THE LABOR BOARD, THE COURTS, AND ARBITRATION—A FEASIBILITY STUDY OF TRIBUNAL INTERACTION IN GRIEVABLE REFUSALS TO DISCLOSE *

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I
INTRODUCTION

As we have seen in the first two articles in this series, arbitration is capable of providing needed "discovery" in the administration of collective bargaining agreements. The arbitration tribunal is created when the disputants mutually select their own decision-maker, responsible for a final and binding resolution of their dispute. His duty is to provide judgment, informed by prudence and experience, at the time when a resolution of the problem is of real and pressing importance to the parties. If discovery procedures are to be effectively adapted to arbitration, a viable system of interaction must be developed among the arbitrators, the Board and the reviewing courts of appeals.

In 1957, in Textile Workers v. Lincoln Mills,¹ the Supreme Court laid the foundation for the allocation of decision-making responsibility

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* This is the last of a series of three articles exploring the adaptability of existing federal discovery procedures to labor arbitration in discovery situations occurring during the terms of collective bargaining agreements. The first article illustrated the recurrence of discovery situations affecting both employers and unions. Jones, Blind Man's Buff and the NOW—Problems of Apocrypha, Inc., and Local 711—Discovery Procedures in Collective Bargaining Disputes, 116 U. Pa. L. Rev. 571 (1967) [hereinafter cited as Blind Man's Buff]. The second article explored various concerns about the prospect of arbitral discovery and considered the use of federal law and policy in support of arbitral discovery through proceedings under § 301 of the Labor-Management Relations Act [hereinafter LMRA], 29 U.S.C. § 185 (1964). It concluded that the national labor policy should include a commitment to arbitral discovery. Jones, The Accretion of Federal Power in Labor Arbitration—The Example of Arbitral Discovery, 116 U. Pa. L. Rev. 830 (1968) [hereinafter cited as Accretion]. This third and final article demonstrates the need for a disclosure remedy under the National Labor Relations Act, the structural incapacity of the Labor Board to supply it, and makes a proposal for effective interaction of the affected tribunals—courts, Labor Board and arbitrators—in order to meet the need. My colleague, William Cohen, gave me helpful criticism relative to the Federal Rules, but is to be absolved for any trespasses I may have committed. Copyright © 1967 by Edgar A. Jones, Jr.


¹ 353 U.S. 448 (1957).
among these three major tribunals in the labor relations field. In *Lincoln Mills* the Court directed the federal judiciary to fashion a body of federal substantive law to be applied in actions under section 301 of the Labor-Management Relations Act,\(^2\) which governs the enforcement of collective agreements to arbitrate.

In the *Steelworkers* trilogy,\(^3\) in 1960, the Court committed to arbitrators the initial assessment of alleged contract violations and the formulation of responsive remedies. Under these cases, the arbitrator “is to bring his informed judgment to bear in order to reach a fair solution of a problem.”\(^4\) The Court thought this to be a sound allocation of the first-instance power to decide contractual disputes because a “labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts.”\(^5\) The arbitrator is not limited to the same resources for forming a judgment as are the courts. His “source of law is not confined to the express provisions of the contract.”\(^6\)

The reasoning of the *Steelworkers* cases was extended in 1964 in *John Wiley & Sons v. Livingston*,\(^7\) which held that the arbitrators should also have first-instance power to decide “'procedural questions' which grow out of the dispute and bear on its final disposition . . . .”\(^8\)

More recently, in 1967, the Court in *Acme Industrial*\(^9\) related the “institutional competency” of arbitration to the role of the Labor Board in such a way as to require further development of the uses of arbitration in the pursuit of national labor policy goals. The Court reemphasized “the national labor policy favoring arbitration.” It observed that “the Board's threshold determination” was an exercise of jurisdiction in a refusal-to-disclose case which “in no way threatens the power which the parties have given the arbitrator to make binding interpretations of the labor agreement.”\(^10\) Although that conclusion

\(^6\) Id.
\(^7\) 376 U.S. 543 (1964).
\(^8\) Id. at 557.
\(^10\) The 1960 *Steelworkers* cases dealt with the relationship of courts to arbitrators when an arbitration award is under review or when the employer's agreement to arbitrate is in question. The weighing of the arbitrator's greater institutional competency, which was so vital to those decisions, must be evaluated in that context. The relationships of the Board to the arbitration process is of a quite different order.” Id. at 436. (Citation omitted.)
\(^10\) Id. at 438.
was somewhat ingenuous, as we have seen,\textsuperscript{11} the Court was manifestly concerned lest interaction with the Board unduly restrict the arbitrator's power to interpret the agreement.

As a result of the \textit{Lincoln Mills} decision, collective bargaining moved into a new phase of its evolution, requiring a new and specialized exercise of creativity by the parties and their personally selected arbitrators. This new requirement was that the parties either join in fashioning the incidents of their own forum or have the courts do it for (or to) them. Although Justice Frankfurter, dissenting in \textit{Lincoln Mills},\textsuperscript{12} was quite concerned lest this, in Dean Shulman's phrase, "seriously affect the going systems of self-government,"\textsuperscript{13} what the Court actually did was push the parties into their own negotiated corners while leaving them free to negotiate their way out, either after the fact of an arbitrator's decision or in anticipation of it. At frequent intervals, the union or the employer can lawfully bargain to an impasse during negotiations, and then resort to a strike or lockout, if either one really wishes to get rid either of their system of judicially enforceable, voluntarily accepted arbitration or of any of the consequences of a particular arbitration decision. If it be said that this is not a realistic view of bargaining, that once incorporated in an agreement the substance of arbitration decisions are not, as a practical matter, readily dislodged, the short answer must be that this symptomizes the existence of the acceptance, not the rejection, of these decisions, and thus their integration as part of the joint "intent" thereafter.

The history of the continued acceptability—indeed, the vigorous growth—of arbitration confirms to a considerable extent the Court's judgment in \textit{Lincoln Mills} in contrast to that of Dean Shulman and Mr. Justice Frankfurter. Yet it would be foolish not to recognize that there remains much essential wisdom underlying the concerns expressed by each of those astute students of labor law. That wisdom forms an indispensable element of the basic premise of the analysis in this study. It is that the prospect of bolstering the bargaining relationship is markedly—one might almost say, exponentially—enhanced to the degree that a final decision is rendered by a procedure which is under the immediate, joint control of the disputants. The more remote the tribunal to which the decision is committed, the more extended becomes the timespan prior to its finality. The more filtered by factors extraneous to the bargaining relationship becomes the "informed" decision which disposes of the issue, the less can it realistically be regarded as informed.

\begin{footnotes}
\item[11] See \textit{Blind Man's Buff} 582-83.
\item[12] 353 U.S. at 463.
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Keeping in mind the "institutional competency" of arbitration identified by the Court,\textsuperscript{14} it is the purpose of this article to examine the Labor Board's response to refusal-to-disclose cases in order to develop a theory for the interaction of the Board with arbitration in this area.

II

Disclosure and the Labor Board

A. The Board's Disposition of Refusal-to-Disclose Cases

There is no doubt that disclosure can be compelled during the term of a collective bargaining agreement in labor disputes affecting interstate commerce. The National Labor Relations Board can, and often does, issue an order directing one party to bargain in good faith by disclosing information requested by the other. But disclosure thus achieved bears no resemblance to the remedy of "discovery." Discovery is a NOW-remedy. It has evolved as a judicial mechanism to compel timely disclosure of the evidentiary elements of the opposing claims of litigants in pending actions. A major purpose is to bring the dispute into sharp focus, encouraging, if not compelling, realistic settlement efforts. But perhaps the ultimate purpose of discovery is to transform trials from a process of evasion into one of realization in which the facts of the case are more easily ascertained. As the Supreme Court has stated, "[L]itigation is the pursuit of practical ends, not a game of chess."\textsuperscript{15} As true as that is of adjudication, it is much more so of arbitration, since arbitration is the non-judicial means evolved over the centuries whereby disputes may quickly be brought to a "friendly and quyet end" by submission to the final and binding decision of "gentlemen of the country"\textsuperscript{16} selected by the disputants themselves, rather than imposed on them.

The terms of collective agreements are generally far shorter than the time required for adjudication of a contested lawsuit through the available stages of trial and appeal. Their renegotiation cannot await the outcome of litigation, nor can the parties' continuing relationship.\textsuperscript{17} The time factor is particularly pertinent to discovery situations arising during the terms of collective agreements. Time is then crucial; often


\textsuperscript{15}City of Indianapolis v. Chase, 314 U.S. 63, 69 (1941) (Frankfurter, J.).

\textsuperscript{16}Quoted in J. Dawson, \textit{A History of Lay Judges} 168 (1960).

\textsuperscript{17}Textile Workers v. Lincoln Mills, 353 U.S. 448, 463 (1957) (Frankfurter, J., dissenting).
it is everything. It is apparent today that the typical remedy invoked by a party aggrieved by a refusal to disclose information is a Labor Board proceeding; the charge is failure to bargain in good faith. Yet the Board's refusal-to-disclose cases show that resort to that tribunal frustrates the hope of the wronged party for an effective remedy.

It takes nearly a year and a half, on average, for the Board to issue a disclosure order. In almost half the cases another twelve to eighteen months will elapse before the order is enforced in a court of appeals. By that time, the discovery situation will long since have been transformed into a bargaining cause célèbre only to be concluded by an order retaliatory in tone but of no remedial effect. At the end of two or three years a chastising Board order will be tacked on a plant bulletin board. But it will be obvious to the employees that this is no real penalty. Any grievance concealed in the withheld information is apt by then to have been dissipated by the passage of time and events. A Board order to disclose information may have its uses, but "discovery" certainly is not one of them.

Chief Justice Warren has observed the necessity of a judicial system in which "a case is litigated in its entirety in one system of courts or the other, rather than sent back and forth like a shuttlecock."

That thought is certainly applicable to the interaction between arbitrators and the Board, since its judgment is reviewable in federal circuit courts.

Aside from refusal-to-bargain disclosure orders, the Board has disapproved of the use of inter-party discovery in connection with its proceedings. It has taken the position that the section 10(b) reference to the Federal Rules of Civil Procedure "clearly relates to the introduction of evidence before the Board, and not to pretrial privileges accorded parties to judicial proceedings." But the need for effective disclosure nonetheless exists.

Board and court decisions establish that the duty to bargain includes the duty to furnish sufficient information to bargain intelligently. For an employer, this has been called an "affirmative statutory duty to supply relevant wage data" to the union unless it "plainly appears

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18 The data on which these statements are based is set forth in the appendix to this article.


22 Del E. Webb Constr. Co., 95 N.L.R.B. 377 n.2 (1951) (no merit in exception to trial examiner's denial of motion to vacate hearing on ground that respondent was entitled, under Fed. R. Civ. P. 26(a), to take deposition of charging party).
irrelevant." The claim that such information is confidential and can be withheld has long been rejected by the Board and the courts. Employers are required to furnish information concerning names of unit employees, rates paid each employee, rate history, classifications, duties, dates of hire, merit increases and their recipients. The right to the information cannot be waived unless the waiver is expressed in "clear and unequivocal language." Former NLRB Chairman Guy Farmer, in a much-quoted concur-
currence in 1954 in *Whitin Machine Works,* observed that "a clear-
cut rule relating to this issue is desirable." He felt that the unusually large number of wage-rate information cases might thus be eased. "I would not require that the Union show the precise relevancy of the requested information to particular current bargaining issues," he stated. "It is enough for me that the information relate to the wages or fringe benefits of the employees. Such information is obviously related to the bargaining process, and the Union is therefore entitled to ask and receive it." But this presupposes good faith. Farmer declared that "this broad rule is necessary to avoid the disruptive effect of the endless bickering and jockeying which has hereto-
fore been characteristic of Union demands and employer reaction to request by unions for wage and related information." He concluded that "wage and related information pertaining to employees in the bargaining unit should, upon request, be made available to the bargain-
ing agent without regard to its immediate relationship to the negotiation or administration of the collective-bargaining agreement." When no bad faith existed a "limited remedial order" would be appropriate which "requires only that the Employer, upon request, furnish the list of individual wage rates of employees in the unit." Yet five years later, it could still be said by a trial examiner that there was "an increasing multiplicity" of refusal-to-disclose cases, even though the Board's decisions had created a "familiar and well-trodden path." Discovery situations are not novel; they are chronic.

24 Aluminum Ore Co. v. NLRB, 131 F.2d 485, 487 (7th Cir. 1942).
29 Id.
30 Id. at 1541.
31 Id.
32 Id.
33 Id. at 1541-42.
In the establishment of a properly balanced relationship between arbitrators and the Board, it is important to realize that since 1947 the Board has been concerned with the vindication of rights which blend public and private interests. "In short, we think that the statutory pattern of the Labor Act does not dichotomize 'public' as opposed to 'private' interests. Rather, the two interblend in the intricate statutory scheme." 35 In that connection, the Cox Panel found the Board to be "largely an umpire engaged in enforcing established rules first against one party and then against the other." 36 This is a continuing development in which the Board is increasingly an enforcer of collectively bargained commitments. In assessing the Board's relations with its hearing officers in contested representation cases, the Cox Panel concluded that the Board ought to exercise its review power only if "the case presents a difficult or important question of law or administrative policy which the Board should decide . . . ." 37

The Board has actually been moving in that direction in regard to arbitrators for some years. Twenty-five years ago the Board, in Consolidated Aircraft Corp., 38 was confronted with allegedly unlawful discharges in January and April of 1942 which might also have been contractual violations remediable under an existing arbitration provision. It dismissed the section 8(a)(1) 39 complaint on February 18, 1943, without prejudice since the parties conceded that the discharges were arbitrable. The Board members felt that they ought not assume the role of policing collective contracts . . . by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act. On the contrary, we believe that parties . . . would thereby be encouraged to abandon their efforts to dispose of disputes under the contracts through collective bargaining or through the settlement procedures mutually agreed upon by them, and to remit the interpretation and administration of their contracts to the Board. We therefore do not deem it wise to exercise our jurisdiction in such a case, where the parties have not exhausted their rights and remedies under the contract as to which the dispute has arisen. 40
Again in 1951 in *Crown Zellerbach Corp.* it dismissed a union's complaint of a unilateral change of a piece rate when new equipment was installed; the union had failed to use "the grievance and arbitration machinery." The Board observed that it had "frequently stated that the stability of labor relations which the statute seeks to accomplish through the encouragement of the collective bargaining process ultimately depends upon the channelization of the collective bargaining relationship within the procedures of a collective bargaining agreement." The evidence actually showed a "background of a peaceful and what appears to be a wholly salutary employer-employee relationship." There had occurred an employer's "isolated unilateral action." Although "there is apparently no serious obstacle to an amicable settlement of the issue through bargaining within the framework provided in [the] contract," the union had "failed to utilize the contractual procedures established for bargaining concerning the interpretation and administration of their contract." In reaction to that bargaining environment the Board properly concluded that it would best effectuate the statutory policy of stability of bargaining relations if it refrained from issuing a remedial order and thereby putting itself, instead of the bargaining parties, "in the position of policing collective bargaining agreements, a role we are unwilling to assume."

The existence of the *Crown Zellerbach* pattern of a peaceful and salutary bargaining relationship is typical of most discovery situations that have resulted in Board proceedings. Tough bargaining should not be equated with bad faith. When parties to collective agreements probe and sometimes exceed the limits of the contractually allowable, there is no reason for the Board to impale them on the timespan of a Board proceeding. The military distinction between tactics and strategy is useful here: the question should be whether there is a tactical rather than a strategic refusal to disclose. The long-range statutory policy of encouragement of good-faith bargaining is the strategic concept to be effectuated by the Board. Tactical feints and withdrawals by one or the other of the bargainers ought not automatically to be caught up in the Board's procedures as if they were strategic assaults on the existence of the bargaining relationship. If adversary bargaining is to succeed there has to be room for tactical maneuver without involvement in the strategic confrontation of a Board proceeding. The Board should not transform a tactical encounter subject to arbitration into a strategic questioning of good faith bargain-

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41 95 N.L.R.B. 753 (1951).
42 *Id.*
43 This and all the remaining quotations in the paragraph are from p. 754 of the report.
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ing requiring federal intervention. Many of the discovery situations coming to the Board unfortunately are of that type. In others malice may prompt the refusal to disclose but it still may more readily be remediable in the NOW-proceedings of an arbitration.

