Id.* at 408-10. Limiting union liability to agency principles is a necessary accommodation to the democratic structure of the labor organization. If a minority of dissidents call a work stoppage imposing liability on the union, majority rule is replaced by the tyranny of the minority. Not only would such an approach severely imperil the democratic organizational structure of the union, but it would also potentially increase the severity of work stoppages. If the union is held liable on this variant of respondeat superior, it has no incentive not to ratify and participate actively in the strike activity. It can be argued that in wildcat strikes, the union’s obligation is limited to not calling or authorizing a work stoppage. Beyond that, the parties are free to impose other specific contractual obligations.
A collateral issue in *Carbon Fuel* addressed the scope of obligations in contract language preserving the "integrity of [the] contract." Carbon Fuel had argued that such language in the contract created a duty to use "all reasonable means" to end the wildcat strikes. Although the union acted in good faith, it limited its actions to persuasion rather than the use of internal discipline. Thus, Carbon Fuel argued that such language required the union to take affirmative disciplinary action against its wildcat striking members.

The Court dismissed Carbon Fuel's argument. Relying upon the parties' bargaining history, the Court held that the "parties purposely decided not to impose on the union an obligation to take disciplinary or other actions to get unauthorized strikers back to work." Whether preserving the integrity of the contract language would create such a duty in the absence of such a detailed and lengthy bargaining history of the particular issue is unclear. Nevertheless, at a minimum, complete silence on the part of the union could amount to tacit approval of the wildcat stoppage, thereby defeating the employer's contractual expectations, and sufficient to create union liability under the agency concepts embraced by section 301 even without the "integrity of [the] contract" language.

A similar issue was raised in *Metropolitan Edison Co. v. NLRB.* After a strike settlement, Metropolitan Edison disciplined two sympathy strikers more severely than other returning employees solely because they were union officials. The employer argued the disparate disciplinary treatment was "justified because there is an implied duty on the part of the union officials to uphold the terms of the collective bargaining agreement." The Court held the disparate discipline violated section 8(a)(3). The Court's position embraced the policy behind the independence of the labor union and recognized that union official-employees serve two masters.

Recognizing that union officials have a legal obligation to "support the terms of the contract and set a responsible example for their members," the Court declined to allow the employer, under the rubric of

161. 444 U.S. at 218.
162. Id.
163. Id. at 213-14.
164. Id. at 221.
165. The Court expressly declined to give effect to the content of this language. Id. at 221-22 nn. 9-10.
167. Id. at 703.
168. Id.
169. Id. at 704-05.
170. Id. at 704.
171. Id.
the command-obedience relationship, to define what constitutes "responsible behavior," to judge its performance, and impose a penalty for non-compliance.\textsuperscript{172} To do so, the Court held, would undermine the independence of the union official and improperly inject the employer into "the manner in which the official performs his union duties."\textsuperscript{173} Presumably, there is an implied obligation to support the present contract. The scope and performance of this obligation, however, is to be evaluated by an impartial umpire rather than an interested party.\textsuperscript{174}

A collateral argument in \textit{Metropolitan Edison} addressed the issue of whether statutory protection from disparate disciplinary treatment of a union official could be waived in the collective bargaining agreement.\textsuperscript{175} The Court held such rights could be waived but that a waiver must be explicitly stated or be a clear and unmistakable expression of intent of the parties.\textsuperscript{176} The Court declined to read a standard no-strike clause as waiving the right to equal discipline.\textsuperscript{177} Interestingly, contrary to \textit{Carbon Fuel}, the Court declined to give much weight to two adverse arbitration decisions. The Court held "that two arbitration awards [do not] establish a pattern of decisions clear enough to convert the union's silence into a binding waiver."\textsuperscript{178}

The problems generated by express and implied waivers of statutory rights underscore the difficulty in predicting and consistently determining the breadth of a no-strike clause. Collective rights may be waived if waiver is explicitly stated or is a clear and unmistakable expression of intent of the parties.\textsuperscript{179} And, as indicated in \textit{Lucas Flour}, a waiver may be implied from the presence of an applicable arbitration clause. Other relevant issues include whether a standard no-strike clause necessarily includes disruptive work activities short of a strike, such as slowdowns, and whether a no-strike pledge reaches unfair labor practices and sympathy strikes. The slowdown and related activities are expressly included in the definition of strike under the NLRA.\textsuperscript{180} Therefore, arguments that slowdowns and other concerted activities short of a cessation of work are not included in a no-strike pledge would likely fail.\textsuperscript{181} The statutory definition, however, does not expressly include or exclude sympathy and unfair labor practice strikes. These issues are left to judicial construction.

