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Essay: Statutory Rights and Arbitral Values: Some Conclusions

Dennis O. Lynch
University of Miami School of Law, dlynch@law.miami.edu

ESSAY

Statutory Rights and Arbitral Values: Some Conclusions

DENNIS O. LYNCH*

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I. INTRODUCTION

In this Special Topic's lead Article, I claimed that it matters when statutory rights are adjudicated by an arbitrator rather than by the National Labor Relations Board ("NLRB" or "Board") because of the different ways in which disputes are framed and argued in the two forums.[1] In arbitration, it is accepted that disputes are bounded by the parties' agreement and the expectations that arise from their past practices.[2] The statutory framework governing collective bargaining, however, is treated as a given. The capacity to alter that structure incrementally through the processing of workplace disputes in an arbitral forum is limited.[3] The student Comments in this Special Topics issue examined specific topics that illustrate the tension between a model of labor relations that embraces private ordering as the predominant policy and a model that seeks to foster statutory policies in addition to private ordering by preserving the ability of unions and individual employees to vindicate their statutory rights through access to the NLRB and the courts. This Essay focuses on how the findings of each Comment demonstrate the extent to which increased

* Dennis O. Lynch is a Professor of Law at the University of Miami School of Law.

1. *See* Lynch, *Deferral, Waiver, and Arbitration Under the NLRA: From Status to Contract and Back Again*, 44 U. MIAMI L. REV. 237, 327-34 (1989).

2. *Id.* at 327-29.

3. *Id.* at 327-31.

reliance on arbitration tends to submerge the significance of statutory policies other than that of private ordering.

Five of the student Comments published in this issue are case studies that compare the reasoning of arbitrators with the reasoning of the NLRB and the courts.[4] Specifically, two Comments deal with employer entitlements,[5] two with employee statutory entitlements under Section 7 of the National Labor Relations Act ("NLRA" or

4. *See* Comment, *Arbitral Treatment of Subcontracting After* Milwaukee Spring II: *Much Ado About Nothing?*, 44 U. MIAMI L. REV. 371 (1989) [hereinafter Comment, *Arbitral Treatment of Subcontracting*]; Comment, *Arbitration and Selective Discipline of Union Officials After* Metropolitan Edison, 44 U. MIAMI L. REV. 443 (1989) [hereinafter Comment, *Selective Discipline*]; Comment, *The Differing Nature of the* Weingarten *Right to Union Representation in the NLRB and Arbitral Forums*, 44 U. MIAMI L. REV. 467 (1989) [hereinafter Comment, *Weingarten Right*]; Comment, *Employee Drug Testing: Federal Courts Are Redefining Individual Rights of Privacy, Will Labor Arbitrators Follow Suit?*, 44 U. MIAMI L. REV. 489 (1989) [hereinafter Comment, *Drug Testing*]; Comment, *Successorship Doctrine, the Courts and Arbitrators: Common Sense or Dollars and Cents?*, 44 U. MIAMI L. REV. 403 (1989) [hereinafter Comment, *Successorship Doctrine*].

5. For a description of the classification of statutory limits on employer discretion under the NLRA as entitlements, see Lynch, *supra* note 1, at 271-94. An employer's decision to sell a business is classified as permissive under the Supreme Court's test for distinguishing mandatory and permissive subjects of bargaining, and it is thus an employer entitlement not limited by a bargaining obligation. *See* First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 686 (1981) ("[T]he harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision . . . ."); Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 269 (1965) (Referring to an employer's decision to terminate its business, the Court stated that such decisions are "so peculiarly matters of management prerogative that they would never constitute violations" of Section 8(a)(1).).