The discovery situations that have concerned the Board indicate that the nature of the problems, the Board's reactions to them, and the traumatic timespan frustrating their resolution have remained remarkably consistent over the years. Thus, in Yawman & Erbe Mfg. Co., the employer refused to supply the union with a list of all employees in the bargaining unit, their wage rates, and their job classifications for the years 1946-1948. The union had been recently certified. Certain members had made claims that they were being underpaid in comparison with nonunion employees. In anticipation of the expiration of the agreement, the union wanted to compare the rates of nonunion employees in the bargaining unit. In the 1947 negotiations, the employer had refused to disclose that data for 1946. Again, in 1948, it refused to disclose the 1947 data. The union apparently acceded to those refusals. The parties had commenced their 1949 negotiations before the agreement expired, and after several meetings, the union sent a letter requesting the information, which was refused again. It then filed a section 8(a)(5) charge although the refusal occurred during the term of a collective agreement in which there was an arbitration provision. While that charge was pending, the parties completed their negotiations and executed a new agreement, although they remained at an impasse on the information demand and refusal.

A year after the employer's refusal the Board issued its order:

Upon request, furnish Office Employees International Union, Local No. 34, A. F. of L., with the names, positions and current wages of the employees in the Unit described herein, in order to enable [the Union] to discharge its functions as statutory representative of the employees in the appropriate unit.46

But the order was restricted to 1948 data, stating that the record failed to disclose the relevance of the 1946 and 1947 wage information.47 Of course, it was obvious that the recently certified union was simply looking for proof of a pattern of discrimination between union and nonunion employees in the few years it had been certified. As the dissent saw it, the company had only itself to blame for any added

44 89 N.L.R.B. 881 (1950), enforced, 187 F.2d 947 (2d Cir. 1951).
46 89 N.L.R.B. at 884.
47 Id. at 882.
The burden in responding to the request for data covering all three years. The dissent suggested a rule of accessibility for the Board to apply: "So long as wage information of this character cannot be said to be patently irrelevant, I believe the Union is entitled to it, subject, of course, to the qualification that an employer should not be compelled to provide information the furnishing of which would impose an impossible or unreasonable burden." 48

In the meantime, another yearly contract term had come and gone. And the Board imposes no monetary penalty in this kind of case: it has no statutory authority to assess damages for the wrongful withholding of bargaining data. Nor is its order self-enforcing. Contempt proceedings to compel compliance can only result after violation of a court's order enforcing the Board's. So a number of employers, as in Yawman & Erbe, have felt that they might just as well play out the string of review until the final appellate word has been spoken. In that case, the court issued its enforcement order twenty-three months after the employer's refusal to disclose.

The court declined to see any significance in the union's initial failure to show the relevance of the requested information. Under modern discovery procedures, the court observed,

> information must be disclosed unless it plainly appears irrelevant. Any less lenient rule in labor disputes would greatly hamper the bargaining process, for it is virtually impossible to tell in advance whether the requested data will be relevant except in those infrequent instances in which the inquiry is patently outside the bargaining issue. 49

The disclosure dispute in Yawman & Erbe spanned two, perhaps three, contract terms before the refusal was remedied. 50 But the classic case of intransigence and maneuver is that involving the Boston Herald-Traveler and the American Newspaper Guild. 51 In November of 1951 the Guild requested the names of all bargaining unit employees, their classifications, sex, dates of hire, birthdates, and salaries. There were 520 employees in the unit, occupying 77 classifications, whose salaries ranged from the contractual minimum up to $15,000 a year.

48 Id. at 885.


50 The 1948 contract (#1) expired February 24, 1949. Assuming the parties continued their one-year terms and stuck to the same effective date, the 1949 contract (#2) expired on that date a year later. The Board's decision issued two months later, April 28, 1950. The 1950 contract (#3) expired February 24, 1951. The court's order issued a month later, March 28, 1951.

51 Boston Herald-Traveler Corp., 102 N.L.R.B. 627 (1953), enforced as modified, 210 F.2d 134 (1st Cir. 1954); Boston Herald-Traveler Corp., 110 N.L.R.B. 2097 (1954), enforced, 223 F.2d 58 (1st Cir. 1955).
The newspaper refused to supply the information, arguing that the Guild did not really need it. More important, it declared that the data was confidential as to competing newspapers; the Guild's executive committee included some members who worked for competitors of the Herald-Traveler.

Three months later the newspaper refused to disclose any names other than those of employees whose dues were not being deducted. The Guild promptly filed a section 8(a)(5) charge. The existence of arbitration as an alternative tribunal may be presumed. The new collective agreement was executed in February, 1952. The intermediate report of the trial examiner followed in August, accurately describing the confidentiality argument as having been "rejected in numerous decisions." At the outset of the next year, thirteen months after the employer's final refusal, the Board issued its decision. It ordered the employer "[u]pon request [to] furnish to the Union wage data concerning work classifications and salaries of all employees in said unit."  

When the newspaper refused to comply (as is its privilege), the Board sought enforcement of its order from the First Circuit. Exactly one year later, twenty-five months after the original refusal had occurred, that court decreed that the employer must disclose the salaries paid in each job classification and the number of employees receiving each salary paid, but not the salaries paid to each individual employee. The court reasoned that the Board did not intend that last piece of information to be disclosed since it had not explicitly so required.

Four months earlier the parties had begun negotiations over their next contract. The Guild renewed its demand for the information. The newspaper supplied most of it, but refused to disclose anything that would enable the identification of individual employees. Three weeks later the circuit court upheld the employer's refusal to do so in the course of the earlier 1952 negotiations, not as a matter of substantive law but because the Labor Board had not expressly required that extensive a disclosure.

So the Guild then went back to the Board, filing its section 8(a)(5) charge in March, 1954. The parties, still out of phase with the Board's disclosure orders, executed their new agreement in April in an apparently expedited procedure. This time the Board's disclosure order was handed down within eight months; six months later the court issued its unqualified enforcement decree.

52 102 N.L.R.B. at 635.
53 102 N.L.R.B. at 629.
54 210 F.2d at 137.
This record might suggest that the bargaining relationship between the Guild and the Herald-Traveler had so seriously deteriorated that the band-aid remedies of a grievance procedure would have to be supplanted by the procedures that the Board utilizes in cases of fractured relationships. Such a suggestion would be incorrect. The trial examiner in the second case, finding a violation of the Act in the newspaper’s refusal to link wage information to individual employees, nonetheless added that “the picture would not be complete if it were not noted that aside from the question herein considered, relations between the Respondent and the Union have been excellent, and that there is no evidence of unlawful intent or act beyond what is inherent in the violation found.”

That last quotation teaches one of the basic lessons which has emerged from this study. The Board must distinguish between allowable tactical bargaining maneuvers and proscribed strategic assaults upon the integrity of the bargaining relationship itself. Excesses stemming from tactical maneuvers are remediable through the tribunal created by the disputants. The Board will have to decide whether the contractual tribunal can fashion the needed remedy without resort to the statutory tribunal. In order to effectuate the purposes of the Act in disclosure cases, the Board should keep its processes routinely aloof from the tactical maneuver cases because it simply does not have at its disposal the remedy of discovery. In the strategic assault cases, it may be necessary to invoke the presence of the Board and the courts of appeals; a deferral to arbitration would not then be sound.

In its second decision in the Boston Herald-Traveler litigation, the Board emphasized that it had long since established (and the courts long since approved) a rule under which “an employer is required to furnish the Union representing its employees with the name and earnings of each employee in the appropriate unit in order to make collective bargaining effective.” Such information is obviously related to the bargaining process, and the union is therefore entitled to receive it.

The Board emphasized that more was at stake than just the immediate contract negotiation. It rejected the Herald-Traveler’s suggested dichotomy “between the Union’s specific contract demands and

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55 110 N.L.R.B. at 2106.
56 Even so, there will be many strategic assault cases in which it will be preferable to use arbitration to compel a specific contractual compliance which, in turn, will satisfy the needs of public policy expressed in the NLRA.
57 110 N.L.R.B. 2097 (1954), enforced, 223 F.2d 58 (1st Cir. 1955).
58 110 N.L.R.B. at 2097-98.
its more general bargaining function.” To require undue precision in the phrasing of the union’s requests for information or of its reasons for requesting it, the Board concluded, would simply cause the “endless bickering and jockeying” earlier deplored by Chairman Farmer in *Whitin Machine Works*. Furthermore, the argument that some employees might wish to preserve their financial anonymity “rests on but a speculative basis and, in any event, such individual desires must yield to the interests of the great majority of workers represented in the unit.” Similarly disposed of was the avowed desire of the employer to preserve confidentiality for competitive reasons. The Board reaffirmed its past holdings that, “in the face of the expressed social and economic purposes of the Act, any possible risk that competitors may hire key employees does not justify an employer’s refusal to divulge pertinent wage information.” The Board’s reasoning was approved by the First Circuit, which observed rather curtly that employers had been ordered in “dozens of cases” to furnish detailed data of the type asked for by the Guild.

While the Bostonians were engaged in the tactical intricacies of their “excellent” relationship, Woolworth’s Five-and-Ten in San Bernardino, California, was bargaining with Retail Clerks Local 1167. The Clerks had been certified to represent Woolworth’s seventy employees on March 22, 1952. A week or so earlier, a two-year collective agreement had been executed. It contained a broad arbitration clause, making arbitrable at the instance of either party any “dispute . . . as to the correct interpretation or application of any provision of this agreement.” The agreement also provided for negotiation of cost-of-living adjustments in 1953.

During the negotiations concerning those adjustments, the Clerks requested the names of the seventy bargaining unit employees and their individual wage, hour and classification categories because they felt it was “imperative [to] have this information for the intelligent and equitable administration of the Agreement.” The company, however, refused to disclose the necessary data. Although the Clerks could have filed a grievance in March (when the information was needed for bargaining), they instead continued to negotiate and in

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60 110 N.L.R.B. at 2099.
61 Id.
62 Id. at 2100.
63 Id.
64 *Boston Herald-Traveler Corp. v. NLRB*, 223 F.2d 58, 61 (1st Cir. 1955).
66 F. W. Woolworth Co., 109 N.L.R.B. at 204.
May accepted the company's wage proposal. Then, when the union's last letter demanding disclosure went unanswered, it elected to file an 8(a)(5) charge rather than pursue arbitration. The trial examiner heard the matter the following December, issuing his intermediate report six weeks later, and concluding that the store had violated the Act by its refusal. Six months later—seventeen months after the final demand—the Board approved his conclusion, observing that

[t]he Board, with court approval, has consistently held that an employer is under a duty to accommodate a Union's request during contract negotiations for relevant wage information . . . . [S]uch duty continues after a collective-bargaining agreement has been executed. The employer's duty, in either instance, is predicated upon the need of the Union for such information in order to provide intelligent representation of the employees. When administering a collective-bargaining agreement, the Union's need for current and authoritative information is no less real than it was before the contract was executed.67

Woolworth nevertheless refused to comply with the Board's order to furnish the Clerks with the information requested. Almost two years after the Board's disclosure order—over three years after the union's final demand—the Ninth Circuit refused to enforce it. In setting aside the order it observed that "the claim . . . condenses to no more than, 'Well, we might find something . . . .’ [T]here must under all the circumstances be a showing of reasonable need of the information to meet a condition. If the reason is not obvious, then he who asserts the claim should demonstrate to him against whom it is asserted some relevant particularity."68

But when the Board appealed the decision, the Supreme Court—three years and several weeks after the wrongful refusal to disclose—reversed in a one-sentence per curiam: "The Board acted within its allowable discretion in finding that under the circumstances of this case failure to furnish the wage information constituted an unfair labor practice."69

The only possible reason not to compel disclosure in the Woolworth circumstances was the company's interest in the protection of the privacy of its business operations. That interest, however, the Board has consistently found to be subordinated to the policy of encouraging good-faith bargaining. The courts have agreed.70

67 Id. at 197.
68 235 F.2d at 323.
69 352 U.S. at 938.
70 See notes 62-64 supra and accompanying text.
Chairman Farmer emphasized in *Whitin Machine* that the only basis for refusal to disclose "pertinent bargaining information" would be that the demand was a "harassing tactic." 71 The effect of this reasoning is to shift the emphasis of scrutiny from why a union wants the requested information to whether the employer will be unduly disadvantaged in complying with the request. This shift was evidenced, for instance, in the *J. I. Case Co.* dispute in 1958. During the term of an agreement containing an arbitration provision, the union had asked for existing wage data (time-studies) for "purposes of collective bargaining and contract administration." 72 The company argued that the union had no need for the information since no grievances had been filed and no negotiations were pending. Before the trial examiner it also pressed the defense of undue burden of compliance. The Board, however, rejected both positions. It denied that the right to relevant wage information was dependent upon the processing of a particular grievance 74 and it found no evidence of undue burden. The union's failure to demonstrate its need for the data was not evidence of harassment. 75 In addition, even though the time-study data was voluminous, the Board noted that it was collected in centralized files and could readily be made available to the union for examination or duplication. All that was needed, it concluded, was for the parties to "enter into reasonable arrangements" 76 for the transfer of the information. Therefore, almost seventeen months after the employer's refusal of the union's request, the Board ordered disclosure.

When the employer refused to comply with the Board's disclosure order, enforcement was sought in the Court of Appeals for the Seventh Circuit. Ten months later—twenty-seven months after the refusal—that court ordered enforcement. It conceded that a bad-faith union request for information could lawfully be refused. 77 But it rejected the company's claim of general harassment as unfounded, basing its conclusion on a finding of the relevance of the data sought. It stressed that

*collective bargaining is a continuing process which, "[a]mong other things, involves day to day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract."* 78 The Union not only has the duty to negotiate collective bargaining

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72 118 N.L.R.B. 520 (1957), enforced, 253 F.2d 149 (7th Cir. 1958).
73 118 N.L.R.B. at 522 (letter from union to employer).
74 Id.
75 Id. at 523.
76 Id.
77 253 F.2d at 153.
agreements but also the statutory obligation to police and administer the existing agreements.\(^7\)

Finally, as to the burden of disclosure, the court observed that even had disclosure been burdensome, "some arrangement could have possibly been made to lessen such burden." \(^8\)

"Undue burden" may be said to require extreme circumstances to be allowed to parry a thrust for bargaining information. It certainly demands more of a showing than the crusty response of the employer's general manager in Fitzgerald Mills Corp.\(^9\) that management was "busy trying to run a plant and could not furnish the information." \(^8\)

The refusal to disclose occurred during contract negotiations; it was one among several incidents evidencing bad-faith bargaining by the employer. The employees struck for two months and the Board ultimately found that they did so in protest against the company's bad-faith bargaining. That led to its order directing reinstatement of the strikers without loss of pay, seniority or other rights, as well as back pay from the date of the unconditional application for reinstatement to the date of the employer's offer of reinstatement, less the striker's net earnings during that period.\(^8\)

The tab for the back pay which was due about 160 employees (legally regarded as "unfair labor practice strikers"), covering an extended period of months, would certainly have been sizable enough to encourage candor in the future. Unlike the employer whose refusal to disclose results in no economic penalty other than the legal costs of defense, an employer struck as a consequence of his refusal must reckon with the prospect of being compelled to compensate his striking employees.\(^8\)

That prospect alone will often cause employers to prefer an immediate arbitral resolution of whatever objections they may have to the disclosure of particular information.

But curiously enough the employer's offer to submit the issue to arbitration as an alternative to a Labor Board proceeding has been

\(^7\) Id.

\(^8\) Id. at 156.


\(^8\) 133 N.L.R.B. at 878.

\(^8\) Id. at 887.

\(^8\) "Unfair labor practice strikers" may be so regarded even though they may also entertain economic motives in striking. See Butcher Boy Refrigerator Co. v. N.L.R.B., 295 F.2d 22 (7th Cir. 1961); NLRB v. A. Sartorious & Co., 140 F.2d 203 (2d Cir. 1944); NLRB v. Stackpole Carbon Co., 105 F.2d 167 (3d Cir.), cert. denied, 308 U.S. 605 (1939). They must be rehired on demand. See Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956); NLRB v. Sunrise Lumber & Trim Co., 241 F.2d 620, 625 (2d Cir.), cert. denied, 355 U.S. 818 (1957). If they are not reinstated, they are entitled to reinstatement and back pay from the date of demand, even though there may have been other causes for the strike. See NLRB v. Remington Rand, Inc., 94 F.2d 862 (2d Cir.), cert. denied, 304 U.S. 576 (1938).
rebuffed by the Board. Typical of its reasoning is the observation in *Sinclair Refining Co.*
that a willingness to arbitrate "is no defense to a refusal to furnish information which a union needs in order to enable it to bargain intelligently." The Board found an 8(a)(5) violation and ordered disclosure.