\begin{itemize}
  \item \textsuperscript{172} Id. at 704.
  \item \textsuperscript{173} Id. at 704-05.
  \item \textsuperscript{174} Id. at 704.
  \item \textsuperscript{175} Id. at 705-07.
  \item \textsuperscript{176} Id.
  \item \textsuperscript{177} Id. at 707-08.
  \item \textsuperscript{178} Id. at 709. Two arbitration decisions upheld a disparate disciplinary treatment for union officials.
  \item \textsuperscript{179} Id. at 705-07.
  \item \textsuperscript{180} 29 U.S.C. § 151 (1982).
  \item \textsuperscript{181} See F. Elkouri & E. Elkouri, supra note 18, at 644-46, 664.
\end{itemize}
A first line of inquiry is the scope of a standard no-strike clause. In *Mastro Plastics Corp. v. NLRB* the Supreme Court addressed the issue of work stoppages in response to employer unfair labor practices in the face of a standard no-strike pledge. The Court held that a standard no-strike pledge does not include unfair labor practice strikes. The Court’s holding was based on two observations. First, the strike’s objective was not to change the terms and conditions in the contract. And second, the employer’s unfair labor practices did not grow out of any matters covered by the contract or arising out of normal labor-management relations. The Court added “[t]here also is inherent inequity in any interpretation that [by restricting labor’s cost of noncompliance] penalizes one party to a contract for the conduct induced solely by the unlawful conduct of the other, thus giving advantage to the wrongdoer.” Later cases have limited this interpretation to flagrant or serious unfair labor practices, where express contract procedures have been followed, and where the union has “clean hands.”

The inclusion of sympathy strike coverage in a standard no-strike clause raises significant solidarity and union power issues. The sympathy strike is a protected collective right which the union can waive. In *Buffalo Forge v. United Steelworkers*, the Court apparently answered the question of whether a no-sympathy-strike pledge would be implied from a binding arbitration clause. The Court stated: “To the extent that [courts] have assumed that a mandatory arbitration clause implies a commitment not to engage in sympathy strikes, they are wrong.” Thus, the inquiry is again confined to waiver in the no-strike language.

If sympathy strikes are specifically stated in the no-strike pledge, they are actionable. The Supreme Court has not clearly spoken on whether sympathy strikes are included in a standard no-strike pledge. The Board has been inconsistent and the circuits are split. Recent

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183. *Id.* at 271.
184. *Id.* at 286-89.
185. *Id.* at 285-86.
186. *Id.* at 287.
190. *Id.* at 409 n.10.
191. *Id.* at 408-09.
192. But see NLRB v. Rockaway News Supply, 345 U.S. 71 (1953) (upholding arbitrators decision that in light of particular bargaining history, no-strike clause can be read to include sympathy action). *Rockaway News* has been arguably rejected by the Court. See Harper, *Union Waiver of Employee Rights Under the NLRA: Part I*, 4 INDUS. REL. L.J. 335, 377-80 (1981); see also supra note 190 and accompanying text.
193. See U.S. Steel Corp. v. NLRB, 711 F.2d 772 (7th Cir. 1983); Cedar Coal Co. v. UMWA,
Board decisions are instructive. In *Indianapolis Power & Light*, the Board held that a standard no-strike clause will include sympathy strikes unless extrinsic evidence indicates that the parties intended otherwise. In effect, the Board has turned the concept of waiver upside-down by maintaining that if the contract did not expressly preserve that right, it is waived. This approach creates an implied waiver of a statutory right, not from the presence of an arbitration clause, but from the existence of the no-strike clause.