The doctrine governing the employer's entitlement to subcontract is more complex. An employer's decision to subcontract has traditionally been regarded as a mandatory subject of bargaining. *See* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 215 (1964). Under the Board's application of the *First National Maintenance* test, a decision to transfer work or to subcontract work may not be a mandatory subject of bargaining if it turns on the nature and direction of the business rather than on labor costs. *See* Otis Elevator Co., 269 N.L.R.B. 891, 893-94 (1984) (plurality opinion) (*Otis Elevator II*), *rev'g* 255 N.L.R.B. 235 (1981) (*Otis Elevator I*). For a more complete treatment of the NLRB's test for a mandatory subject of bargaining, see Lynch, *supra* note 1, at 277 n.225. Even in a situation where an employer does have a statutory duty to bargain, the employer may unilaterally act subsequent to impasse without violating the NLRA, unless the employer is explicitly constrained by the terms of the collective bargaining agreement. *See* Milwaukee Spring Div. of Ill. Coil Spring Co., 268 N.L.R.B. 601 (1984) (*Milwaukee Spring II*), *rev'g* 265 N.L.R.B. 206 (1982) (*Milwaukee Spring I*). For a discussion of the way in which arbitrators define good faith limits on the scope of an employer's entitlement, see Comment, *Arbitral Treatment of Subcontracting*, *supra* note 4, at 386-89.

"Act"),[6] and one with what can be labeled an unsettled entitlement.[7] The Comments compare the treatment of the entitlements in public forums with the treatment accorded by arbitrators who are confronted with similar disputes. In this Essay, I will focus on the students' findings regarding the way in which disputes are framed and argued in arbitration in each of the five areas and the implications of their findings for the protection of statutory values implicated in the disputes resolved through arbitration.

The two remaining Comments analyze doctrinal developments which parallel the principal themes of my earlier Article in this Special Topic.[8] For example, one of these Comments deals with the tension between collective and individual control over Section 7 rights, focusing in part on deferral to grievance settlements rather than deferral to arbitrators' awards. The other Comment describes recent doctrinal trends under the Railway Labor Act (RLA),[9] trends which alter the classification of disputes as "major" or "minor" and thereby cause increased referral to arbitrators of disputes involving questions of statutory policy. The classification of a dispute as "minor," requiring the dispute to be resolved through arbitration, has an impact under the RLA similar to the consequences of the deferral doctrine under the NLRA. The latter two Comments are discussed first, followed by a brief analysis of the other five Comments' findings regarding arbitral treatment of employer, employee, and unsettled entitlements.

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6. Union leaders may not be differentially sanctioned for engaging in protected activity unless a collective bargaining agreement so provides. *See* Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 710 (1983); Comment, *Selective Discipline, supra* note 4. Moreover, Section 7 protects an employee's right to have a union representative present at an investigatory interview that the employee reasonably believes might lead to discipline. *See* NLRB v. J. Weingarten, Inc., 420 U.S. 251, 267 (1975); Prudential Ins. Co., 275 N.L.R.B. 208 (1985) (*Weingarten* right may be waived by a union); Comment, *Weingarten Right, supra* note 4.

7. Drug testing is an unsettled entitlement in the sense that our societal values regarding the appropriate balance between employee privacy and a drug free workplace are currently being defined simultaneously through constitutional litigation, state and federal legislation, collective bargaining, and arbitration. *See* Comment, *Drug Testing, supra* note 4.

8. *See* Comment, *Distinguishing Arbitration and Private Settlement in NLRB Deferral Policy*, 44 U. MIAMI L. REV. 341 (1989) [hereinafter Comment, *Deferral Policy*]; Comment, *Merging the RLA and the NLRA for Eastern Air Lines: Can It Fly?*, 44 U. MIAMI L. REV. 539 (1989) [hereinafter Comment, *Eastern Air Lines*].

9. Ch. 347, 44 Stat. 577-80, 582, 584-87 (1926) (codified as amended at 45 U.S.C. §§ 151-188 (1982 & Supp. V 1987) (RLA).