The Fifth Circuit, however, rejected the Board's rationale. It saw that the courts had previously assumed it to be proper for a union to resort to section 8(a)(5) to enforce the obligation to furnish data. But this was due, in part, to "a mistaken reliance on the accepted proposition that the decision of a private arbitrator, even though ostensibly binding on the parties, cannot justify violation of the Act or oust the Board of its rightful and exclusive power to effectuate the policies of the Act." To Judge Brown, it was specious to assume prior to an arbitration that an arbitral award would be repugnant to the Act. The second error he saw was "a misguided application of another well established principle that a union's waiver will not be implied, but must be clear and unmistakable." But the waiver assertion is either "meaningless" or "begs the question." The "right" to the data can hardly be tested when it has not yet been determined in arbitration whether such a right exists contractually. Section 8(d) confers an abstract right to data for administering a contract, but it is the specific contract itself which must determine whether there is a "right" to the particular information requested.

Thus, the court held that an 8(a)(5) Board proceeding could not be utilized to secure data for use in a grievance "where determination of relevance and pertinency requires determination of the critical substantive issue of the grievance itself." That was for the arbitrator. And the court found it difficult to see how an employer's willingness to abide by the arbitration provision could itself be deemed a failure to bargain.

But unfortunately the court then moved vulnerably beyond that sound premise. Not only was the Board to be precluded from asserting its jurisdiction, but "resort to traditional court remedies" should also be recognized as "one of two potential means by which this dispute is resolved." Thus the courts, but not the Board, were to constitute an alternative to arbitration "as a forum to achieve final resolution."
This alternative once again raised the unfortunate prospect of judicial interposition of judgment in arbitrable matters which the Supreme Court had previously disapproved in the Steelworkers trilogy. In American Mfg. Co. it expressed disapproval of the New York Cutler-Hammer doctrine under which the court determined if a grievance was meritorious and, therefore, arbitrable. The Court described the doctrine as "a principle that could only have a crippling effect on grievance arbitration." Thus, the courts are not an alternative tribunal. And, in Acme Industrial, the Court expressly disapproved of the Fifth Circuit's conclusion that the Labor Board was "automatically" required "to defer to the primary determination of an arbitrator." In C & C Plywood, the Court also asserted the Board's primary jurisdiction and barred judicial usurpation of its power to respond to charges of statutory violations arising during the term of a collective bargaining agreement.

However, this rejection of the view of the courts as alternative tribunals, and the assertion of the primacy of the Board over both courts and arbitrators, does not impair the utility of the main line of the court's reasoning in Sinclair Refining. Judge Brown's major premise was that the voluntary commitment of bargaining disputes to arbitration should not be involuntarily displaced by Board procedures in refusal-to-disclose cases. Disclosure cases are interim procedural disputes between the contracting parties. They do not involve the resolution of ultimate substantive issues under the agreement. Interim disputes should be disposed of in an expedited manner. They should not be prolonged by being subjected to the delay which inexorably characterizes disclosure disputes when they are taken to the Board in an 8(a)(5) proceeding. Judge Brown pointed to the time limits embodied in the collective agreement and compared them to the cost in time of "resort to the coercive sanctions of the Board," which had

brought the grievance machinery to a dead halt. In the meantime, with inevitable delays in the administrative and judicial review process, the second anniversary of the grievance of April 28, 1960, has taken place. Though the grievance is older, it is hardly wiser, and it is certainly no nearer decision than it was when the parties first squared off.

92 Cases cited note 3 supra.
97 Id. at 437.
99 Sinclair Ref. Co. v. NLRB, 306 F.2d 569, 578 (5th Cir. 1962) (footnote omitted).
Beyond the problem of time lies the element of judgment. Whose is the preferable first-instance judgment in these cases? Judge Brown pointed to the fact that arbitrators jointly and voluntarily selected by the parties have had committed to them "decisions having the most profound impact upon the stability, survival and economic, financial wellbeing of a business, its employees, or both. An adjudicatory body dealing with matters of transcendent substantive importance may surely be trusted by the law to take steps which lawyers and Judges would characterize as procedural to enable that tribunal to do its work."\(^{100}\) The court had no doubt that arbitrators could "fashion suitable sanctions by which to acquire records, data, information and evidence thought by the arbiters to be essential for a proper determination of the issue."\(^{101}\)

Furthermore if the union can "call upon an outside agency as the weapon for discovery of information . . . the whole proceeding is necessarily disrupted." The dispute "then shifts from the plant to the nearest Board hearing room, and thereafter to the nation’s capital, and then on to the seat of any one of the eleven Courts of Appeals having geographical jurisdiction over the employer. Whatever else that is, it is not giving full play to the means established by the parties."\(^{102}\)

In addition to the delay and the desire of the parties to localize their tribunal, the court realized that an adverse psychological factor was involved. The switch from the contractual to the statutory forum "introduces or magnifies advocative hostility. For now a new adversary has entered the lists—the General Counsel who, from the nature of the complaint, aligns himself with one of the adversaries—the Union—but who as a sort of protector of the general public interest must advance his advocacy, pro and con, not in the manner best calculated to bring an end to the dispute, but in a manner thought, from that lofty vantage, to be best for the general good." Further along the litigation route stands the Board, which first functions as the trier of fact and law but then, after making its decision, must act as a prosecutor to justify the decision in an enforcement proceeding in a circuit court. To get the matter back where it started—arbitration—the employer "must come to court. But the courthouse, says the Supreme Court, is not the place to work out industrial disputes when arbitration has been prescribed and is available."\(^{103}\)

\(^{100}\) Id.


\(^{102}\) 306 F.2d at 579. For a more extensive analysis of this division of decisional power, see Jones, The Name of the Game is Decision—Some Reflections on "Arbitrability" and "Authority" in Labor Arbitration, 46 TEX. L. REV.—(July, 1968).

\(^{103}\) Id.
Most of Judge Brown's reasoning is persuasive, and some of it, incontrovertible. Although the Supreme Court properly disapproved of that part of his analysis which provided for automatic displacement of the Board's jurisdiction, our study of collective bargaining discovery situations confirms the remainder. The conclusions here are that the contractual procedures voluntarily established by the parties themselves should be legally preferred, for disposing of disclosure disputes, over the statutory proceedings of the Board, and that the Board should so declare as a matter of policy. The Court in Acme Industrial has given it the option to exercise its expertise in this problem area.

These are delicate problems, which summon all the arbitrator's skills. They are not susceptible of satisfactory resolution through judicial proceedings independent of arbitration. On the other hand, it makes good sense in effectuating the purposes of the Act to think in terms of an interactive sequence of arbitrators as first-instance tribunals, with courts immediately available (under rule 30(b) of the Federal Rules of Civil Procedure) as superintending tribunals. The Labor Board, guided by its Spielberg criteria of review, is in any event empowered to assure that the policies of the Act are effectuated by any application of arbitral discovery.

Judge Brown's reasoning in Sinclair Refining contrasts with that of the Sixth Circuit in Timken Roller Bearing Co. v. NLRB. The company had refused in August, 1960, to give the union its wage-rate data, denying that the agreement required it to produce the data and arguing that the union's remedy in any event lay through the grievance procedure. Five wage-rate grievances were pending. Two went to arbitration after the refusal. In each, the company refused to produce the requested wage data unless the arbitrator ruled that the agreement required it to do so. In one, the arbitrator ruled that the company was not so obligated, and decided for the company on the merits. In the other, a different arbitrator asked the company to deliver some of the requested data to the union and the company complied. At the time of the trial examiner's hearing on the union's 8(a)(5) charge in February, 1961, the union was still studying the data procured through the second arbitrator's ruling. The trial examiner's intermediate report, recommending a finding of an 8(a)(5) refusal to disclose, was issued in April, 1961, and the Board's decision adopting it followed in August.

104 Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955): that "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act."


1962. That was two years after the rejection by the first arbitrator of the union's discovery motion; it was a year and a half after the company had complied with the second arbitrator's order to produce data.

That sequence is clearly undesirable. The employer was bargaining in manifest good faith, adhering to the arbitrators' decisions. Yet both the trial examiner and the Board inexplicably found that Timken was refusing to bargain in good faith. Finally, forty-two months after the first arbitrator's discovery ruling, the court of appeals enforced the Board's order, reasoning that the union had not relinquished its statutory right to information in "clear and unmistakable" language, silence alone in the agreement not sufficing for that purpose.\(^{107}\) The company's position, even granting the union's right to the information, was also that arbitration is the preferable tribunal in which to enforce any disclosure obligation because the arbitrator can rule immediately on the degree of disclosure needed to satisfy the union's needs. The court, however, interpreting the bargaining agreement, concluded that the union's demand, and the company's refusal, was not a complaint or grievance within the meaning of the agreement and hence "the claim of the Union for wage information and data was not an arbitrable one."\(^{108}\) Therefore, the company was not justified in basing its refusal on the need to resort to arbitration. Four months later certiorari was denied by the Supreme Court. After all this time, the workers' grievances no longer had any contact with industrial reality. But one had been resolved on the merits—in 1960—by arbitration, exemplifying how all five should have been handled by the Board and the court.

_Timken Roller Bearing_ counsels the employer who wants discovery submitted to arbitration to get that "clear and unmistakable" language to evidence relinquishment of the union's statutory right to Board-court belated disclosure in favor of the NOW-remedy of contractual discovery. Ironically, of course, the company would have prevailed in the Board proceeding had it not successfully resisted the union's 1960 bargaining demand for inclusion of an arbitral discovery provision.

Over the years, the Board and the courts have quite uniformly enforced a duty to disclose.\(^{109}\) The question at this late date therefore is no longer whether an employer has a duty to divulge bargaining data reasonably needed by the union in the administration of a collective

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\(^{107}\) 325 F.2d at 751.

\(^{108}\) Id. at 754.

\(^{109}\) Perhaps the broadest disclosure doctrine has been that articulated in 1954 by the Eisenhower Board chairman Guy Farmer in Whitin Machine Works, 108 N.L.R.B. 1537, 1540 (1954) (concurring opinion).
agreement. The real question now is by which tribunal or combination of tribunals discovery shall be effectuated.

Undoubtedly, most employers would regard silence as golden. But they lost that option when the duty to bargain was forged by Congress and hammered out in Board and court decisions linking them to collective bargaining with unions representing their employees. So it is in 1965 that a federal court can say to an employer, in *Curtiss-Wright Corp. v. NLRB,*\(^1\)

Thus, unless the collective bargaining agreement both contains a broad disclosure provision and the grievance and arbitration provisions are also couched most broadly, clearly indicating that demands for information are to be made through the grievance and arbitration machinery, the existence of such machinery is no defense to an employer who has refused to supply relevant data upon a union request.\(^2\)

The court found the agreement "silent as to a broad right of disclosure which in turn might be subject exclusively to the grievance machinery and arbitration."\(^3\) So it concluded that the right to the requested data was grounded in the statute rather than in the contract, and therefore "the Employer cannot demand that the Union use the grievance machinery as its method of data accumulation."\(^4\)

The court in *Curtiss-Wright* could well have heard the still, small voice of implied obligation speaking from the progressive step-structure of the grievance procedure. It could have seen that the purpose of compromise and settlement, which radiates from the procedure's graduated steps, can only be attained if disclosure is candid on both sides and comes at the earliest possible step of the procedure. What was apparently inaudible in the quietude of the courtroom would come through loud and clear to most arbitrators because of, rather than despite, the din in the plant beyond the walls of the hearing room. Fortunately, the Supreme Court in *Acme Industrial* showed that it had not missed the point that collective bargaining would disintegrate if grievances were either stifled through inaction or left unsettled in significant number. The Court also saw the vital necessity for routine, unlitigated disclosure if efforts to compromise and settle were to succeed as a pattern. It has been evident for years that the viability of American collective bargaining is in great part attributable to the increasingly developed capacity of the industrial participants themselves to compromise and settle most of their disputes. The Board is cer-

\(^{1}\) 347 F.2d 61 (3d Cir. 1965), enforcing 145 N.L.R.B. 152 (1963).

\(^{2}\) 347 F.2d at 71.

\(^{3}\) Id. at 71.

\(^{4}\) Id.
tainly aware of this but has yet to make its archaic disclosure procedures responsive to it. As we shall see, it has but one feasible and effective option: channeling the NOW-problems of bargaining discovery situations into resolution by the parties’ own tribunal, arbitration.

Undoubtedly there is a sense among the courts and in the Board that in these cases it ill lies in the mouth of a wrongful withholder to argue that the undoubted power of the Board to compel disclosure ought not to be exerted. But the fact is that the Board and the courts could short-circuit such dilatory nonsense by simply adopting a rule that disclosure cases must be arbitrated when contractually possible. Effective good-faith collective bargaining would thereby be enhanced. The temporary advantage to a few testy employers or unions would be far outweighed by the ultimate strengthening of the bargaining process. In truth, the employer who seeks to preserve his silence as long as he possibly can would be dismayed at the prospect. On the other hand, he must be carefully distinguished from the good-faith bargainer who withholds information, yet thereby engages in bargaining through tactical maneuver. If he is willing to have arbitration rather than the Board-court procedure resolve the sensitive problems of management prerogative, union rights, and undue burden which characterize the discovery situations occurring during the term of a collective agreement, his interest is entitled to protection.

Today, the employer who sincerely wants a discovery situation resolved as soon as possible but is faced with an 8(a)(5) charge should immediately seek arbitration (either of the underlying dispute or of the disclosure demand itself) in order to forestall the Board proceeding. If the matter is scheduled for arbitration, it is quite likely that the regional office of the Board will mark time pending completion of the arbitration. Even if its processes were to follow the usual undelayed sequence, the employer would in most cases have the arbitrator’s decision either upholding its position or directing disclosure on behalf of the union long before the Board’s own consideration of the matter, in all likelihood before the issuance of the trial examiner’s intermediate report, and quite probably before the trial examiner has even convened the hearing. If favorable to the union, the arbitrator’s report would (assuming the employer’s compliance) make the matter moot as to the Board. If the award is favorable to the employer, it would be grounds for a motion to dismiss the proceeding. The proper disposition of that motion, of course, is one of the things this study is about. The thesis here is that the 8(a)(5) charge should then be dismissed so long as the arbitral award otherwise satisfies the Board’s

114 See notes 126-50 infra and accompanying text.
Spielberg criteria.\textsuperscript{115} If the Board were to adopt this approach it would convert these embittering disclosure disputes into remediable arbitral discovery situations.

The Board has not been equipped by Congress to resolve discovery problems arising under collective agreements. The appellate provisions of the NLRA subject the Board's section 8(a)(5) or 8(b)(3) disclosure orders to court review. Yet no penalty can be imposed by the Board on an obdurate withholder other than an administrative finger-shaking several years after the fact. This is far more embarrassing to the questioner than to its adversary, since it dramatizes the former's lack of bargaining power to compel compliance when it is both needed and legally required.

There can be few actions more likely to undermine respect for law than to be compelled by operation of law to wait several years before seeing an adversary "ordered" (albeit with all federal solemnity) to,

\textit{upon request, furnish the Union with all information relevant to the grievances filed by the Union with respect to the discharges of the above-named individuals.}\textsuperscript{116}

That is the routine language of a Board disclosure order. This one was issued after three discharges by Metropolitan Life Insurance Company in the summer of 1963. After pre-arbitral grievance meetings had failed to result in a settlement, the union formally submitted them to arbitration in December. By letter it then requested the details on which the employer relied for its conclusion that the three grievants had merited discharge, framing a number of factual inquiries. The employer refused to supply the information, observing in part that since "the Union has already submitted these cases to arbitration under the contract, your request is obviously now academic."\textsuperscript{117} At the hearing before the trial examiner one of the company's defenses was that "the union's sole purpose in filing the charge herein was to use the Board's processes for pretrial discovery in the arbitration proceedings."\textsuperscript{118}

If so, the union's attempt was doomed to frustration from the start. Although it had a quick remedy available in arbitration, the union elected instead to grind out its request for information through the Board-court procedures. This case is another good example of the inexorable timespan of such Board proceedings. The discharges had occurred in the summer of 1963; pre-arbitral grievance steps were

\textsuperscript{115} See note 104 supra.