As in *Mastro Plastics* and *Buffalo Forge*, the objective of the *Indianapolis Power* union's sympathy action was not to change the terms and conditions of the contract nor was the underlying issue capable of being resolved through the contract. The union's objective was to support other labor organizations. This objective, one should note, is expressly protected in a proviso to NLRA section 8(b)(4). Therefore, without an express inclusion of the sympathy action, the union may not be acting contrary to the express contractual obligations created by the collective bargaining agreement. Nevertheless, unlike *Mastro Plastics*, one can also argue that the employer may be innocent apart from the primary labor dispute. As such, to allow the employer's contractual expectations to be defeated by such sympathy actions is inequitable in the absence of some allied or common ownership and control relationship between primary and secondary employer. Therefore, reading the no-strike clause as controlling a union cost of noncompliance actively protects the employer's contractual expectations. Such a reading is further buttressed if the union's contractual expectations are afforded similar protection from employer exercised costs of noncompliance.

C. The Movement of Bargaining Unit Work During the Term of the Agreement

This section addresses the employer's movement of unit work as a cost of noncompliance depriving bargaining unit employees of the benefit of their bargain. Therefore, the issues addressed include subcontracting, relocation, reassignment, and consolidation during the term of a collective bargaining agreement. These areas of inquiry do not break down as easily as the work stoppage issue does due, in large part, to definitional

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195. *Id.* at 1715.
196. *Id.* Compare *supra* notes 175-78 and accompanying text.
197. Compare *supra* notes 188-90 and accompanying text.
problems in categorizing a particular movement of work. Nevertheless, the discussion can be organized along three tracts. The first tract addresses issues related to express restrictions on the movement of unit work. The second tract concerns the use of implied restrictions to insure that unit employees receive the benefit of their bargain. And the third tract involves the breadth and scope of management rights clauses and related contract language.

The analysis of unit work movement, like its strike weapon counterpart, has identifiable underlying problem areas. First, categorizing the particular activity, (relocation vis-a-vis allocation) is often the point in controversy. Second, the validity of its purported rationale (labor cost vis-a-vis antilabor animus) must be scrutinized. Third, actions wholly within the control of one party, exercised with the intent to change the terms and conditions of the collective bargaining agreement, must be distinguished from events affecting contract obligations beyond the control of a party. And fourth, the scope and substance of the balancing of interests created by the tension between the policies of the NLRA and the traditionally based prerogatives of the owners of capital must be incorporated in the analysis.

The NLRA does not grant the employer a statutory right to unfettered control of his enterprise. The traditional command-obedience and capital control concepts, however, support an employer’s common law right to exercise discretion in running the enterprise except where constrained by NLRA policy. But, the NLRA policy is far from clear. For example, it is arguable that the mandatory-permissive bargaining item dichotomy creates derivative employer rights equivalent to statutory rights. These employer rights, if recognized, raise a significant analytical point. Should these employer rights be treated the same as employee statutory rights? Are explicit and unmistakable waivers of these employer rights required under NLRA policy? Can these employer rights be implicitly waived under an implied obligations analysis similar to Lucas Flour? The courts have yet to provide a consistent analytical framework for employer rights.

The presence of express language addressing a movement of bargaining unit work does not necessarily dictate a solution. As Teamsters

201. See supra note 18.
203. See supra note 14.
204. The scope of this Article is limited to actions wholly within the control of one party to the collective bargaining agreement, where the bargaining unit work survives although at a different location.
205. See, e.g., John Wiley & Sons v. Livingston, 376 U.S. 543 (1964) (surviving company bound by arbitration pact of the merged company); see also supra note 22.
206. See First National Maintenance Corp. v. NLRB, 452 U.S. 666, 674-79 (1981); see also supra note 22.
v. DeSoto illustrates, the characterization of the movement—allocation or relocation—becomes a central issue.\textsuperscript{207} Assuming a consensus on the characterization of the movement is reached and there is applicable contract language, section 301 actions to compel arbitration as well as the potential recovery of damages and injunctive relief may be available to the union.\textsuperscript{208} The less expensive route through the Board processes may also be available through section 8(d)'s prohibition of midterm modification of mandatory bargaining items in the collective bargaining agreement. This route, however, presents problems.