II. THE FRAGMENTATION OF DISPUTE PROCESSING UNDER THE RLA

Eastern Air Lines[10] begins by analyzing how deregulation of the airline industry led to increased competion among carriers.[11] In order to reduce costs in the face of growing competition, airlines began to seek concessions from unions when collective bargaining agreements expired.[12] As a result, the practical impact of an employer's obligation to maintain the status quo changed. Prior to concession bargaining, the status quo obligation meant that the costs of wages and benefits during bargaining were less than what the employees would be earning once there was an agreement on a new contract.[13] With the advent of concession bargaining, employees were being paid more during bargaining than they could expect to earn once there was an agreement on a new contract.[14] Consequently, unions acquired a vested interest in prolonged bargaining. Delays in a declaration of impasse by the National Mediation Board, a declaration which would free management to implement concessions unilaterally, tended to strengthen the bargaining power of unions rather than that of employers.[15]

The *Eastern Air Lines* Comment further described the way in which courts responded to this change in the economic environment of the airline industry by expanding the category of "minor" disputes, which are not subject to the statutory status quo obligation, and by shrinking the scope of "major" disputes which are subject to the obligation.[16] The decisions emphasize a contractarian image in which parties define workplace entitlements in the shadow of the law, with neutral courts enforcing the terms of private agreements interpreted by arbitrators.[17] When disputes over unilateral changes in working conditions are addressed in arbitration rather than in courts, statutory policies concerned with the balance of power in bargaining drop to the background. The freedom of management to respond to product

10. Comment, *Eastern Air Lines, supra* note 8.

11. *See id.* at 549-53, 567-68.

12. *See id.* at 552-53.

13. *See id.* at 567-68.

14. *See id.*

15. *See id.*

16. *See* RLA §§ 3-6, 10, 45 U.S.C. §§ 153-156, 160. For a description of the "major" dispute procedures under the RLA, see Comment, *Eastern Air Lines, supra* note 8, at 557 n.117. For a discussion of status quo obligations, see *id.* at 559 nn. 125-28 and accompanying text.

17. The term arbitrator is used here to refer to the neutral party who sits with the systems board of an air carrier or the adjustment board of a railroad. *See* Comment, *Eastern Air Lines, supra* note 8, at 565 n.171.

market changes by altering working conditions—both during the bargaining stages of new agreements and during the terms of existing agreements—is determined by reference to parties' expectations based on past practices and current or former collective bargaining agreements, and not by reference to statutory policies concerned with maintaining the union's voice in workplace decisions and the existing balance of bargaining power during negotiations.[18]

This shift in the doctrinal classification of disputes under the RLA has a number of consequences similar to the increased reliance on deferral and waiver doctrines under the NLRA.[19] First, because of the "obey and grieve" doctrine in arbitration, management enjoys more flexibility to act unilaterally pending resolution of minor disputes than would be the case if the disputes were classified as major.[20] The possibility of an adverse arbitration ruling in a minor dispute provides some deterrence, but a union is likely to need specific contract language restricting employer action to win in arbitration.[21] In addition, an employer's actions prior to an arbitral award may so alter the underlying circumstances that an arbitrator will be unable or unwilling to grant a remedy that would deter similar breaches in the future.[22] Finally, courts rarely issue status quo injunctions in minor disputes under the RLA due to the courts' hesitancy to interfere with the arbitrator's role as the interpreter of a collective bargaining agreement.[23] In order to issue a status quo injunction pending arbitration, based on a union demonstrating the traditional equitable requirements of irreparable harm and likelihood of success on the merits, a court will inevitably become involved in contract interpretation. Consequently, management is relatively free to make changes in working conditions pending arbitration of a minor dispute under the RLA, just

18. *See, e.g.*, Comment, *Eastern Air Lines, supra* note 8, at 557-83 (describing the court's opinion in Air Line Pilots Ass'n Int'l v. Eastern Air Lines, 863 F.2d 891 (D.C. Cir. 1988) (*Eastern Furlough II*)).

19. *See* Lynch, *supra* note 1, at 296-98 nn.312-27.

20. *See* Comment, *Eastern Air Lines, supra* note 8, at 563-65.