\textsuperscript{116} This particular order is taken from Metropolitan Life Ins. Co., 150 N.L.R.B. 1478, 1487 (1965).

\textsuperscript{117} Id. at 1482.

\textsuperscript{118} Id.
completed on October 24; arbitration was invoked on December 6 for one grievant and on December 18 for the other two; the data on the discharges was demanded on December 3 and 12, and was refused on December 30; the first arbitral hearing was set for February 11, 1964.119 It would thus have been possible to make discovery motions to an arbitrator in January or February since by then he had been designated. Instead, the discovery situation festered until the middle of the following June at which time a three-day hearing was held before the Board's trial examiner;120 his intermediate report was issued on November 4, 1964; and the Board adopted his recommended disclosure order on February 1, 1965.121

Actually, that progression was more rapid than most. Only thirteen months elapsed before the Board's disclosure order issued. This has taken as long as thirty-nine months, although the average is seventeen.122 But what if Metropolitan Life had ignored the Board's disclosure order, as it had a legal privilege to do? The Board would then have had to seek enforcement. Almost half of the Board's disclosure cases must be taken to court for enforcement; in 84 per cent of those cases the courts have enforced the disclosure orders; all of those taken to the Supreme Court have resulted in enforcement of disclosure orders.

But what of the employees discharged almost three years ago? Their cause, valid or not, would long since have withered in the legal thicket. The household budgets of unemployed workers cannot possibly cope with this skirmishing before someone has finally disposed of the merits of their discharges. The available tribunals will have to interact so as to give people like those employees their fair measure when their rights are caught in a controversy requiring discovery for its resolution.

The decision in Acme Industrial that the Board has jurisdiction in discovery situations occurring during the term of a collective agreement has been thought by some to presage a more effective use of the grievance procedure. Even a decline in resort to arbitration is predicted "as recalcitrant employers are advised by their counsel that refusal to furnish information during the grievance process may result in a charge and complaint of breach of Section 8(a)(5)." 123

119 Id. at 1482-83.
120 Id. at 1480.
121 Id. at 1478.
122 See appendix, infra.
123 Howlett, The Arbitrator, the N.L.R.B., and the Courts, in 20TH PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 67 (D. Jones ed. 1967). Mr. Howlett is a lawyer, an arbitrator, and chairman of the Michigan Labor Relations Board. His interesting paper consists of an extensive marshalling of authorities on the subject. Interestingly enough, however, a show of hands at the San Francisco meeting indi-
But in what way will the withholder suffer if he knows that a Board proceeding will enable him to conceal the requested information not only through lengthy Board proceedings but until a circuit court enforces the Board's decree? When information is withheld to gain a tactical bargaining advantage, it admittedly violates the Act; but to the extent that it materially impairs the capacity of the wronged party to administer the agreement, it also violates the typical collective bargaining contract. If this party elects to proceed through the Board and the courts instead of through arbitration, it is actually playing into the withholder's hands: his is the tactic of delay to postpone disclosure. The passage of time foreseeably alters many of the elements of a bargaining situation. To the extent that possession of the information sought by the requesting party will make its bargaining more effective, going to the Board instead of arbitration locks it into a time-consuming game of blind man's buff with an adversary of unimpaired sight.

Of course, the bargaining relationship may have so far deteriorated that the questioner really does not care so much about getting disclosure as it does about lacerating its adversary with legal cost and inconvenience. The Board is likely to recognize that situation for what it is and react to it accordingly.

The employer who wishes to bargain in good faith but not to disclose faces now two possible forums (the Labor Board and the arbitration process), either successively or concurrently. Because of the economic risk of an unfair labor practice strike, he will often want to arbitrate in order to resolve the extent of his obligation to disclose. But he cannot safely do so until the Board adapts to a realistic sequence of Board-arbitration interaction. Once this happens, problems of disclosure submitted to arbitration are quite likely to increase.

Of course, a union seeking discovery may elect to strike and hope thereby to place a punitive cost on the employer. But it can do so only theoretically, for such action is not effective in every case. The Board may or may not find the withholding an unfair labor practice; consequently, the strikers may or may not be entitled to back pay. If the Board or the reviewing court does not see matters the union's

cated that most of the arbitrators there present (about a third of the membership of the Academy) did not share Mr. Howlett's conviction that arbitrators should seek to effectuate the policies of the NLRA.

124 See Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956); note 83 supra and accompanying text.

125 “The difficulties which the Employer now faces were not unknown when it set out on its forthright but risky course of declining to bargain at all. For once the strike is an unfair labor strike . . . the employer is compelled under the Act to reinstate the strikers upon application even though it means discharging replacements hired during the strike.” NLRB v. J. H. Rutter-Rex Mfg. Co., 245 F.2d 594, 598 (5th Cir. 1957) (footnote omitted).
way, the strikers may be deprived of not only their lost wages, but also their jobs. It is not likely that anyone will seriously urge that strikes are a desirable discovery mechanism.

B. The Usefulness to the Board of Arbitral Discovery

The National Labor Relations Board should be not just willing, but eager to exercise the discretion conferred upon it by *Acme Industrial* to require first-instance arbitration, where available, as a condition to resort to its procedures in discovery situations. Three major factors point to this conclusion: first, arbitration is insulated from the pervasive judicial review built into the procedures of the Board; second, the Board's caseload is constantly increasing; and third, arbitration can resolve disputes in less than one-third the time required by Board procedures.

1. Insulation From Judicial Review

The Supreme Court has consistently pointed out the patterns of appellate review now prevailing in labor dispute resolution. From these patterns can be drawn five major premises:

(1) Courts may not usurp the functions of the Board simply because a contract violation may exist and arbitration is not available.

(2) The courts of appeals are obligated to review the Board's findings of fact and conclusions of law to assure that the latter are proper and that the former are "supported by substantial evidence on the record considered as a whole." 126

(3) The Board has the power to defer to arbitration. In doing so it exercises a superintending function and has the last word (subject to judicial review as outlined in (2) above) on issues which are susceptible to decision either by it or by arbitrators.

(4) Courts are not to displace an arbitrator's exercise of judgment on the merits of contractual disputes under the guise of determining what is arbitrable.

(5) Arbitrators have jurisdiction of even those alleged breaches of contract which may also constitute unfair labor practices.

These premises lead to the conclusion that the Board can effectively overturn an arbitrator's decision by refusing to defer to it; 127 but a

126 NLRA §§10(e), 10(f), 29 U.S.C. §§160(e), 160(f) (1964); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

127 As pointed out above, see text at note 115 supra, an arbitrator's final decision will frequently be before the Board when the latter is considering the proper forum for adjudication of the issue.
court, normally, cannot. Furthermore, arbitrators have the final word so far as the courts are concerned as long as the Board refrains from second-guessing the arbitrators. It is possible, of course, that some courts of appeals will speciously conclude that an arbitral award, to which the Board has deferred, is vulnerable to judicial reversal on the merits because the award has become part of the "record" to be considered "as a whole" once the Board has deferred to arbitration. And what of the converse? Would it be equally specious for the court to review and displace a Board decision not to defer to an arbitral award?

An arbitrator's award, deferred to by the Board, preserves its character as an expression of arbitral judgment without the administrative agency's "interpretation" superimposed on it. It should be no less entitled to preservation from judicial interference after Board abstention than it was before being brought to the Board.

The case is different if the Board refuses to defer to arbitration. In assessing an arbitral award, all that the Board can legitimately do is decide, (a) whether the pattern of events involved in the initial dispute resulted in a contravention of the policies of the Act, and, (b) whether the arbitrator's disposition of the case (viewed by the Board objectively and regardless of his stated reasoning or apparent intent) can be said to have corrected any statutory deficiency. The Board's decision that an arbitrator's award is not consistent with the policies of the Act is that kind of statutory policy assessment which the courts of appeal have traditionally scrutinized. What the court then reviews is not the merits of the arbitral award, but the Board's decision on a question of law.

The legal and practical insulation of arbitral awards from judicial upset is a major consideration in determining the relationship desirable between the Labor Board and arbitration. This legal insulation was traditionally conferred in many, but not all, state courts. In 1957 and 1960, deference to arbitration and arbitral awards was transformed by the Supreme Court into a requirement of federal law binding in all cases brought under the National Labor Relations Act.128 But aside from judicial forebearance there has also been a practical phenomenon of equal importance: the parties to labor relations disputes have shown a marked disinclination to resort to the courts, either to fend off an impending arbitration or to rectify alleged errors of arbitrators. For example, the American Arbitration Association's analysis of its file of labor cases for the year 1954 disclosed that of 1,183 cases only 12

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were ever contested in court—either to compel arbitration or to confirm or vacate awards.\textsuperscript{120}

In contrast, the Board's orders are frequently before the federal courts, and the courts have not exhibited any reluctance to modify or set them aside. In 1965, for example, 951 unfair labor practice cases were closed by Board or court decision. Of that group, 540 were closed after Board decision but before any court had issued a decree. Decision by a court of appeals closed 359 cases.\textsuperscript{129} Another 52 cases required Supreme Court action. Thus, almost half of the Board's unfair labor practice cases were subjected to judicial review. As we shall see,\textsuperscript{131} that typically adds at least a year to the decisional timespan of a dispute. But what of the merits?

The only purpose here for inquiring how Board decisions have fared in the circuit courts is to compare the immunity from judicial scrutiny accorded the Board's decisions with the insulation assured to the labor arbitration process. In fiscal 1965 there were 212 circuit court decisions disposing of petitions to enforce or review Board orders.\textsuperscript{123} Of them 57.5 per cent of the Board orders were affirmed in full. In the remaining 42.5 per cent the courts interposed their views of the merits of the disputes by either modifying or setting aside Board orders.\textsuperscript{125} While 22 per cent were modified, and 17 per cent

\textsuperscript{120} Procedural and Substantive Aspects of Labor-Management Arbitration: An AAA Research Report, 12 ARB. J. 67, 78 (1957). Of the 8 awards contested, 3 were vacated. In all 4 pre-award cases, arbitration was permitted to proceed, in 3 cases by injunction so ordering and in the remaining 1 by the court's refusal to stay an arbitral proceeding. \textit{Id.}

\textsuperscript{129} 30 NLRB ANN. REP. 191 (Table 8) (1965). In fiscal 1965, the Board closed 15,219 unfair labor practice cases. 93.8 per cent were closed without necessity for hearing a decision on the merits. Indeed 85.5 per cent did not even require the issuance of a complaint. \textit{Id.}

\textsuperscript{131} See Appendix infra.

\textsuperscript{123} Id. at 212 (Table 19).

\textsuperscript{125} Id. The Board continues to show an increasingly good record in the courts when viewed against its own history or that of other federal regulatory agencies. But its record is poor indeed when compared with the almost total insulation—practical and judicial—of arbitrators' decisions. In all fairness, it must be emphasized the disparity is a structural handicap of the Board, imposed on it by the Act and the Supreme Court's decisions. But it is nonetheless a real and presently inseparable obstacle to its effectiveness in most discovery situations.

There are many examples available of the kind of judicial second-guessing experienced by the Board. \textit{E.g.,} NLRB v. Camco, Inc., 369 F.2d 125 (5th Cir. 1966); Raytheon Co. v. NLRB, 326 F.2d 471 (1st Cir. 1964). One suffices to illustrate the problem. In NLRB v. Dominick's Finer Foods, Inc., 367 F.2d 781 (7th Cir. 1966), the Board had ordered reinstatement of an employee fired because she allegedly spoke in a loud voice, used profanity, was offensive to her co-workers and had a poor appearance and demeanor. She had never been warned about her objectionable conduct before being discharged. The Board concluded that the lack of warning vitiated the termination. A year later, the Seventh Circuit disagreed, refusing to enforce the Board's order two and one half years after an arbitrator, in all likelihood, would have ordered reinstatement. Had an arbitrator done so, that would have been the end of it. The Seventh Circuit would have rejected the employer's effort to vacate the arbitral award as staunchly as it had seized the occasion to vitiate the Board's order.
were set aside, only 3 per cent were remanded to the Board for its further consideration.

The Board has been able to live with that review process. Arbitration would be destroyed by it, and the courts seem to have realized this. But in regulating post-contractual relationships the Board has yet to take full advantage of the opportunity to channel disputes into the voluntary procedures set up by the parties for resolution of their disputes. Nowhere is that more evident than in discovery situations.

2. Workload of the Labor Board

The caseload of the Labor Board has been rising relentlessly since the Board's inception. During the decade 1945-1955 the Board's caseload rose from 9,738 to 13,391.\(^\text{134}\) And between 1955 and 1965 the increase accelerated, the load more than doubling in ten years to 28,025 cases.\(^\text{135}\) The Board expects 50,000 cases annually by 1975.\(^\text{136}\) In addition to this quantitative leap, a qualitative increase in workload has been experienced because of the increasing proportion of unfair labor practice cases. These tend to be more complicated than representation cases, requiring both more manpower and more processing time. The only thing which has saved the Board from caseload collapse is the fact that more than 75 per cent of the cases are settled by the parties.\(^\text{137}\) As the Board itself put it, "This elimination of litigation from the labor relations scene relieved the NLRB of a potentially mountainous workload."\(^\text{138}\) That must certainly be viewed, however, as a precarious administrative situation.

We can ill afford to continue under such circumstances. Clearly, long-range measures for relief must be devised. In doing so, it will be necessary to reinforce the tendencies toward settlement to the fullest extent possible. But it is reasonable to assume that there will be no legislative change regarding the relationship between the Board, the trial examiners, the General Counsel and the regional directors for several years. If changes are made, they are likely to be in the direction of strengthening the role of the trial examiners; but review would still undoubtedly be part of the examiner-Board-court structure. The options open to the Board to cope with the prospect of an overwhelming caseload are thus limited. There are only two principal directions of jurisdictional development in which the Board...

\(^{134}\) See NLRB Ann. Rep. for years cited.

\(^{135}\) See NLRB Ann. Rep. for years cited.


\(^{138}\) Id. at 1.
may look for long-range relief. One is promising: the encouragement and reinforcement of the effectiveness of arbitration. The other is the possible constriction of the Board's jurisdiction by its cession to the states; that latter holds out little, if any, promise, and considerable potential for conflict rather than stability in labor relations.

Jurisdictional withdrawal of the Board is not a viable method for coping with the problem of increased caseload. The Board in the past has experimented with reducing its caseload by promulgating jurisdictional "yardsticks" geared to the dollar volume of the employer's involvement in interstate commerce. The trouble with the yardstick policy is that it can only relieve the Board's administrative plight by casting thousands of "small" employers and their employees beyond the pale of the Act's protection against secondary boycotts and other federally proscribed union organizational and bargaining tactics, as well as against unlawful employer pressures. Thus the yardstick policy renders the most defenseless employers vulnerable to exploitation. That vulnerability encourages and propagates the very strife and discontent that the NLRA is designed to ameliorate. Furthermore, the yardstick cannot be administered with any precision because most employers are massed at the lowest range of any measure based on dollar volume or number of employees.

The Board's statistics demonstrate that the bulk of its business originates among smaller employers. Of the unfair labor practice cases in 1965, some 20 per cent came from employers with bargaining units of 9 or fewer employees; a third of the employers involved hired fewer than 20 workers; over half the employers concerned dealt with bargaining units of fewer than 50 employees; and two-thirds of the bargaining units were of fewer than 100 persons. Almost two-thirds of the election cases closed by the Board involved units of fewer than 40 employees, almost half involved fewer than 20 employees, and a quarter involved fewer than 10.

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140 State courts disposed to help these small employers or unions are powerless to do so because of the doctrine of federal-state preemption. Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957).


142 Id. at 208 (Table 17). One caveat in the use of these figures should be noted: there is presently no statistical way to differentiate between the truly "small" employer and the large one who may have one or several bargaining units. This is of course a sociologically important distinction which the Labor Board could readily make available if it would simply ask the question on its routine forms.
There appears, therefore, to be little utility in the suggestion that the Board respond to its ever-increasing caseload by constricting its own jurisdiction. Since there is now no apparent prospect of congressional action to solve the Board's administrative dilemma, it seems almost inevitable that the Board and the courts will react in part by encouraging labor arbitrators to play an increasingly significant first-instance role as a forum for the redress of grievances that may also constitute statutory violations, but which arise during the life of collective bargaining agreements. Arbitrators could be effective in relieving the burden on the Board, thereby facilitating the elimination of much of the delay involved in Board proceedings.