Section 8(d) protects only mandatory bargaining items from modification during the term of the agreement.\textsuperscript{209} Arbitration and section 301 actions arguably protect the remainder. This would not present a problem but for the Board's classification of bargaining items affecting bargaining unit work movements as being outside the mandatory reach of the collective bargaining process.\textsuperscript{210} Otis Elevator held that unit work movement predicated upon labor costs is a mandatory bargaining item.\textsuperscript{211} But what of an employer's decision to relocate for "entrepreneurial" reasons such as "economies of scale" or "efficiency" in the face of express language restricting the employer's right to relocate? Is the relocation language read narrowly to restrict only relocations subject to labor costs or broadly encompassing all relocations? Is section 8(d)'s protection conditioned upon how an interested party defines the issue? Moreover, during negotiations can labor exercise costs of noncompliance to achieve inclusion of unit work movement restrictions without violating their duty of good faith bargaining?\textsuperscript{212}

Case law on these questions is lacking. Outgoing Board Member Dennis indicated that such unit work restrictions during negotiations were mandatory bargaining items since rationales for their use were, at the negotiation stage, speculative.\textsuperscript{213} Other Board members have not expressed views. The Tenth Circuit in Lone Star Steel Co. v. NLRB\textsuperscript{214} addressed a related issue in holding that a "successors and assigns" clause is a mandatory bargaining item.\textsuperscript{215} Thus, the court allowed the union to strike to command its inclusion in the collective bargaining agreement. The court reasoned that the successors and assigns clause

\begin{itemize}
\item \textsuperscript{207} See supra notes 85-104 and accompanying text.
\item \textsuperscript{208} See, e.g., DeSoto, 725 F.2d 931.
\item \textsuperscript{209} Allied Chem. Workers Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div., 404 U.S. 157 (1971).
\item \textsuperscript{210} Regarding this process, see supra notes 66-78 and accompanying text.
\item \textsuperscript{211} 269 N.L.R.B. 891 (1984).
\item \textsuperscript{212} See Chemical Workers, 404 U.S. 157.
\item \textsuperscript{213} See DeSoto, Inc., 278 N.L.R.B. 788, 789-80 (1986) (Mbr., dissenting); Otis Elevator, 269 N.L.R.B. 891, 899 n.16 (1984) (Dennis, Mbr., concurring).
\item \textsuperscript{214} 639 F.2d 545 (10th Cir. 1980), cert. denied, 450 U.S. 911 (1981).
\item \textsuperscript{215} Id. at 553-56.
\end{itemize}
went to the "effects" of a sale rather than the "decision" itself and therefore was a mandatory bargaining item. One could extrapolate from this and argue that a clause directed to the "effects" of a nonlabor cost prompted move is mandatory but one directed to the "decision" to move is permissive. As such, with the former clause labor can impose a cost of noncompliance; with the latter it cannot. Moreover, the former is protected by section 8(d); the latter is not. Such nuances create a mire of uncertainty and are not conducive to stable labor relations or to the protection of the parties' contractual expectations.

There are no Lucas Flour rationale implied restrictions upon the employer exercising his cost of noncompliance by moving unit work. Drawing from the policy arguments in Lucas Flour and Warrior & Gulf, a compelling argument can be made that such restrictions actively support the policies of the Act and the expectations of the employees in much the same way as an implied no-strike policy serves to protect the expectations of employers. Without Supreme Court guidance on the implied obligations approach, it remains for the lower courts, the Board, and arbitrators to protect the contractual expectations of employees.

Arbitration decisions present a mixed record. Arbitrators embracing the concepts of good faith and fair dealing, reasonableness, and promissory estoppel derived from concession bargaining, have implied restrictions on employers if the primary purpose for a move is to avoid contractual obligations. Although many arbitration cases address the avoidance of labor costs, akin to the Board's Otis Elevator argument, arbitration inquiry is broader. Implied obligations embrace the contractual expectancies of the parties generated by past practices as well as contractual language. The circuits' reaction to the implied obligations approach as exercised by arbitrators has been mixed. The circuits, fol-