21. *See, e.g.*, Pittsburgh & L.E. R.R. v. Railway Labor Executives' Ass'n, 109 S. Ct. 2584, 2592-93 (1989) (Rejecting the Third Circuit's conclusion that a company had a duty to bargain because the sale of the company would mean a substantial loss in jobs, the Court pointed to the lack of any specific contract clause limiting management's discretion to sell, and refused to find an implied limitation in job security guarantees.).

22. *See* Lynch, *supra* note 1, at 293-94.

23. *See* Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 109 S. Ct. 2477, 2481 n.5 (1989) (declining to address the unresolved question of a court's power to issue an injunction pending arbitration under the RLA based on a claim of irreparable injury); International Bhd. of Teamsters v. Southwest Airlines, 875 F.2d 1129, 1136 (5th Cir. 1989) (insufficient showing of irreparable harm to warrant an injunction).

as employers governed by the NLRA and Section 301 of the LMRA are relatively free to make changes pending arbitration.

Second, because disputes will be resolved by reference to the parties' past practices and expectations under current or former agreements, the role of statutory policy is limited to reinforcing private ordering. A sense of shared workers' rights cutting across bargaining unit lines is undermined because the processing of disputes concerning those rights is localized within particular bargaining units. Thus, unions are encouraged to focus their efforts on constraining unilateral employer decisions through contract negotiations, and they are discouraged from using litigation to reinforce the structure of the legal framework governing bargaining in a way that preserves union bargaining power and protects employee job security during negotiations.[24]

These trends are visible in each of the cases involving Eastern Air Lines. In *Air Line Pilots Association v. Eastern Air Lines (Eastern Furlough II)*,[25] the District of Columbia Circuit defined status quo obligations under Section 6 by reference to both implied contractual entitlements under an expired agreement and past practices.[26] The court could have classified the dispute as major and interpreted the contract to establish status quo obligations in light of statutory policies concerned with protecting the existing balance in bargaining power while allowing employers some latitude in responding to product market changes. Instead, the court determined the initial issue of whether the dispute was minor or major by asking whether the dispute could have been resolved by reference to the agreement and past practices if the dispute had arisen during the term of agreement.[27]

Because it will normally be at least arguable that any mid-term dispute can be resolved by reference to implied contract terms and past practices, this reasoning can turn most status quo issues during Section 6 bargaining into "minor" disputes to be resolved by an arbitrator. This result submerges the statutory policies underlying status quo obligations during bargaining and highlights a policy preference

24. *See* Lynch, *supra* note 1, at 290, 324-25.

25. 863 F.2d 891 (D.C. Cir. 1988) (*Eastern Furlough II*).

26. *Id.* at 898. In *Eastern Furlough II*, three unions (TWU, IAM and ALPA), sought to enjoin the decision to close a hub and furlough employees. The TWU agreement was still in effect, but the IAM agreement and the ALPA agreements had expired. *Id.* at 897-98. In rejecting an injunction, the court reasoned that disputes which would have been minor had they arisen during the term of an agreement should not become major, and thus subject to the status quo obligations under Section 6 of the RLA, merely because they arise once the parties are engaged in negotiations over a new agreement. *Id.* at 898-99; *see* Comment, *Eastern Air Lines*, *supra* note 8, at 582-83.

27. *Eastern Furlough II*, 863 F.2d at 898-900.

for private ordering by making management's freedom to act during bargaining solely a question of contract interpretation for an arbitrator. Thus, in order to decide if the dispute was arbitrable, the court in *Eastern Furlough II* interpreted past practice and the agreement as if the court were an arbitrator and essentially ruled that the contract permitted Eastern Air Lines to furlough its employees.[28] The court then held that the parties' dispute was "minor" under the RLA and that the district court was therefore without jurisdiction to enter a preliminary injunction to block the decision to furlough pending the parties agreeing on a new agreement or reaching impasse.[29] Instead, the dispute over the furlough of employees was to be resolved under the terms of the collective bargaining agreement by an arbitrator, even though the court had virtually predetermined the arbitrator's award.[30] If this general approach for determining whether a dispute is "minor" is adopted by other circuits, they will likely limit their analysis to whether the change in working conditions during Section 6 bargaining is "arguably" justified under the contract, thereby avoiding interference with an arbitrator's province to interpret the agreement. If the change is arguably justified, then courts will refer the dispute to arbitration with no reference to the merits, thereby leaving the employer free to act pending arbitration.[31]