3. Time Required for Decision

The American Arbitration Association, in its 1957 study of the 1,183 labor cases in its 1954 file,\textsuperscript{143} found that the typical arbitral award was issued two to three months after the dispute was submitted to arbitration.\textsuperscript{144} A 1958 study by Arthur Ross indicated an average time lapse in 1955-56 of about six months from grievance to decision.\textsuperscript{145} More recently, the General Counsel of the Federal Mediation and Conciliation Service reported in 1964 on a survey of about 250 cases drawn at random from the FMCS files.\textsuperscript{146} The study indicated that the parties consumed about three months (86 days on the average) from the date of filing the grievance until requesting a panel of possible arbitrators from the FMCS. It then took the parties another four weeks (27 days on the average) to select an arbitrator and notify the FMCS. About seven weeks (an average of 51 days) elapsed between the arbitrator's appointment and the commencement of the hearing. Ten weeks (73 days) were generally consumed between the date of the hearing and the issuance of the decision by the arbitrator. Thus it typically took five months to get the arbitrator's decision once the parties had elected to go to arbitration.\textsuperscript{147} Therefore, even including the three months or so spent in processing the grievance from its

\textsuperscript{144} Id. at 77. Of the cases studied, 69.8% resulted from a contractually authorized unilateral demand for arbitration; 30.2% were submitted by both parties. Id. at 68. Cases decided in less than two months totaled 268, or 22.6%; 55.3% were decided in less than three months; 84.2% in less than five months; 90.3% in less than six months; and 99.4% in less than one year. Id. at 77.
\textsuperscript{147} Both the AAA and FMCS studies involved \textit{ad hoc} cases, not reflecting the timespan achievable with direct access to a permanent umpire. Robben Fleming's study of FMCS discharge cases in 1951-52, 1956-57 and 1962-63 disclosed the significant fact that by the end of the decade 1951-62, only about two weeks had been added to the time required to get a decision once an arbitrator had been appointed. R. Fleming, \textit{The Labor Arbitration Process} 59 (1965).
initiation through the pre-arbitral settlement efforts of the progressive steps of the grievance procedure, the arbitrator's decision is typically available in no more than eight months and may frequently be had far sooner.

The contrast between the typical arbitral timespan and the time required to dispose of Labor Board section 8(a)(5) cases of refusal to disclose information is dramatic. The timespan for the latter procedure is set out in the tables of forty-nine cases in the appendix. A study of those tables indicates that a Board decision in these 8(a)(5) disclosure cases will be available, on the average, about 17 months after the refusal of the requested information. It can take considerably longer. Almost a third (15) of the 49 cases stretched on for 20 months or more before a Board decision. Furthermore, Board orders are not self-enforcing; no penalty is incurred under the Act for refusal to abide by a Board order until the order is enforced by a court. Of course, the withholding party is not apt to want to advance the moment of compelled disclosure.

The average lapse of time between the wrongful refusal to disclose and a court of appeals' decision is almost 30 months. The timespan can be considerably longer. More than a quarter (7) of the 24 cases involved a timespan ranging from 35 to 50 months. Six of the cases involved Supreme Court action (decision on the merits or denial of certiorari). Each of the six resulted in the enforcement of the Board's disclosure order but only from 33 to 59 months after the original disclosure request had been refused.

While an arbitral award is normally issued within five months, it takes on the average five and one-half months just to get the General Counsel's complaint issued. Furthermore, for all practical purposes the arbitral award must be regarded as final. In contrast, 44 per cent of the 8(a)(5) disclosure cases required court of appeals enforcement. It should also be noted that a substantial majority of the disclosure cases taken to the Board have a predictable end. Disclosure was ordered by the Board in 81 per cent of the cases. Board orders for disclosure are enforced in 84 per cent of the cases by the courts of appeals and in our survey the Supreme Court enforced all of the Board orders it reviewed.

At this point, it is fitting to recall Judge John R. Brown's epitaph for the grievance in *Sinclair Refining*:

Resort to the coercive sanctions of the Board has brought the grievance machinery to a dead halt. In the meantime,

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148 See Appendix infra.
149 See text accompanying notes 128-29 supra.
with inevitable delays in the administrative and judicial review process, the second anniversary of the grievance of April 28, 1960 has taken place. Though the grievance is older it is hardly wiser, and it is certainly no nearer decision than it was when the parties first squared off.\textsuperscript{150}

We have seen that the Board not only can, but should, defer to arbitration for the resolution of discovery problems. We must now turn to the arbitration process to see what procedural devices are available to secure disclosure.

\section*{III}
\textbf{Fashioning the Discovery Remedy}

Discovery situations may be few in number, but those few are important. Unresolved refusals to disclose breed an atmosphere of suspicion and insecurity corrosive of good-faith collective bargaining. It is no argument to say that arbitration need not or ought not take account of discovery situations arising during contract terms simply because they are atypical. The fact that they are unusual situations simply means that they require their own specially designed procedures for resolution.

\textbf{A. Informal Techniques}

The employer and the union at odds in a grievance proceeding are not litigants—they are adversary bargainers. They cannot merely fire off salvoes of orders to compel depositions and interrogatories, engage in the psychological warfare of a trial, and then simply walk their respective ways after the decision. They must continue to bargain tomorrow. Complete disclosure might help litigation reach a more just result, but it would tend to frustrate the purposes of collective bargaining. Measured disclosure is needed. The minimum amount of intrusion needed to achieve the maximum amount of disclosure advisable in the circumstances must be gauged.\textsuperscript{151}

\textsuperscript{150} Sinclair Ref. Co. v. NLRB, 306 F.2d 569, 578 (5th Cir. 1962).

\textsuperscript{151} Actual presence in the bargaining climate, as it is revealed in the arbitration hearing room, is important for a decision-maker in discovery situations. A bargaining relationship exhibits many symptoms. In considering a request for discovery an arbitrator must draw upon both his past experience with labor disputes and his present sense of what is needed and tolerable in the circumstances of a particular bargaining situation.

Sinclair Ref. Co., 145 N.L.R.B. 732 (1963), is a good example of an arbitrator's reaction in the context of a hearing. While the hearing was pending, the union demanded company records going back some 10 years relating to vacation pay and possible past company practices. The company was willing to submit the discovery issue to the arbitrator, but the union wanted the data prior to the hearing and charged the company with undermining the grievance procedure. Shortly thereafter, it filed
Even without judicial enforcement (in federal and state courts) of arbitral discovery orders, there is much that a labor arbitrator can do to encourage disclosure through arbitration. The arbitral discovery process begins whenever either party to a collective agreement requests and is refused information which it regards as necessary to the administration of the agreement. The party seeking disclosure should follow the usual grievance procedure established in the collective agreement. Typically, an aggrieved party would (1) file a grievance, (2) process the grievance through the levels required under the contract, (3) join with the other party in the selection of an arbitrator if the grievance cannot be resolved, (4) arrange with the arbitrator for a hearing date several weeks in the future and (5) write him requesting that he direct disclosure in the terms and for the reasons stated. The winnowing phenomenon, always present in dispute resolution, will cause a substantial number of disclosure problems to evaporate at that point. Some telephone calls and perhaps some more correspondence will settle even more cases. It will still be necessary for the arbitrator, in some cases, to make a more formal response to the disclosure request. If, by then, he has become convinced that the request is justified, he can direct disclosure in an interim award, to become final and binding within several days unless the withholding petitioner for a hearing on the scope or propriety of his discovery order.\footnote{152}

If the discovery problem arises in the course of an arbitration of a separate issue, a hearing on the latter issue will probably be convened anyway. Quite often, matters in the nature of discovery are disposed of effectively in the preliminaries which take place at the outset of this

\footnote{152}This might be termed a "pre-hearing" function, but such a label would be misleading. It is inaccurate to talk about "pre-hearing" procedures in relation to arbitral discovery once the arbitrator has been selected, the question has been put to him by the parties (or a court), and he has begun to hear argument or receive evidence. At this point the arbitrator's "hearing" has already begun. Unlike a court, which sits as an open-ended, continuing institution, the arbitrator's legal existence \textit{qua} arbitrator is coextensive with the grievance placed before him. Once he has issued his decision he is, in that allusive legal phrase, \textit{finitus officio}.\footnote{152}
hearing, without formally being identified as discovery situations. The pretrial conference, commonly used by the courts, suggests a hearing technique which has had utility for labor arbitrators. Parties to a dispute frequently spend a considerable amount of time in the course of a hearing establishing a set of facts through the testimony of witnesses, only for it finally to become evident that a stipulation at the outset could have saved most or all of the time involved. Eventually, when the import of the testimony becomes evident to the arbitrator (and often, to the adversary party), he will realize that he might have been able to short-circuit the entire line of examination (on occasion, even the balance of the hearing) simply by prodding the parties toward an agreed statement of facts.

This waste of motion might easily be avoided through the use of a similar technique in arbitration. It is simple enough to arrange a private meeting between the arbitrator and the advocates, immediately prior to the hearing, to plan the order of proof and explore the possibility of stipulations of fact. It is not uncommon to find that the advocates, lawyers as well as laymen, have not really framed the controverted issues in their own minds as they proceed to put in their respective cases, if only because their clients have given them an incomplete picture of what the case is about and what the evidence, once it is all in, will show. A good deal of time could be saved were the arbitrator and the advocates to use some procedure that would enable them to agree on the boundaries of the areas of dispute before the hearing began. Thus, what the judicial system seeks to do through its pleadings and pretrial procedures, arbitrators may be able to do through this offstage preliminary meeting on the day and at the location of the hearing. Even so, there will be cases in which there

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163 Often management or the union will bring contested material to the hearing in order to make it available should the arbitrator overrule objections based on its materiality or confidentiality. Again, it is usually possible to proceed with the testimony of witnesses and the reception of exhibits, leaving material thus "discovered" to be examined prior to reconvening at a later date, or simply to have reference made to it in later briefs. On other occasions, the arbitrator may order that the information be made available prior to the filing of briefs, granting the discoverer the right to respond to the disclosed material either by submitting additional material by mail or by requesting a further session before the arbitrator to explore its significance or to rebut it through testimony or exhibits.

164 See generally Fee, Pre-Trial Conferences and Other Procedures Prior to Trial in the Ordinary Civil Action, 23 F.R.D. 328, 331 (1959).

165 The utility of this preliminary confrontation should by no means be thought of as limited to occasions when lawyers are the advocates. It can be fruitfully employed by business representatives and industrial relations personnel in their presentation of the case. Out of the presence of the grievance committee and the company staff, off stage, where stridency and rigor are not part of the script, it is often possible to thereby dismiss prospective witnesses no longer needed to establish what turns out to be a conceded point, an undisputed document, or a stipulated pattern of events.

166 My own observation is that any prior reluctance to disclose the particulars of proof and contention is markedly diminished on the day of hearing. The people are assembled; there is really no time to fabricate checkmates to previously disclosed
is a refusal to disclose despite the arbitrator's efforts to induce disclosure.

It has been suggested that the arbitrator, "without benefit of the power of a judge to compel discovery, can by indirection but with propriety encourage it simply by evaluating the weight he is going to give withheld evidence that ought in good conscience to have been disclosed earlier."\(^{167}\) The key word there is "earlier," since it posits a belated proffer of information and the devaluing of its weight because of its earlier withholding. But that kind of a sanction imposed upon a party for pre-hearing nondisclosure is at odds with the sense of need for wholeness which is one of the mainsprings of the arbitrator's judgment. A decision which is based on the downgrading or washing out of withheld evidence which should have been disclosed earlier, but which has now been credibly revealed, is not a decision on the merits.\(^{168}\)

The philosophy of modern discovery quite properly rejected that kind of consciously imperfect judgment. Trials are not to be "carried on in the dark."\(^{169}\) Much less so arbitrations in which the arbitrator is commissioned to apply the parties' intent, not just a penalized portion of it. It has been recognized that a system of justice, to warrant the name, must "make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."\(^{160}\) It is as true of arbitration as of adjudication that "[v]ictory is intended to go to the party entitled to it, on all the facts, rather than to the side which best uses its wits."\(^{161}\) The proper function of arbitration cannot be served unless all the evidence available for support; and there is a sense of final commitment to proceed with the hearing rather than to maneuver a settlement.

This kind of pre-hearing, day-of-hearing meeting should not be construed as an effort at mediation or compromise. Unlike a judicial pretrial conference, which is scheduled well in advance of a trial date, this arbitral technique is really a housekeeping device to make the hearing more efficient. Forseeably, it will on occasion result in settlement. But that is neither its intent nor its likely result.


This discovery technique is exemplified in the National Electric Coil arbitration, 66-3 CCH LAB. ARB. AWARDS ¶ 8897 (1966). Grievant had been discharged for several specific reasons, one of which was "immoral conduct and indecency." The union apparently requested company information concerning the grounds for this contention. The company's responses up to the time of the hearing were negative. The arbitrator, at the outset of the hearing, granted the union's motion to dismiss that charge, holding the company to have violated its obligation to disclose under the grievance procedure. Id. at 6119.

\(^{168}\) Default judgments do have utility, however, when there is a failure to support allegations with proof. See the effective use of this sanction in Jacuzzi v. Jacuzzi Bros., Inc., 243 Cal. App. 2d 1, 52 Cal. Rptr. 147 (1966). As an instance of the use of the concept of burden of proof for disclosure purposes see Brotherhood of Ry. & Steamship Clerks v. Allen, 373 U.S. 113, 122 (1963) (burden imposed on union of proving proportion of political expenditures to total expenditures).


\(^{161}\) C. Wright, Federal Courts 308 (1963).
is brought into focus. Evidence that is discoverable, is available. The lack, then, is not of the evidence, but of a remedy to produce it.

While informal methods are quite effective in securing disclosure, they do not work in every case and there still exists the need for a more formalized procedure of arbitral discovery. The remedy of discovery is not commonly necessary, largely because in most collective bargaining relationships the parties comply with the obvious intent of the graduated steps of the grievance procedure. When followed, those steps tend to produce adequate disclosure of the setting of the dispute, the operative facts, and the positions taken by each side concerning its resolution. Obviously, however, there will be recurring instances in which persons will mistakenly or malevolently withhold information which they should divulge. Realizing this, it then becomes possible to devise the proper methods of forestalling the adverse effects both upon the efficacy of their continuing bargaining relationship and on the specific rights of the parties involved. The task thus becomes one of structuring the arbitral discovery remedy so that it is possible "to thwart . . . the protean ingenuity of those who would alternately use discovery to harass and then resist all disclosure when their turn came." 163

162 It is possible, of course, for bargainers to establish in their agreement a disclosure mechanism in addition to the normal steps of the grievance procedure. Where the parties utilize a "permanent" arbitrator or umpire, a simple provision can be incorporated in the collective agreement. Where a pre-selected rotation panel of acceptable arbitrators is designated in the agreement instead of a permanent umpire, it is simple to adapt to that circumstance. The arbitrator to whom recourse is available can be designated as the one next in line for case assignment, by whatever means the parties may normally determine that matter. This kind of provision would dispose of discovery problems where there is already a named arbitrator or panel of arbitrators. But what of the bulk of arbitrations—those submitted on an ad hoc basis to arbitrators not previously designated?

Contractual anticipation of discovery needs remains the key. It would be simple to put into a collective agreement a provision for discovery demand which would refer the party seeking discovery to the nearest office of the American Arbitration Association, to the Federal Mediation & Conciliation Service, or to the appropriate state agency, in order to obtain a panel of arbitrators from which one may be selected. Were the AAA, the FMCS, or a state agency to establish a separate discovery panel as an extension of its services, it could be comprised of the members of its overall labor panel. Experienced arbitrators who wished to do so could thereby make themselves available to rule on discovery motions for parties whose collective agreements contained the suggested provision. Expense and delay could be diminished by enabling the arbitrator, upon reference by the AAA, the FMCS or the state agency to hear the parties in his office. The fee for the arbitrator's time and judgment could be minimal, say $25 for an office ruling without a hearing, or $50 for an office hearing held so as not to interfere unduly with his normal workday. A maximum fee chargeable could be established by the referring organization. The FMCS has just revised its fee policy to enable panel arbitrators to designate their own maximum per diem rate. 26 Fed. Reg. 9202 (June 21, 1968).