216. Id. at 553-54.
217. The decision directed and the effects directed clause determination is simply unworkable at the negotiation stage. See Zimarowski, supra note 75.
221. See, e.g., Burroughs, supra note 220, at 384-87.
222. Nor is this position confined solely to arbitration. Hence the utility of the "zipper" clause in collective bargaining agreements in which the parties expressly waive their rights to negotiate changes during the term of the agreement. Zipper clauses, however, are of limited use in interpreting silence and ambiguity in contract language within the context of major costs of noncompliance. The Board has made policy changes in this area as well, creating an implied waiver of union rights. See National Metalcrafters Inc., 276 N.L.R.B. 90 (1985) (advise language in relocation clause waives union's right to demand bargaining over unit work transfer); Continental Tel. Co., 274 N.L.R.B.
lowing the Court's articulation of arbitration policy in the *Steelworkers Trilogy* and recognizing the broad sources of contractual expectations, generally uphold arbitration decisions as "draw[ing] their essence" from the contract.223

The current Board is hostile to the implied obligations approach, at least where it restricts traditional employer prerogatives. Prior to *Milwaukee Spring Division of Illinois Coil Spring (II)*224 the Board viewed plant relocations and consolidations during the term of a collective bargaining agreement as modifications prohibited by section 8(d). In a series of decisions, the Board held that unilateral decisions to relocate and consolidate frustrated the collective bargaining process and contract avoidance. Therefore, these decisions to relocate unit work constituted modifications of the agreement in violation of sections 8(d) and 8(a)(5).225 The Board, with a Reagan appointed majority, initiated rehearing of *Illinois Coil Spring (I)* and changed that direction.

*Milwaukee Spring Division of Illinois Coil Spring (II)* in a three-to-one decision with former Member Zimmerman dissenting, held that, in the absence of express contract language to the contrary, an employer does not violate sections 8(d) and 8(a)(5) by relocating the plant during the term of the agreement.226 Six years earlier, in a Ninth Circuit decision, *Los Angeles Marine Hardware*,227 a case factually similar to *Illinois Coil Spring*, the court held that a plant relocation during the term of the agreement for economic reasons constituted an indirect modification of the wage clause and therefore was prohibited by section 8(d).228

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226. 268 N.L.R.B. 601.

227. *Los Angeles Marine Hardware Co. v. NLRB*, 602 F.2d 1302 (9th Cir. 1979).

228. There is little doubt that the employment conditions for one third of the bargaining unit employees at Illinois Coil Spring were modified substantively by the unilateral decision to relocate. They were, in fact, terminated. And if in lieu of the relocation the employer, in an effort to reduce labor costs, had unilaterally reduced the wages of the unit employees such direct modification of the wage clause would have been prohibited by § 8(d). Similarly, in *Los Angeles Marine Hardware* the Ninth Circuit reasoned that permitting a relocation to cut labor costs "would allow an employer to do indirectly what cannot be done directly under the Act" and amount to impermissible contract avoidance. *Id.* at 1307.
In *Illinois Coil Spring (II)* the Board disagreed with the Ninth Circuit's approach and the Board's prior decision in this area. The *Illinois Coil Spring (II)* Board held that since there was no specific clause "contained in" the agreement prohibiting such a relocation, the employer was "doing directly what lawfully can be done directly." The majority reasoned that to hold otherwise would amount to an implied work preservation clause in the agreement and discourage "truthful midterm bargaining over decisions to transfer unit work."

The Board's approach has some facial validity, but clearly is problematic. First, the Board's literal seek-and-find process exalts form over substance. The Board simply ignores Justice Stewart's *Fibreboard* view on the avoidance and frustration of the collective bargaining process. Moreover, such an approach demonstrates a callous lack of appreciation for the integrity of the agreement. Fundamental to both common law and collective bargaining contract interpretation is the canon that contract language should be read as a whole.

Second, the Board's fear of an implied work preservation clause is unfounded. The focus is not on preserving work under the contract in any and all circumstances, but rather in protecting the collective bargaining agreement from modifications wholly within the control and discretion of one party. Moreover, the employer used the relocation as a cost of noncompliance for the precise reason of securing bargaining concessions during the term of the agreement. The employer always has the economic power to terminate the work, but to preserve the integrity of the agreement the employer should be denied the legal right absent express language akin to a condition subsequent.