Air Line Pilots Association v. Eastern Air Lines (Eastern Pilots II)[32] is the reverse side of the same coin. Late in the term of a collective bargaining agreement, Eastern Air Lines subcontracted with a company to train its employees to fly Eastern planes should the Air Line Pilots Association (ALPA) strike following an impasse in bargaining.[33] The dispute went to the heart of the parties' obligations to maintain the status quo under Section 6: One party sought a strategic advantage in anticipation of the expiration of the agreement. Although the agreement contained relatively clear contract language restricting the employer's discretion to subcontract work covered by the agreement, the District of Columbia Circuit still classified the dis-

28. *Id.* at 899-900.

29. *Id.* at 913.

30. *Id.* at 899.

31. *See, e.g., id.* at 926 (Silberman, J., concurring in the denial of rehearing en banc) (noting that whether the expired agreement would have authorized the furloughs is an issue for the system board and not the court). *Compare id. with* Consolidated Rail Corp. v. Railway Labor Executives' Trans. Ass'n, 109 S. Ct. 2477, 2484 (1989) (mid-term disputes must go to arbitrators if they are "arguably" justified by the collective bargaining agreement).

32. 869 F.2d 1518 (D.C. Cir. 1989) (*Eastern Pilots II*). For an analysis of the case, see Comment, *Eastern Air Lines*, *supra* note 8, at 569-75.

33. *Eastern Pilots II*, 869 F.2d at 1519.

pute as minor because it arose while the agreement was in effect.[34] This left Eastern Air Lines free to subcontract pending arbitration unless the union could obtain a status quo injunction based on a claim of irreparable harm. Thus, *any* dispute arising during the term of an agreement could be referred to arbitration without the issuance of a status quo injunction, even if the employer's purpose in breaching the contract was to obtain an advantage during subsequent bargaining over a new agreement.

The recent Supreme Court opinion in *Consolidated Rail Corp. v. Railway Labor Executives' Association*[35] does not go as far as the *Eastern Pilots II* opinion, but it may have the same pragmatic consequence. In *Consolidated Rail,* the Court held that all mid-term disputes are classified as minor if the employer's unilateral action is "arguably" justified by the terms of the parties' collective bargaining agreement.[36] In *Consolidated Rail,* the employer could only point to an implied contract term that permitted annual physical examinations in order to "arguably" justify the unilateral imposition of drug testing.[37] On this slim reed, the Court held the dispute to be minor.[38] Consequently, it will be a rare case in which management cannot identify some implied term that makes a disputed issue "arguable."

The sale of Eastern Air Lines' shuttle to Donald Trump[39] presents the least interesting of the three Eastern Air Lines law suits because the district court felt compelled to follow the District of Columbia Circuit's opinion in *Eastern Furlough II.*[40] The Supreme Court, however, subsequently decided a similar controversy in *Pittsburgh & Lake Erie Railroad v. Railway Labor Executives' Association.*[41] In *Pittsburgh & Lake Erie Railroad,* the Supreme Court explicitly referred to the underlying value of protecting capital mobility in a market economy as a justification for limiting a court's power to restrain management's discretion to sell a business pending bargaining under the status quo obligation of Section 6 of the RLA.[42] Relying on NLRA precedent,[43] the Court held: "Absent statutory

34. *Id.* at 1524.

35. 109 S. Ct. 2477 (1989).

36. *Id.* at 2482.

37. *Id.* at 2484-89.

38. *Id.* at 2489.

39. Air Line Pilots Ass'n Int'l v. Eastern Air Lines, 701 F. Supp. 865 (D.D.C. 1988) (*Trump Shuttle*).

40. *See id.* at 879; Comment, *Eastern Air Lines, supra* note 8, at 588-92.