Should those three sources not be formally available for any reason, the party who wants pre-arbitral discovery, and has not made express contractual provision for it, will have to process the disclosure demand routinely through the regular grievance procedure.

163 Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 Colum. L. Rev. 480, 481-82 (1958).
B. The Need for a "Good Cause" Showing

Professor Louisell cautions that "Whenever we are in the area loosely called 'discretion of the trial judge' it behooves us to struggle for norms, so far as possible, that are objectively identifiable, observable, and reasonable." 164 Although no one arbitrator is bound by the reasoning of another, except in a few unusual situations where the contract so provides, there is a clear tendency among arbitrators at least to be responsive to notions of the "typical" decision. This is contractually justifiable because the parties bargain in the environment of industrial relations; they form their expectations of reasonable conduct, to some extent, in the light of prior conduct upheld by labor arbitrators. But the correspondence of present expectations and past decision is far from exact. It is possible to reach for Professor Louisell's norms; but in doing so it must be realized that they are norms of suggestion rather than compulsion. They are descriptive norms, sociologically discernible from their acceptance by a number of arbitrators; they are not the dictates of legal decision.

These norms afford only a limited degree of protection against the possible abuse of arbitral discovery; other safeguards are required. The standards required for discovery in a federal judicial proceeding are not designed to meet the needs of the labor arbitration process. The devices which have evolved to enable discovery by a party to a federal judicial proceeding are limited in number, although broad in range. 165 With few exceptions, these devices operate without court intervention and are triggered by the parties. The information sought need not withstand any exclusionary test, but need merely be relevant to the subject matter of the litigation and not privileged. "Good cause," in most cases, need not be shown. 166 Admissibility as evidence is not required, but only that the information sought "appears reasonably calculated to lead to the discovery of admissible evidence." In administering arbitral discovery in collective bargaining, other notions of exclusion unique to that process will have to be engrafted onto the broad license to inquire granted by the Federal Rules. These requirements stem from the nature of the continuous process of collective bargaining which binds together, but does not unite, parties to grievance procedures in the daily negotiations which constitute the administration of the collective agreement. It is a living process and the discovery probe must be applied with safeguards. Certainly, "good

164 D. LOUISELL, MODERN CALIFORNIA DISCOVERY 199 (1963).
165 See FED. R. CIV. P. 26-37.
166 But see FED. R. CIV. P. 34-35.
167 FED. R. CIV. P. 24(b).
cause” will be a minimal requisite, in contrast both to the Federal Rules and to the Labor Board’s construction of the disclosure provisions of section 8(a)(5).

The needs of the managerial process require a different and more cautious approach than the broad license to probe embodied in the Federal Rules. Furthermore, the constituent nature of a labor union, its political structure, means that discovery without “good cause” shown would be unwise in those situations in which the union is the object rather than the initiator of discovery remedies. The underlying psychology looks much the same in either case. A certain amount of inscrutability is needed on each side for an effective continuing bargaining relationship to function.

C. The Need-to-Know Standard for Arbitral Discovery

In the federal courts discovery by deposition or written interrogatory is routinely granted when asked, unless the court is convinced that the administration of justice will thereby be impeded. In arbitration, however, that liberality of inquiry does not fit the peculiar necessities of collective bargaining. Discovery ought not to be granted by an arbitrator unless he finds specifically that it is needed to assure effective collective bargaining in the circumstances.

Federal Rule 34, relating to discovery through the production of documents, and rule 35, concerning physical and mental examinations, embody the more cautious standard of requiring that “good cause” be shown to justify the discovery request. It should be applied to all requests for arbitral discovery.

“Good cause” under rules 34 and 35 has been strictly applied by the courts to prevent undue intrusiveness. One commentator observed of two decades of federal experience that “[a]lthough there were certain exceptions, it is fair to say that, in general, good cause was interpreted by the federal appellate courts as requiring a showing akin to absolute necessity.”

Federal strictness is to be contrasted with the California Supreme Court's more permissive view. It has defined "good cause" as that showing which "will satisfy an impartial tribunal that the request may be granted without abuse of the inherent rights of the adversary." One commentator has observed that "[p]robably the only generalization which can be made as to the [California] court's present view of good cause is that a need for an inspection is an element of good cause, but only 'need' in a practical sense." The court has also left the determination of the need for discovery almost exclusively to the trial judge. If he orders discovery, "the attempt to secure a review by a prohibition proceeding is almost an exercise in futility, unless some absolute privilege such as an attorney-client communication has been violated." But this is only a one-way discretion, since the reviewing court will displace it if a denial of discovery is out of step with the state's commitment to liberal disclosure. In contrast, the arbitrator's denial of discovery may well be warranted in the setting of the hearing and the state of the bargaining relationship. The decision of an arbitrator to refrain from reordering the situation despite his legal power to do so should be insulated against activist judicial interference. Sometimes the toughest but wisest choice is, as the bo'sun said, "to set still and let the waves do the rockin'."

The Labor Board has recently indicated a measure of caution which should also characterize arbitral discovery. In White Furniture Co., the union negotiated for an increase in the customary Christmas bonus. The employer refused, although not on the basis of financial inability. Nevertheless, the union demanded the financial information used to compute the bonus, the gross profits, business deductions, salaries of officers, and other financial details. Concededly, all of these could be said to be "relevant." In a routine federal discovery situation the data would be discoverable. But discovery in labor disputes must reckon the basic goal of national labor policy: encouraging the processes of collective bargaining as an instrument for the relatively stable allocation of economic resources in major sectors of our economy. This means that the discovery remedy should be calculated to achieve only that disclosure needed so as not unduly to displace routine bargaining tactics.

The Board in White Furniture prudently dismissed the 8(a) (5) charge since the union did not need to know what it demanded in

174 See Masterson, supra note 172, at 588.
175 Id. at 589.
order to engage in bargaining under those circumstances. The Board required the showing of a specific need for the information; otherwise, it was the employer's prerogative to refuse to disclose such economic data.

When arbitration rather than the Board is invoked, it is reasonable to conclude that self-interest in many cases will prompt disclosure in order to avoid the risk of having the arbitrator react adversely to an unwarranted withholding. It would be unusual for a party to refuse an arbitrator's request for the production of a document or witness. But it can happen, and without impropriety, as with evidence disclosing secret manufacturing processes or customer lists; possible violations of law; matters which might be actionably defamatory; financial data crucial to a competitive stance (presenting a prosperous aura in the trade despite a financial pratfall). However one may view the ethics of candor and deception in this context, it is true that niggling and haggling are vital elements of negotiation. The need-to-know standard, applied pragmatically, is the only criterion compatible with the desire to interfere as little as possible with the dynamics of bargaining.

Clearly, therefore, arbitral discovery is not comparable to a "fishing expedition." That latter is a speculation on the nature of the catch. Arbitral discovery is not. The data involved here must be precisely related to matters which are contractually cognizable in arbitration. Indeed, the only fish to be snatched by arbitral discovery from either party's pool of data should already have been put on the hook through their collective bargaining. Protection against an unfair arbitral discovery order may be afforded by the courts, federal or state, functioning under the aegis of section 301 pursuant to Lincoln Mills so long as interstate commerce may be said to be affected. As a section 301 resource, Federal Rule 30(b) authorizes protective court orders and is applicable to all the discovery rules.

Its availability is indispensable to federal arbitral discovery. If a disadvantaged person cannot obtain relief from an arbitrator ordering discovery, relief must be available under rule 30(b) on motion to an appropriate state or federal court. Since that court is then operating under section 301, it will have to superintend the application of arbitral discovery with the same sense of forbearance required by the Supreme Court in other grievance procedure issues. The Supreme Court's instruction to avoid judicial displacement of the exercise of arbitral discretion is quite pertinent in discovery situations. It is easy to charge that a particular order is "too broad" or "burdensome" or

179 See the discussion in C. WRIGHT, FEDERAL COURTS 320-24 (1963).
"oppressive"; but a court should only vacate or modify an arbitral discovery order on convincing proof of serious interference with substantial rights of the one seeking relief. The courts will have to be wary of being put in the position of performing first-instance roles.

Arbitral discovery remedies will have to be carefully adapted to the particular needs and temperaments of the parties in the light of their particular bargaining relationship. They can themselves shape and reshape the discovery remedy to suit their own views. Labor arbitration is by no means "a single, standard process, but a range of processes that may vary with the enterprise and from case to case within the same enterprise." In contrast, courts "would inevitably develop uniformities or principles which would be applied to all enterprises. . . . They would become agencies of authoritative control from above removed from the unique atmosphere of the particular enterprise." 189

D. Guidelines for "Good Cause"

We turn now to an examination of some useful guidelines available in the federal practice to determine what might comprise "good cause" for discovery in an arbitration.

1. Burden of Proof

First, the reasoning pattern characterized as "burden of proof" may be helpful. As shown elsewhere, 181 it is deceptive to think of the legal idea of "burden of proof" as a formula of exactitude in assessing which litigant should prevail. But it has a rule-of-thumb utility. It is a reminder that one who initiates a proceeding seeking to alter the legal significance of a sequence of events—the "moving party"—must persuade the decision-maker to set aside the status quo. 182

In arbitral discovery situations the burden of proof ought to be borne by him who seeks the benefit of the order. The status quo is normally the negotiated creation of the parties. No arbitrator should upset that negotiated balance through a discovery award unless he is convinced that such an award is compatible with the intent of the parties.

2. Legal Compulsions

There are some legal compulsions affecting the exercise of arbitral discretion in framing discovery remedies. First, discovery will be

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182 See id. at 1285, for the legal description of that common-sense proposition as applied to labor arbitration.
barred if it would intrude upon any matter on which the withholder is privileged to remain silent. The only specific limitation, other than relevance, on the scope of examination under rule 26 is that one cannot be examined regarding any privileged matter. The grounds of privilege cognizable at a trial are applicable to discovery proceedings.

Second, discovery will not be tolerated by courts if either its motivation or the foreseeable effect of its allowance is to cause someone unreasonable annoyance, embarrassment or oppression; and "even very slight inconvenience may be unreasonable if there is no showing of need for the discovery sought."

That judicial standard has its corollary in the Taft-Hartley Act in sections 8(a)(5), 8(b)(3), and 8(d), requiring good faith bargaining. Thus a proven instance of willful abuse of discovery, even through the hands of an arbitrator, would be an unfair labor practice. Nor should the presence of arbitration in the chain of events insulate the wrongdoer from the Board's remedial action.

3. The "Work Product" Discovery Rationale

Discovery under the Federal Rules to some degree makes discoverable an opposing attorney's "work product," his preparation for an impending trial. The "work product" is the material assembled by a party's attorney in connection with his preparation to represent that party in a pending action.

In Hickman v. Taylor the Supreme Court held that "the protective cloak of . . . privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case, and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories." But simply because an attorney's work product is not privileged does not mean that it is automatically subject to discovery. The Court did not issue carte blanche access to the work product. Instead, the Court imposed the requirement that any access be strongly justified by the one seeking discovery of the work product.

188 See id. at 1286-96.
184 See id.
185 C. WRIGHT, FEDERAL COURTS 323 (1963).
188 329 U.S. 495 (1947).
187 Id. at 508 (emphasis added).
186 In Hickman, access was denied. For the considerations the Court deemed relevant to the determination, see id. at 510-14.
But the work-product rules which have evolved under discovery principles are peculiarly inapplicable to collective bargaining. It would undoubtedly be regarded by both parties to a collective bargaining agreement as an act of sheer lunacy for an arbitrator to tell an employer or a union official that the notes he has made while investigating and analyzing a grievance have to be turned over to his opponent to be examined prior to an arbitration hearing. It would run directly against the grain of thirty years of enforcement of the National Labor Relations Act which has sought to preserve the independence of action and judgment of the collective bargainers. The Labor Board has always taken a dim view of intrusions into the internal decision-making processes of either bargaining party. This policy reflects the need to maintain arm’s-length collective bargaining among persons on both sides of the table who quite often have no legal training. The administration of a grievance procedure is part of the negotiation process; it is not litigation. It may indeed lead ultimately to an adversary proceeding before an arbitrator, but it is designed and administered to dispose of the great bulk of grievances prior to arbitration. Collective bargaining would otherwise collapse. Judicial techniques like discovery can have arbitral utility only so long as they are selectively adapted to the needs and characteristics of collective bargaining. Ideas developed in the evolution of some discovery techniques have obvious potential utility; others would become malignant if transplanted. The Hickman rule happens to be one of the latter. Even so, there are routine bargaining situations in which access to working papers of an adversary party may legitimately be sought. It is not unusual, for instance, for the notes kept by one party as the minutes of grievance step meetings to be demanded by the other as credibility evidence. Nor is it unusual for an arbitrator (so long as such notes do not contain descriptions of settlement negotiations) to require their production. Another common example is a request for the production of the adversary’s memoranda or minutes reflecting proposals and counterproposals in the changing course of contract negotiations where an issue of interpretation warrants their receipt in evidence. These instances could be classified as work-product cases were they to arise in the context of legal discovery. They illustrate once again the highly selective nature of arbitral adaptation of existing legal techniques. Although a set of rules comprising a legal concept may be ill-suited for importation in toto to arbitration, one or more of them may indeed be useful. This is simply another application of arbitral pragmatism.

4. The Uses of Written Interrogatories

Under Federal Rule 33, a party may serve any number of interrogatories, containing any number of questions, "except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression." A rule of reason applies to the claim of abuse and a labor arbitrator should have no more difficulty assessing the reasonableness of proposed interrogatories than he does in determining the reasonableness of conduct in the myriad cases that call for that kind of gauging. Under rule 33, objections to interrogatories must be specific. General allegations of burdensomeness are not sufficient. More important, the burden is upon the objecting party to demonstrate that a limitation on the number of interrogatories is needed to avoid abuse. It will not meet that burden simply to allege that research or investigations will have to be made, or data compiled, or that the information is as readily available to the interrogating party as to the objecting one.

In applying the rule 33 obligation to "furnish such information as is available to the party," the courts have evolved a standard for use in assessing reasonableness. As Judge Holtzoff has observed, "interrogatories are not to be used in an oppressive manner. An adverse party should not be required to perform burdensome labors or to execute difficult and expensive tasks, in searching for facts and classifying and compiling data. A litigant may not compel his adversary to go to work for him." Of course, the burden is considerably lightened, if not removed, when the adversary is given the right to inspect records himself on a showing of "good cause" under rule 34. So it is that it has been said to be an undue burden to require an adversary to compile and correlate information where the adversary can have access to perform the task himself.

An example of the kind of balancing needed is readily at hand in the Sinclair Refining Co. case. There the union's request for information was prompted by layoffs and demotions due to a reduction of forces which the affected employees felt was unwarranted. The union submitted the employees' grievance and at the same time requested "all records that reflect or tend to reflect the amount of work...

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196 H.K. Porter Co. v. Bremer, 12 F.R.D. 187 (N.D. Ohio, 1951) (not unreasonable burden in this case since the data was so complex).
hours for the separate jobs performed by the pipe department for the past year to date. . . . This information is needed so we can intelligently evaluate this grievance with respect to settlement of or further processing of same." 188 The company responded that to do so would impose an undue burden upon it. It estimated that 15,000 timesheets would have to be inspected; about 1,700 of them would disclose the work performed by employees of the pipe department or labor department; and that the 1,700 would then have to be collated with 4,800 work order sheets to determine the nature of the work performed by the employees whose 1,700 sheets had been pulled. The trial examiner neatly disposed of the problem, rejecting the employer's claim of undue burden, observing that "[a]s the Union appears to have accepted this job by asking that the information be made available to it I would deem it burdensome only to the Union and not to the Respondent. The burden on the Respondent reduces itself therefore to making materials available after working hours, the materials being otherwise in use throughout the workday." 189

5. Mental and Physical Examinations

We have already discussed the standard of "good cause" applicable under Federal Rules 34 and 35. The latter rule applies to actions in which the mental and physical condition of a party is put in controversy. It authorizes the court in which the action is pending to order him to submit to a physical or mental examination by a physician. "Good cause" must be shown, but the rule also requires the court to find that the issue of the person's mental or physical condition has actually been put "in controversy" in the pending action.