Third, the Board's argument that allowing plant relocations in the absence of express contract language to the contrary encourages truthful collective bargaining is absurd. In fact, the opposite is more likely to

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229. 268 N.L.R.B. at 604 n.13. Member Zimmerman in dissent responded:
   Such decision [midterm plant relocation], admittedly motivated solely to avoid the contractual wage rates, was simply an attempt to modify the wage rate provisions in the contract albeit indirectly. . . . It is disingenuous to argue, as do my colleagues, that Respondent's relocation did not disturb the contractual wages and benefits at the Milwaukee facility. If Respondent had implemented its decision, there would be no assembly employees at the Milwaukee facility to receive the contractual wages and benefits. Rather, all assembly work would be performed at McHenry where Respondent would pay its employees less for the same work. Under these circumstances, my colleagues' conclusion that Respondent left the wage and benefit provisions "intact" at Milwaukee is illogical and without legal significance.

   *Id.* at 611 (Zimmerman, Mbr., dissenting).

230. *Id.* at 604.

231. *Id.* at 605.


233. *See supra* note 117 and accompanying text.

234. 268 N.L.R.B. at 606 (Zimmerman, Mgr., dissenting).

235. *Id.* at 605.
be true. It is the determination of a subject matter as mandatory and its protection through section 8(d) with the attendant notice and information access that encourages truthful collective bargaining. Prohibiting the indirect modification of the collective bargaining agreement by plant relocations and consolidations will require the employer to produce supportive data and persuade the union of its need for the necessary changes. Underlying this process will be the parties' mutual desire to avoid organizational dissolution. This dissolution has a cost not only to labor, if no duty to bargain is found, but also to the employer. Such information exchange can only encourage truthful and meaningful collective bargaining.

The D.C. Circuit held that Illinois Coil Spring's decision to relocate unit work did not violate section 8(d).\textsuperscript{236} Unlike the Board, the D.C. Circuit viewed the management rights and zipper\textsuperscript{237} clauses as granting to management a right "contained in" the contract permitting the move.\textsuperscript{238} In effect Illinois Coil Spring was simply doing that which under the collective bargaining agreement they had the right to do.\textsuperscript{239} Although the court's holding is readily identifiable, the decision is problematic from both a policy perspective and the substantive aspects of the court's reasoning.

The D.C. Circuit approached the scope of the management rights clause in a peculiar manner. The reasoning can be viewed as a skillful procedural reliance on the union's failure to timely raise specific issues, rather than the presence of inherent rights of management.\textsuperscript{240} The court reasoned that since the union had not argued that management did not have the right to move work, then implicitly management must have had the right under the management rights clause.\textsuperscript{241} Moreover, by agreeing to the inclusion of the zipper clause, the union waived any right to bargain over the midterm move since management "apparently possessed the contractual right to make the relocation decision."\textsuperscript{242} The court con-

\textsuperscript{236} International Union, UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985).
\textsuperscript{237} A zipper clause is defined in supra note 222.
\textsuperscript{238} 765 F.2d at 181.
\textsuperscript{239} The management rights clause at issue reads: Except as expressly limited by other articles of this Agreement, the Company shall have the exclusive right to manage the plant and business and direct the working forces. These rights include, but are not limited to, the right to plan, direct and control operations, to determine the operations or services to be performed in or at the plant or by the employees of the Company, to establish and maintain production and quality standards, to schedule the working hours, to hire, promote, demote, and transfer, to suspend, discipline or discharge for just cause or to relieve employees because of lack of work or for other legitimate reasons, to introduce new and improved methods, materials or facilities or to change existing methods, materials or facilities.
\textsuperscript{240} Id. at 182 n.24.
\textsuperscript{241} Id. at 181-82.
\textsuperscript{242} Id. at 182.
spicuously declined to identify language in the management rights clause expressly granting management this contractual right. Moreover, the court expressly declined to endorse the management reserved rights theory.\textsuperscript{243}

Unfortunately the D.C. Circuit opinion is too narrow to be used to support either the reserved management rights theory or an implied obligations theory. The actions by Illinois Coil Spring were not brought before an arbitrator. As indicated earlier, arbitrators have applied an implied obligations approach in similar circumstances.\textsuperscript{244}