41. 109 S. Ct. 2584 (1989).

42. *Id.* at 2596.

43. Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 270 (1965) ("A proposition that a single businessman cannot choose to go out of business if he wants to would

direction to the contrary, the decision of a railroad employer to go out of business and consequently to reduce to zero the number of available jobs is not a change in the conditions of employment forbidden by the status quo provision of § 156."[44] Just as with permissive subjects of bargaining under the NLRA, the only way a union may now restrain employer action under the RLA in core areas of management prerogative is by obtaining a clause in the collective bargaining agreement specifically prohibiting the type of unilateral change at issue and enforcing that clause through arbitration.[45]

When one looks at these RLA opinions as a group, there is a marked shift from court adjudication of conflicts involving tensions in statutory policies under the RLA to arbitration of the disputes. In arbitration, statutory policy plays less of a role in the way in which disputes are resolved. Management is relatively free to act pending arbitration while unions are prohibited from striking over a minor dispute.[46] Furthermore, statutory policy is not likely to be preserved through judicial review of arbitral awards because the scope of judicial review is as limited under the RLA as it is limited under federal common law.[47] In summary, the opinions concerning Eastern Air Lines fit within the general trend in labor doctrine to emphasize private ordering within specific bargaining units as the overriding statutory value.

III. DEFERRAL TO COLLECTIVE CONTROL OVER SECTION 7 RIGHTS

In *Deferral Policy*,[48] the author concludes that the Board should alter its current standard for deferral to arbitral awards that involve disputes over statutory rights and should decline to defer unless waiver by contract is a central issue, but the author also concludes that the Board should be more willing to defer to a settlement of the same dispute by a union and employer, despite the objection of the affected employees.[49] The Comment argues that the two situations are different because the arbitral award thwarts Congress' intent to

represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act.")

44. *Pittsburgh & L.E. R.R.*, 109 S. Ct. at 2596.

45. *See* Lynch, *supra* note 1, at 276-92.

46. *See id.* at 279-81 (discussing similar trends under the NLRA).

47. *See id.* at 268-69 (discussing judicial review of a Delta Airlines arbitral award).

48. Comment, *Deferral Policy, supra* note 8.

49. *Compare id.* at 367 (limiting deferral to "those situations in which contractual issues are dispositive of statutory charges") *with id.* at 368-69 & nn.198-200 ("[C]ontroversies settled during greivance discussions require only a minimal measure of review.").

have the NLRB decide unfair labor practice charges, but a negotiated settlement reinforces the type of voluntary adjustment of disputes that Congress sought to encourage.[50] The author concludes that reinforcing negotiated settlements is consistent with a union's power to waive statutory entitlements as set forth by the Supreme Court in *Metropolitan Edison*.[51]

The Comment correctly concludes that deferral to grievance settlements is more a question of the scope of a union's power to waive individual rights than a conflict over the preferred forum for resolving claims of statutory entitlements.[52] Justice O'Connor's dissenting opinion in *NLRB v. City Disposal Systems*[53] aptly presents the central problem: Should the Board regard a union's decision to refuse to press a grievance or, alternatively, to settle a grievance over the objection of the affected employee, as a basis for dismissing an unfair labor practice charge based on the same underlying facts as the contract dispute? Most individual employee rights derived from statutes that are independent of the legal regime governing collective bargaining cannot be waived by unions.[54] The waiver of Section 7 rights under the NLRA, however, is more complicated because the principal purpose of Section 7 is to protect and strengthen collective action.[55] I disagree, however, with the Comment's conclusion that the Board should defer to union and employer settlements involving the Section 7 rights of employees, unless the union breached its duty of fair representation in agreeing to settle.

Fair representation doctrine is primarily a doctrine that sets limits on the discretion of a union to waive an individual employee's contract entitlements, not on the ability to waive statutory rights.[56] A union's power to waive an employee's access to a neutral forum in which to resolve disputes over statutory entitlements is distinct from the ability to waive contract entitlements.[57] The waiver of contract entitlements is integral to the system of private ordering. The exclusive control held by bargaining unit representatives over the forma-

50. *Id.* at 368.