The courts have regarded the possibility of abuse of discovery to be particularly enhanced when documents are demanded under rule 34 and when a person is compelled to surrender his physical privacy under rule 35 by subjecting himself to a physician's physical or mental examination at the behest of an adversary party. The same degree of caution is needed in arbitral discovery. It is not unusual for an employee to be demoted or discharged because of his physical or mental health. 200 It is also common for the reports of company doctors to be submitted, and for employees to secure their own medical reports to support their claims to unimpaired employment rights. Since it is accepted that an employee must submit to reasonable physical

188 Id. at 1666.
189 Id. at 1671. See Tree Fruits Labor Relations Comm., Inc., 121 N.L.R.B. 516, 519, 526, 531-32 (1958), for greater volume of requested materials held by Labor Board not to constitute undue burden.
examinations as an incident of the employment relationship, it is unlikely that an employer would normally need an arbitral order in the nature of rule 35. But circumstances have occurred in which an employer’s action was taken without the benefit of a recent company physical. The company may then wish to have an examination before proceeding in arbitration in order to evaluate the health evidence relied upon to support a grievant’s claim. An arbitral order fashioned after rule 35 may then be appropriate.

6. Sanctions to Enforce Discovery

There are recurrent instances of wrongful refusals to disclose information which put the adversary party to the expense of seeking to compel disclosure. Must the wronged party be doubly wronged, both delayed in receiving the data to which it is entitled, and at the same time compelled to share the costs of righting the wrong? That galling prospect is characteristic of Labor Board proceedings in which the wronged party feels that he must have the protective status of an intervenor.201 What of arbitration? We have seen that the violator has all the cards stacked in his favor when he sits at the Board table; he can keep them close to his vest until a court orders him to spread them face up on the bargaining table.202 Time is indeed the friend of the wrongdoer in the Board’s refusal-to-disclose cases. Need this also be true in arbitration?

Federal Rule 37 provides for court orders to compel response to interrogatories, disobedience to such orders constituting contempt of court. Although rule 37 does not in terms cover the case of incomplete, evasive or false answers, the courts have uniformly held that a motion lies to compel further answers where the answers given are felt to be inadequate.203 Although false answers to interrogatories have been held not to constitute a contempt of court without a clear showing of

201 See Accretion, supra note 4, at 845-46.
202 Mr. Justice Brennan has asserted that the device of pretrial disclosure should be mandatory in every civil case because of its pronounced favorable impact on the rate of settlement and the courts’ dockets. More than any other reform in the New Jersey court system, he feels its introduction was responsible for those salutary effects. And it did it largely by throwing out the window the old advocacy, the "close to the vest" approach and by requiring . . . disclosures . . . with the result that our rate of settlement increased to the degree . . . that not more than one case out of every 5 ever actually gets to trial. . . .

The biggest single obstacle in my judgment to acceptance of this technique and to full cooperation in making it work, is the old business of playing the cards close to the vest, the way most of us grew up in the handling of litigation for our clients. We did not like the idea of having to put the cards upon the table before putting our witnesses on the stand.

perjury or of obstruction of justice, the courts have reasoned that a corporation willfully falsifying answers, framing them so as to deceive or mislead, or recklessly making them to resist disclosure, must bear the costs of the interrogator for resort to depositions to secure full and truthful answers. It is only fair that the piper should pay the cost of the tune he insists on playing.

A California procedure is helpful in resolving the problem of the withholding collective bargainer. In the recent case of *Weinkauf v. Superior Court*, the plaintiff in a personal injury action filed and served interrogatories upon the defendant, but after nearly five months received no reply. Plaintiffs then moved for a default judgment and for reimbursement for the costs and fees of so moving. The trial court both ordered the defendant to answer the interrogatories within five weeks and directed his attorney to pay $500 as reimbursement to the plaintiff for his attorney's fees and expenses. The imposition of costs was affirmed by the California Supreme Court when the defendant's attorney sought a writ of prohibition to restrain the lower court from enforcing its reimbursement order against him. The trial court had concluded that it was the attorney's fault that the interrogatories had remained unanswered. In affirming the court's power to issue such an order, Justice Tobriner observed succinctly: "To accomplish the expedition requisite to successful discovery proceedings sanctions may sometimes be necessary; it is not our province to nullify them."

An arbitrator's order charging the wrongfully withholding party with the entire cost of an arbitral proceeding to procure discovery in a case of a willful and unreasonable withholding of requested information ought similarly to be sustained. This should arguably be so even in the face of a contractual provision for sharing of the costs of arbitration. The withholder should be disabled from relying on the prospect of costliness to bolster his contractually wrongful conduct. However, there will be occasions when the withholding is willful, but still justifiable as a reasonable action to assure protective rulings by an arbitrator to safeguard the confidentiality of the particular information. Imposition of such a sanction would then, of course, be unwarranted.

7. The Subpoena Power

Since all responses to discovery demands under the Federal Rules must be made under oath and are based on the subpoena power, it is obvious that federal preemption doctrines could supply labor arbitrators

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205 64 Cal.2d 662, 414 P.2d 38, 51 Cal. Rptr. 100 (1966).
206 *Id.* at 665, 414 P.2d at 38, 51 Cal. Rptr. at 102.
with the power to administer the oath and the subpoena.\textsuperscript{207} If section 301 is read to enable resort to the Federal Rules,\textsuperscript{208} or to confer the power of administering the oath and subpoena by implication as necessary aspects of the arbitrator's "institutional competence," arbitral discovery will be operative in all states rather than available only in those states in which statutes so provide.

E. The Role of the Judiciary in Arbitral Discovery

The person against whom an arbitral discovery order may run is assured the protection of the courts, federal or state, functioning under the aegis of section 301 so long as interstate commerce may be said to be affected. As a section 301 \textit{Lincoln Mills} resource, rule 30(b) of the Federal Rules authorizes court orders for the protection of parties and witnesses ("deponents"), and the courts have made this safeguard applicable to the discovery rules.\textsuperscript{209} The availability of rule 30(b) protective orders is indispensable for federal arbitral discovery. In the event that a disadvantaged person cannot obtain relief from the arbitrator's order, there must be access to rule 30(b) protection on motion to the appropriate state or federal court. But that court, operating under section 301, will have to superintend the application of arbitral discovery with the same sense of forbearance required of the courts with respect to other grievance procedure issues. The Supreme Court's directions to the courts not to displace the exercise of arbitral discretion is vital to arbitral discovery. Undoubtedly, it will routinely be argued that a particular order is "too broad" or "burdensome" or "oppressive," but a court should vacate or modify an arbitral discovery order only on convincing proof of serious interference with substantial rights of the party seeking relief.

Clearly, the courts should give substantial deference to the arbitrator's order. The "institutional competency" of labor arbitration is particularly needed to respond initially to arbitral discovery situations. These almost always constitute sensitive issues. Arbitral discovery remedies will have to be carefully adapted to the specific needs and temperaments of the parties in light of their particular bargaining relationship. Labor arbitration is by no means a "single, standard process, but a range of processes that may vary with the enterprise and from case to case within the same enterprise." In contrast, courts "would inevitably develop uniformities or principles which would be

\textsuperscript{207} See \textit{Accretion}, supra note *, at 876-77 n.191.
\textsuperscript{208} See \textit{id.} at 877-85.
\textsuperscript{209} C. \textit{Wright, Federal Courts} 320 (1963). A reasonable motion to the court in which the action is pending by either a party or a person to be examined may be made for a protective order under rule 30(b).
applied to all enterprises . . . . They would become agencies of authoritative control from above removed from the unique atmosphere of the particular enterprise.”

F. The Role of the Labor Board

The decision in *Acme Industrial* indicates that the observations of some commentators that the courts have lost confidence in the expertise of the Board may be premature. In that case, the Court held that the Board could take jurisdiction of 8(a)(5) disclosure cases even though arbitration was available. The employer had argued that the union should be denied access to administrative relief unless and until it had exhausted its contractual remedy of arbitration. The Court did no more than uphold the Board’s jurisdiction. It might have gone further to work out a pattern of interaction between the Board, arbitrators and courts. It could have required Board deference to arbitration or it could have advised the Board to study the question of adopting a presumption in favor of deference until the processes of the contractual tribunal had been exhausted. Indeed, the Board may yet (and I would say, should) decide to do precisely that.

On balance, it was a sound course of judicial administration for the Court not to have anticipated the Board’s formulation, whatever that may turn out to be. After all, the Board is an experienced and, on the whole, quite competent administrative agency. The Court’s decision permits the agency to work out its own accommodation of the complex Board-arbitration relationship either on a case-by-case basis, or on a dispute-pattern basis responsive to industrial realities.

But the Board now has the responsibility of assessing how disclosure may best be effectuated, through its procedures or through arbitration—or some combination of both. Factors which will have to weigh heavily in the Board’s assessment are the principal differences between its processes and those of arbitration, notably: the extensive involvement of the Board in routine judicial review procedures; the differences in the respective time needed for final resolution of the issues; and the power of the parties to select their own arbitrator, whose capacities are responsive to their needs in a particular case and drawn from the community of their own choice, in contrast to the Board in Washington or an enforcing federal court wherever it may sit.

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212 The Court was undoubtedly aware of the cooperative studies of Board-arbitrator interaction undertaken by the Board and the National Academy of Arbitrators. See *Proceedings of the Twentieth Annual Meeting of the National Academy of Arbitrators* (1967).
The Board will undoubtedly realize that there are discovery situations in which the full panoply of progressively executed governmental powers will be needed in order to assure compliance with the duty to bargain in good faith. But such cases are exceptional, generally arising from strategic attacks on a deteriorating bargaining relationship. These exceptions must not be confused with the far more frequent, normal bargaining disputes about contract administration. To these normal disputes arbitral techniques ought to be applied rather than the long and cumbersome Labor Board procedures.

The prolonged Board procedures are heavily weighted in favor of the recalcitrant party. Assuming that a party could elect to remedy a refusal to disclose through the relatively short process of arbitration and instead chooses to proceed through the Board and the courts, it is actually playing into its adversary's hands. The passage of time necessarily alters many of the elements of a bargaining situation. To the extent that possession of the information sought by a party will make its bargaining more effective, the choice of going to the Board rather than to arbitration will lock it into a time-consuming game of blind man's buff with an opponent whose vision is unimpaired.

IV

THE STRUCTURE OF ARBITRAL DISCOVERY

Even when the bargainers have no express contractual provision concerning arbitral discovery, it can constitute an expedited mech-

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213 It is, of course, possible and preferable for bargainers to establish in their agreement a negotiated disclosure mechanism in addition to the normal steps of the grievance procedure. This is readily done. Whether the parties utilize a "permanent" arbitrator, a rotating panel of several arbitrators, or simply select an arbitrator on an ad hoc basis, the following provision or something like it can easily be incorporated in the agreement:

Provision for Discovery Demand

If one of the parties to this Agreement wishes to have access to information within the control of the other party concerning a grievance or dispute arising out of the application or interpretation of a specific provision of this agreement, the following procedure shall apply notwithstanding any other provision of this Agreement:

(1) The party seeking disclosure shall state in writing (a) the specific information sought; (b) the contractual provision involved in the grievance or dispute; and (c) why the information presently available to it is not sufficient to determine the validity of the grievance or dispute. The statement shall be delivered to the person designated to make decisions at the final step of the grievance procedure prior to arbitration. The party from whom disclosure is sought shall in writing within five days thereafter grant or deny access. If it denies access, it shall state specifically why it concluded the denial to be required.

(2) If the party seeking disclosure is not satisfied with the response of the other party, or if no response is forthcoming, it may within five days, and with written notice to the other party, submit its original request, together with a letter indicating the nature of
anism for obtaining contractually required disclosure of bargaining information. Arbitral discovery can also provide the needed safeguards against abuse, and can be effectuated through a sequence of interaction among the three tribunals of labor dispute resolution—the courts, the Labor Board, and arbitration—capitalizing on the institutional competence of each, as follows.

A. The Discovery Demand

1. The party aggrieved by a refusal to disclose information needed to administer the collective bargaining agreement should invoke the grievance procedure and should proceed to arbitration with its discovery demand.

2. Once an arbitrator has been designated in accordance with that procedure, the aggrieved party should promptly contact him in writing, sending a copy to the adverse party, stating

   a. what specific information is wanted;

   b. specifically why its disclosure is necessary as an adjunct to the proper administration of the collective agreement;

   and

   c. by what procedure—oral examination (the deposition) or submission of written questions for answer in writing (the interrogatory)—it is proposed to accomplish the discovery.

   The response of the other party, to the arbitrator [designated by whatever procedure the parties use] for his consideration. Should either party so request, the arbitrator shall set the matter to be heard at the earliest possible date. It is the intention of the parties to use the least formality and time possible. No opinion shall be written by the arbitrator; he shall render his decision in writing within twenty-four (24) hours of receipt of the request or, if a hearing is held, immediately upon closing it. He may direct the taking of depositions of designated persons, or the submission and answer of written interrogatories, or the production of documents for examination and copying, or such other relief as in the circumstances may be warranted to effectuate the disclosure requested. He may also assess the costs of the proceeding against one or the other or both of the parties as appears fair in the circumstances.

   (3) Should the party from whom disclosure is sought believe that the arbitrator's award ought not in justice to be effectuated in whole or in part, it may, within five days after issuance of his award and without penalty due to any other provision of this agreement, seek a decision in a court to modify or vacate the award to protect the petitioning party from undue annoyance, embarrassment, or oppression. The court may assess the costs of the proceeding, including reasonable attorney's fees, against one or the other or both of the parties as appears fair in the circumstances.

   This procedure is also workable where a pre-selected rotation panel of acceptable arbitrators is designated in the agreement instead of a single permanent umpire. The arbitrator to whom recourse is available can be designated as the one next in line for case assignment, by whatever means the parties may normally determine that matter.
3. Since the would-be discoverer bears the burden of demonstrating its need for the information sought, general conclusionary allegations of need would be insufficient to warrant an arbitral order to disclose.

B. The Discovery Response

1. Upon receipt of the discovery demand the arbitrator should immediately contact the party against whom the demand has been made, requesting it to send him a written statement indicating
   a. its intention to comply with the discovery demand by a certain date and in a certain manner; or
   b. specifically why the arbitrator ought not to issue an interim award ordering disclosure in accordance with the terms of the discovery demand.

2. If the responding party wishes to have the arbitrator convene a hearing it should so request in writing, sending a copy to the grieving party, stating specifically why a hearing is necessary to dispose of the matter.

3. The presumption is that discovery demands can properly and finally be disposed of
   a. in practically all cases simply through the exchange of letters among the parties and their arbitrator;
   b. with an office conference of the representatives of both parties with their arbitrator occasionally being needed;
   c. with the convening of a hearing being but rarely needed.

4. The arbitrator should strive to complete the discovery demand proceeding as soon as possible. It is a proceeding which requires immediate attention. His order enforcing or denying the demand should issue within no more than one week of receipt by him of the final statement of the respondent opposing the demand, whether by means of a letter, a conference, or a hearing.

C. The Arbitrator's Disposition

1. If the arbitrator denies the discovery demand, his written order shall constitute a final and binding award which may be enforced under section 301 in a state or federal court as a bar to any effort to secure the same relief in a subsequent arbitration or before another tribunal. The Labor Board should regard it as dispositive, subject
only to the application of its *Spielberg* criteria of review of an arbitral award.\(^{214}\)

2. If the arbitrator orders disclosure, his written award should also be final, binding and enforceable. But the party against whom it is directed should have the right without contractual penalty (as, for instance, the automatic waiver of a no-strike or no-lockout pledge) to petition a state or federal court under section 301 to vacate or modify the arbitrator's discovery order on the ground that

a. the subject matter to be disclosed is privileged against compelled disclosure; or,

b. enforcement of the order, as framed, would result in undue embarrassment, harassment or oppression.

D. The Court's Disposition

1. A court petitioned to vacate or modify an arbitrator's discovery award (or to quash or modify his subpoena) should react to the arbitrator's award with the same sense of forebearance required of it under the Supreme Court's rationales insulating discretionary arbitral judgment from judicial displacement. Particularly is this so of its disposition of a claim that the arbitral order is so unduly broad as to be oppressive. It should only vacate or modify the arbitral award, or quash an arbitrator's subpoena, on proof of serious interference with substantial rights of the party seeking relief.