The present Board has taken a decidedly pro-management tack in assessing management rights contract language. The Board approaches the management rights language as an express waiver of union rights. Augmented by past practices embracing the traditional control of capital concepts, this interpretation creates an area of unilateral management discretion or reserved rights.\textsuperscript{245} With this reading a zipper clause benefits only management, since the union is denied the right to compel bargaining over both express and reserved management rights.\textsuperscript{246} One reading of the D.C. Circuit's opinion would also seem to support this view.\textsuperscript{247} Many arbitrators would have little problem with the express waiver and past practice components of the above articulation. The Board's inclusion of the third source—those rights not expressly waived, nor grounded in past practices but traditionally held as part of the command-obedience and control of capital structures—is problematic. The Board arguably approaches the pristine management rights theory rejected by the Court in the \textit{Steelworkers' Trilogy}. In contrast, arbitrators demonstrate a greater willingness to entertain an implied obligations analysis.\textsuperscript{248}

A forum's reading of a management rights and no-strike clauses crystalizes the conflict between management reserved rights theory and the implied obligations theory. The current Board and court approach is too rigid. A double standard of contract reading is present. When ad-

\textsuperscript{243} See supra note 220.

\textsuperscript{244} The aggressive use of the waiver concept by the Board approaches a pristine view of management rights and relegates unions to a second class status. The Board apparently fails to acknowledge the industrial democracy concept and active voice face of union behavior, choosing to exclusively focus on the economic monopoly aspects. This view is not without its adherents. See supra note 28.

\textsuperscript{245} Zipper clauses are viewed as mandatory bargaining items. Union Hosp. Ass'n, NLRB Advice Mem. Case No. 8-Ca-12495 (1979).

\textsuperscript{246} See Teamsters Union Local No. 115 v. DeSoto, 725 F.2d 931 (3d Cir. 1984); see also supra note 220 and accompanying text.
dressing the union's cost of noncompliance, contract clauses and waivers of rights are read broadly with a default toward restriction of the cost of noncompliance. In addressing the restriction of management rights, the contract clauses are read narrowly with a default toward granting management the right at issue. The existence of this double standard refutes employers' claims that the NLRA unduly restricts their activities.

III

IMPLICATIONS

The process of collective bargaining is imperiled. Do we read contract language to avoid forfeiture of the agreement or to preserve traditional management prerogatives? By moving bargaining unit work, employers can walk away from negotiated contract terms without penalty leaving the collective bargaining agreement but a cruel and empty promise. Employers can do this because silence and ambiguity of terms have traditionally been resolved by reference to a default position in management rights. Silence and ambiguity should be resolved to avoid contractual forfeiture. Simply put, why would any party willingly seek contractual agreement that binds only itself?

If forums continue to construe agreements in ways that enable employers to avoid their obligations, the very existence of the union is threatened. If the labor organization has no real power to effect changes in the workplace and protect the security interests of the employees, union membership becomes a poor return. Additionally, labor unions lose their ability to control their membership. At both the union and nonunion level, the intangible concepts of loyalty, confidentiality, pride

249. The tension between defensible positions is inherent in legal decisionmaking and takes the form of commonplace balancing tests. Consistency and adherence to precedent, however, must be tempered with the recognition of a dynamic system evolving into more complex institutional structures and integrated markets. Nevertheless, failure to act in a given area is not without consequences. The difficulty in choosing which classification of activities enlarges the public good is readily apparent.

Customs are, indeed, the raw material out of which justice is constructed. But customs differ, customs change, customs are good and bad, and customs conflict. They are uncertain, complex, contradictory, and confusing. A choice must be made. Somebody must choose which customs to authorize and which to condemn or let alone. Carter maintains his thesis [common law is made by God or Beneficient nature] only by distinguishing "custom" from "bad practice." "Custom" is good custom; "bad practice" is bad custom. Who shall say? Is it the voice of God? Is it the law of Nature? Is it universal reason, or the vox populi? Carter criticised the Supreme Court because, in a railroad consolidation case it did not authorize the modern custom of business in consolidating corporations and eliminating competition. Apparently that custom is the voice of God. Others approve the Supreme Court when it condemns the modern custom of labor organizations in boycotting employers whom they deem unfair. Apparently that custom is not the voice of God.