2. If the court concludes that modification is necessary, it should not institute the modification itself but should state why and in what manner modification is needed and then remand to the arbitrator for action not inconsistent with its decision. He should be enabled to reassess the altered posture of the discovery order in the light of the passage of time, the court's reasoning, and the collective bargaining realities as thus recast.

3. The decision of the court of first instance, enforcing, modifying or vacating the arbitral discovery award, should be held appealable as a "final decision"\(^ {215}\) under section 301, or it should be subject to correction by an appellate court upon the issuance of a prerogative writ to review the lower court's action as an interim discovery order. The choice of procedure for review should be left to the party affected, so as to be able to avail itself of the more expeditious procedure according to the jurisdiction in which relief is sought.

\(^{214}\) *See* note 104 *supra*.

E. The Administrative Disposition

1. If the party seeking disclosure files a charge with the Labor Board claiming a violation of section 8(a)(5) or section 8(b)(3), the Board should neither dismiss the charge nor issue a complaint. So as to preserve the charge from subsequently being barred by the six-months statute of limitations, the Board should instead hold it in abeyance pending the processing of the matter through the arbitral discovery procedure.

2. Once the arbitral award has issued, and any judicial review procedures have been completed, the complaint should only then be issued or, if issued, sustained, upon a substantial showing that the final arbitral disposition of the discovery situation does not effectuate the policies of the Act.

3. The Labor Board should exercise its rule-making power to declare that its procedure henceforth will be to channel contractual discovery disputes through arbitration as a routine first-instance step. It would retain the power in any event to respond to any unusual circumstances indicating the need to superadd its own processes, as, for example,

   a. in cases of repeated refusals to disclose which are shown to be not otherwise readily remediable through arbitration because of the views of the courts of the jurisdiction in which the action occurs; or,

   b. in cases where the refusal to disclose is accompanied by other unfair labor practices which must in any event be remedied by the Board, and the refusal to disclose, therefore, cannot effectively be treated separately from the other wrongful actions.

4. Judicial review of Labor Board dispositions of refusals to disclose should seek to effectuate the principles set forth in this study for the establishment of an arbitral discovery remedy.

F. Discovery Absent an Arbitration Provision

Where there is no arbitration provision in a collective agreement, but a grievance procedure exists, a party seeking discovery will have to resort to a court under section 301 or to the Labor Board under section 8(a)(5) or 8(b)(3). The Supreme Court in *NLRB v. C & C Plywood Corp.* confirmed the jurisdiction of the Labor Board to remedy unfair labor practices despite the existence of a collective agreement enforceable in a federal court under section 301.

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Even under the doctrine of *C & C Plywood*, however, discovery procedures will be available whenever arbitration is not provided for, if the party brings his grievance to a court rather than to the Labor Board. Inherent in the structure of the Labor Board is the necessity for ultimate judicial enforcement of its orders, a factor which simply eliminates it as an effective discovery forum. Thus, whatever limitations a court might be thought to have with respect to the interpretation of collective agreements, they are insignificant in discovery situations when the Board, not arbitration, is the alternative forum.

V

CONCLUSION

The functional incapacity of the Labor Board to be effective in discovery situations does not mean that its duties should, in whole or in part, be committed to the courts. There is a continuing need for the three tribunals—the court, the Board and the arbitrator—each contributing its own special competence to the intricate processes of collective bargaining.

There has been a significant and complex redistribution of decision-making power among federal and state courts, the Labor Board, and privately selected rather than publicly appointed arbitrators. In execution, it has been a judicial rather than a legislative phenomenon. In application, the emphasis has been on contractual standards garnered by the individual disputants prior to the specific controversy as each pursues his economic self-interest as he conceives it, rather than on statutory criteria. The logic of this process commits to the privately created forum of arbitration the great bulk of labor disputes arising during the administration of collective agreements.217 There are occasions during the terms of collective agreements in which a party is seriously disadvantaged and the bargaining relationship significantly impaired by a refusal on the part of the other party to disclose needed bargaining information. When arbitration is contractually provided for, the disadvantaged party has recourse only to the Labor Board or to arbitration; courts are unavailable as a forum for resolving the dispute. The Labor Board's disclosure procedures are so woefully time-consuming as to be totally ineffective. That of

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217 The process reserves for decision by the Labor Board and the courts only those issues which cannot be resolved by the parties themselves through arbitration. Such private resolution by the parties of their dispute without resort to the Labor Board or courts may be impossible because (1) their bargaining relationship has collapsed, (2) the interests of those not party to the collective agreement are involved in the dispute and cannot fairly be resolved by the parties without the participation of those affected, or (3) a paramount public policy is contravened by the private solution.
course means that the sole effective discovery remedy is to be found in arbitration. Arbitral discovery is subject to review by the courts under section 301 and there is an additional safeguard in the Labor Board's competence to respond to abuses of the grievance procedure as unfair labor practices. Thus, there should be initial resort to arbitration for the disclosure needed, backstopped only thereafter by the courts' protective orders and the Board's condemnation of unfair labor practices.

Arbitrators, in disputes affecting interstate commerce, should now be empowered under the aegis of the Supreme Court's mandate in *Lincoln Mills* to act under the appropriate Federal Rules of Civil Procedure as adapted to the needs of collective bargaining. Contrary state statutory or common law should be preempted by the federal law which governs the enforcement of arbitral commitments. Arbitrators, by necessary implication as an attribute of their "institutional competency" created by section 301 as interpreted by *Lincoln Mills*, should have federal authority to administer the oath, compel the attendance of witnesses, the production of documents and the taking of depositions for the purposes of discovery.\(^{218}\) The necessary enforce-

\(^{218}\) A federal district court recently had occasion to determine whether the summary remedies of the Federal Arbitration Act, Title 9, U.S.C., are available in a suit to compel arbitration under § 301. Machinists Local 967 v. General Electric Co., 282 F. Supp. 413 (N.D.N.Y. 1968). It upheld their availability, rejecting the company's assertion of lack of jurisdiction both because of failure of the union to file a complaint or issue a summons, and because it was "being deprived of the time limitations, discovery procedures and other orderly procedural and substantive protections of a plenary proceeding under the Federal Rules of Civil Procedure." *Id.* at 421. Citing the repeated use of various of the Arbitration Act summary remedies by the courts, it observed that the instant proceeding had been concluded within two and one-half months from its commencement—"a sharp contrast to the time schedule of a plenary action which would produce the delay attendant upon judicial proceedings preliminary to arbitration." *John Wiley & Sons v. Livingston*, 376 U.S. 543, 548 (1964). *Id.* at 422.

But the district court, in rejecting that reasoning, appeared to regard itself as bound to opt for one or the other set of procedures and therefore, impliedly, to be precluded from resort to the one rejected. There is no doubt that the Arbitration Act affords a far more expeditious petition procedure under § 4 than is available under the Federal Rules of Civil Procedure. Rule 3 provides that a civil action is commenced by filing a "complaint" with the court whereas § 4 of the Act merely requires a petition with notice of motion which can then be heard and disposed of by the district court with little consumption of time. Of course the thesis of this study is that § 301 enables the courts, and the *Lincoln Mills* mandate requires them, to avail themselves of the Federal Rules or the provisions of the Arbitration Act whenever either proves a workable and helpful resource in fashioning § 301 remedies. There simply is no need for an either/or choice between the sets of procedures available. The *Lincoln Mills* mandate eliminated needless conceptual blocks:

[T]he 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 parties may or may not do in certain situations. Other problems will be in 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.

ment is available in state or federal courts by the party seeking the benefit of the arbitrator's order, as is relief for the person aggrieved by that order. But the initial issuance of the arbitral discovery order should be within the discretion of the arbitrator, not the court.

The corollary of federal power is arbitral prudence. To assert the existence of the federal power is by no means to insist upon its use. A resource now exists, no more. Responding to the particular circumstances put to him by disputants on a case-by-case basis, the opportunity, but not the legal necessity, is now available for the arbitrator to shape federal pretrial discovery techniques to the needs of the arbitration hearing.
APPENDIX

LABOR BOARD TIMETABLE

<table>
<thead>
<tr>
<th>Timespan in NLRB § 8(a)(5) discovery proceedings before the Labor Board and the federal courts</th>
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<sup>a</sup> Bud's Cabinet
<sup>b</sup> Cooke Beach Shoe
### LABOR BOARD TIMETABLE

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LABOR BOARD TIMETABLE

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### LABOR BOARD TIMETABLE

**Timespan in NLRB § 8(a)(5) discovery proceedings before the Labor Board and the federal courts**

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## LABOR BOARD TIMETABLE

*Timespan in NLRB §8(a)(5) discovery proceedings before the Labor Board and the federal courts*

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LABOR BOARD TIMETABLE

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<td>11. Disclosure ordered?</td>
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### LABOR BOARD TIMETABLE

**Timespan in NLRB § 8(a)(5) discovery proceedings before the Labor Board and the federal courts**

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<thead>
<tr>
<th></th>
<th>Taylor Forge</th>
<th>Avco.</th>
<th>Utica Observer</th>
<th>Woolworth</th>
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<tr>
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<td>8. NLRB's decision</td>
<td>8-16-56</td>
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## LABOR BOARD TIMETABLE

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<th>Boston Herald&lt;sup&gt;o&lt;/sup&gt;</th>
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<td>yes</td>
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<td>—</td>
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<td>April 1952&lt;sup&gt;c&lt;/sup&gt;</td>
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<td>10-14-52</td>
<td>7-26-54</td>
<td>8-15-52</td>
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## LABOR BOARD TIMETABLE

**Timespan in NLRB § 8(a)(5) discovery proceedings before the Labor Board and the federal courts**

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<th>Leland-Gifford</th>
<th>Auto-Lite</th>
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<td>5-16-50</td>
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<td>yes</td>
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<td>1-3-50</td>
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<td>8-24-51</td>
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### LABOR BOARD TIMETABLE

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<th>Timespan in NLRB § 8(a)(5) discovery proceedings before the Labor Board and the federal courts</th>
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<td>Cinn.</td>
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<td>Steel</td>
<td>Allison</td>
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<td>3. § 8(a) (5) charge filed</td>
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<td>4. GC Complaint issued</td>
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<td>1-12-49</td>
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<td>1-26-48</td>
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<td>14. Supreme Court decision</td>
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**LABOR BOARD TIMETABLE**

| Timespan in NLRB § 8(a)(5) discovery proceedings before the Labor Board and the federal courts | Statistical Comparison |
|---|---|---|---|---|---|
| | Alum. | Ore. | Average | Median | Shortest | Longest |
| 1. Grievable refusal of data | 4-28-41 | 5.43 | 5 | 1 | 14 |
| 2. Arbitration provision? | yes | 11.19 | 11 | 4 | 31 |
| 3. § 8(a)(5) charge filed | 9-6-41 | 17.37 | 16 | 7 | 39 |
| 4. GC Complaint issued | 9-8-41 | 29.83 | 29 | 17 | 50 |
| 5. Total months to this point | 5 | 11.19 | 11 | 4 | 31 |
| 6. Trial Ex'r Issued Report | 12-10-41 | 45.50 | 44 | 33 | 59 |
Footnotes to Labor Board Timetable

a Volumes 106 through 154 of the reported decisions of the NLRB, covering the period 1954-1965, were searched for refusals to disclose during the terms of collective bargaining agreements containing provisions for arbitration. Some 161 cases were found involving refusals to disclose and of those, 38 occurred during operative arbitration provisions. Our survey of the timespan experienced in this type of unfair labor practice case also adds a representative sample of 11 cases decided prior to 1954 and reaching back to 1942, for comparative purposes. The citations of the cases tabulated above with abbreviated names are listed next below by their identifying numbers:

33. Taylor Forge & Pipe Works Co., 113 N.L.R.B. 693 (1955), enforced, 234 F.2d 227 (7th Cir. 1956).
38. Otis Elevator Co., 102 N.L.R.B. 770, enforced as modified, 208 F.2d 176 (2d Cir. 1953).
43. Leland-Gifford Co., 95 N.L.R.B. 1306, enforced as modified, 200 F.2d 620 (1st Cir. 1952).
47. Cincinnati Steel Castings, 86 N.L.R.B. 592 (1949).
49. Aluminum Ore Co., 39 N.L.R.B. 1286, enforced as modified, 131 F.2d 485 (7th Cir. 1942).

b The collective agreement was extended 35 months by oral agreement.
c This is the date of the hearing. The date of the issuance of the complaint was not indicated.
d Grievance procedure is mentioned but there is no specific reference to arbitration.
e The Board overruled the trial examiner's discovery order although it also directed the employer to bargain.
f After argument on November 30, 1964, the court of appeals denied the union's motion to intervene in the enforcement proceedings on December 24, 1964. Fafnir Bearing Co. v. NLRB, 339 F.2d 801 (2d Cir. 1964). The Supreme Court reversed on December 7, 1965. 382 U.S. 205 (1965). The matter was then resumed as an enforcement proceeding after an interval of 13 months devoted to the intervention issue. That period is subtracted to arrive at the total of months consumed in the normal processing of this case, and this for the reason that the intervenor issue was a first-instance one of substance which cannot be regarded simply as a normal incident of appellate jockeying to avoid a final resolution.
On March 23, 1962, the parties selected an arbitrator to dispose of several grievances. On April 11, 1962, the union demanded the production of certain records reflecting past practice over a period of years, so that it could prepare for the arbitration hearing. The company declined on May 2, 1962, and on June 12 declared it was willing to produce whatever the arbitrator ordered. The union on August 6 insisted that it needed the records to prepare its case. On August 21 the company repeated its view that the union could submit its request to the arbitrator. On October 9, it did so, and the parties argued the matter before the arbitrator on November 16, 1962. He indicated that the matter could be handled according to certain guidelines at the arbitral hearing which then was convened January 31, February 2, and March 9-12, 1963. Although it does not appear in the trial examiner's report or the Board's opinion when the arbitration was decided, the hearings were completed and the discovery problem resolved by March 12, 1963, three weeks before the Trial Examiner's hearing commenced.

The complaint was dismissed "in view of the facts that the parties had agreed to arbitrate the grievances and had selected the arbitrator; that the Respondent expressed its willingness to supply any data the arbitrator ruled was necessary; that the Respondent did furnish data in accord with the rulings of the arbitrator; and that the arbitration hearings on the grievances in question were completed before the instant case came on for hearing before the Trial Examiner." 145 N.L.R.B. at 733 (emphasis added). The hearing before the trial examiner was held on April 3, 24 and 25, 1963, eight months prior to the Board's decision.

The date of the company's refusal is not indicated. This is the date of the union's unequivocal demand for specified data.

Or sometime prior to that date. The report is unclear when prior.

The court of appeals was reversed by the Supreme Court which reinstated the Board's disclosure order.

Includes further litigation on motion to modify decree. The motion was denied by the court of appeals on September 6, 1956, and certiorari was denied November 19, 1956.

The trial examiner declined to find a section 8(a) (5) violation for the refusal to allow the union to conduct an independent time-study on company premises. His reason was that the union could obtain that remedy through arbitration. He did recommend a disclosure order, however, relative to the opportunity to copy data from the company's time-study file. The Board, in turn, held an 8(a) (5) violation as to both items. But the court of appeals adopted the trial examiner's rationale, modifying the Board's order accordingly.

The two Boston Herald-Traveler cases each involved a union request, in a unit of about 520 employees and 77 classifications, for the names of all employees and their classifications, sex, dates of employment, birth date, and salaries and extras paid them. The course of this imbroglio, starting around November 23, 1951, spanned three contract terms. New agreements were executed on February 21, 1952 and April 16, 1954. The final court of appeals order came on June 6, 1955.

The collective agreement was indicated to cover the usual subjects, presumably including grievance and arbitration machinery.

In this wartime decision in 1943 the Board, noting that the collective agreement contained an arbitration provision, observed that it did not "deem it wise to exercise our jurisdiction . . . where the parties have not exhausted their rights and remedies under the contract as to which the dispute has arisen." 47 N.L.R.B. at 706. It accordingly dismissed the complaint without prejudice.

Based on 48 cases. No trial examiner's report appears in Utica Observer, case 35 in the Table.

Based on 49 cases.

Based on 24 cases.

Based on 6 cases.