J. COMMONS, CAPITALISM, supra note 31, at 299-300 (emphasis in original).

The default position in collective bargaining interpretation is just such a complex issue couched in industrial custom. Conceptually, the underlying conflict between the management rights theory and the implied obligations theory suggests an examination of the balance between these conflicting interests drawn from industrial custom, common law, and the policy of the NLRA.
in workmanship, job satisfaction, and organizational justice are sub-
sumed to a harsh authoritarian economic calculus.\textsuperscript{250} Employees then
must turn to other worker legislation for protection from economic coer-
cion.\textsuperscript{251} A return to labor militancy or a hostile, subservient workforce,
thus becomes commonplace. The balance sought by the NLRA between
labor and management interests is lost with resulting economic and so-
cial disruptions.

D.C. Circuit Judge Abner Mikva has suggested that economic reali-
ties have changed so significantly since the original passage of the NLRA
that the Act cannot adequately address the current needs in labor rela-
tions.\textsuperscript{252} To borrow from his Wizard of Oz analogy, a new wizard is
needed to resolve modern labor relations problems: “[T]he Act is not a
bad law; just a bad wizard . . . [and not] a panacea for labor’s trou-
bles.”\textsuperscript{253} Legislative reform is one approach to balance the power be-
tween employers and unions and achieve the policy goal of industrial
democracy. As Judge Mikva suggests, the Act needs significant amend-
ment. Given the political reality, however, even modest changes would
be met with strong opposition.\textsuperscript{254}

This Article has suggested principles of interpretation which can be
implemented without amending the Act. The NLRA and the case law
discussed in this Article condones, if not actively requires, an implied
obligations analysis with a default position toward the avoidance of con-
tact forfeiture. The \textit{Lincoln Mills} decision expressly allows the lower
courts and the Board to establish a federal common law for collective
bargaining agreements.\textsuperscript{255} With a recognition of the NLRA’s power bal-
ancing policy and the concepts of industrial democracy and organiza-
tional justice, this hybrid common law must be broader based than the
common law’s simple command-obedience construct.

The major obstacles to implementing this broader approach are an
adherence to traditional command-obedience concepts and the court-cre-
ated mandatory-permissive bargaining item dichotomy. One can argue
that the Board, following the \textit{Borg-Warner} progeny, must find employer-

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\textsuperscript{250} See supra note 28.

\textsuperscript{251} Even the modest proposals suggested in the Labor Law Reform Act of 1978, with a Demo-
cratic President and Democratic House and Senate, failed to achieve passage. In Freeman and
Medoff’s study the concept of labor political power is debunked as a myth. See \textit{R. Freeman \& J.
Medoff}, supra note 1, at ch. 13.

Economic and organizational realities dictate that the power between labor and manage-
ment will never be in absolute parity. Even where they are stockholders, unions will never be equal par-
tners in the operation of the organization. This does not mean, however, absent legislative interven-
tion, that progress toward industrial democracy and organizational justice cannot achieve a
significant measure of success within the current economic reality.


\textsuperscript{253} \textit{Id.} at 345.

\textsuperscript{254} See supra note 251.

\textsuperscript{255} \textit{Textile Workers v. Lincoln Mills, 353 U.S.} 448 (1957).
exercised costs of noncompliance on permissive issues as being outside section 8(d). The Board's position then becomes inherently contradictory. On one hand it must not interfere with management rights under section 8(d) while, on the other hand, it must protect the integrity of the employee's right to self organization and to bargain collectively under section 7. Thus, labor is stripped of its costs of noncompliance through statutory interpretation and the give and take of bargaining, while management retains costs of noncompliance to unilaterally restructure the agreement.

CONCLUSION

Labor's position in the collective bargaining process is structurally disadvantaged. The preemptive determination of substance through the mandatory-permissive bargaining item dichotomy limits labor's ability to compel substantive decision bargaining. The default position in collective bargaining determination commands a reading in favor of employer interests. And a one-sided application of the implied obligations approach restrains labor costs of noncompliance but leaves employer actions virtually unassailable. In large part, this structural disadvantage is a product of a failure to accommodate the traditional command-obedience prerogatives of employer control over capital with the labor policies of industrial democracy and power balancing commanded by the NLRA. So long as disputes are viewed solely in one-sided economic terms, the long-term policies of the Act will not be realized. The uneven treatment of similar concepts, contractual language, and power exercises invariably leads to disrespect for the Act and potential conflict between arbitration panels and the Board. Moreover, it supports the proposition that labor exercised self-help may be a preferable counter to employer exercised coercion.