51. 460 U.S. 693 (1983); *see* Comment, *Deferral Policy, supra* note 8, at 368-69.

52. *See* Comment, *Deferral Policy, supra* note 8, at 368-69.

53. 465 U.S. 822, 841-47 (1984) (O'Connor, J., dissenting).

54. *See, e.g.*, Lynch, *supra* note 1, at 316 nn.417-19.

55. *See* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 62 (1975) ("[The rights guaranteed by Section 7] are, for the most part, collective rights, rights to act in concert with one's fellow employees; they are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife 'by encouraging the practice and procedure of collective bargaining.' ") (citation omitted).

56. *See* Lynch, *supra* note 1, at 296-97.

57. *See id.* at 315-16.

tion and administration of collective agreements contributes to cohesion within bargaining units and to the capacity of unions and management to deal with problems as they arise. In contrast, union control over employee statutory rights through private ordering requires the scope of the collective's power to be determined in light of statutory policies that involve more than simple deference to private ordering.[58] Instead, the policies underlying the protection of an employee who chooses to engage in concerted activity for mutual aid and protection should be considered in evaluating a union's justification for settling an employee's statutory claim in order to benefit the bargaining unit as a whole.

When an employee who is dissatisfied with a union's decision over a contract entitlement dispute turns to a forum outside the system of private ordering and questions the substantive judgment of the union, the courts have no statutory theory of internal union decision-making against which to assess the substantive judgment of the union.[59] Therefore, courts tend to avoid second guessing the substance of union decisions regarding entitlements derived from private ordering; instead, they restrict their inquiry to the union's motives and whether the union made a considered decision.[60] In contrast, when an employee goes to the Board with a claim that individual statutory rights have been violated, the employee is invoking a set of identifiable policies that underlie and reinforce the system of private ordering. If the union has paid inadequate attention to these policies or sacrificed them in order to foster other collective interests, the charge should not be deferred without considering the merits of the employee's statutory claim;[61] the policies underlying exclusive representation will not be undermined because the source of the employee's statutory right is independent of the system of private ordering. Moreover, access to public forums provides a check on collective

58. *See id.* at 334-37.

59. *See* Freed, Polsby & Spitzer, *Unions, Fairness, and the Conundrums of Collective Choice,* 56 S. CAL. L. REV. 461 (1983) (maintaining that there is no general rule of distributive or procedural fairness that a court can employ to overrule the discretionary decisions made by a union in bargaining for its constituents); Freed, Polsby & Spitzer, *A Reply to Hyde, Can Judges Identify Fair Bargaining Procedures?,* 57 S. CAL. L. REV. 425 (1984); Hyde, *Can Judges Identify Fair Bargaining Procedures?: A Comment on Freed, Polsby & Spitzer,* 57 S. CAL. L. REV. 415 (1984).

60. *See* Lynch, *supra* note 1, at 296-97 (discussing the legal standard for a breach of the duty of fair representation).

61. *See* Taylor v. NLRB, 786 F.2d 1516, 1522 (11th Cir. 1986) (The court expressed concern over bipartite proceedings under collective bargaining agreements where the grievance arbitration board is composed of 50% representatives of management and 50% representatives of labor with no neutral representative and this board resolves employee claims to a statutory right where "individual rights may be negotiated away in the interest of the collective good.").

power based on substantive policies derived from statutory rights and obligations.[62] Thus, the Board should not defer to a settlement reached between a union and an employer over the objection of the affected employees without first addressing whether the settlement sacrifices policies aimed at protecting the activity in question.[63]

IV. MANAGEMENT ENTITLEMENTS AND ARBITRATION

Arbitral Treatment of Subcontracting[64] and *Successorship Doctrine*[65] analyze arbitral awards that deal with subcontracting and successorship issues. The two Comments provide useful illustrations of the relationship between Board and court doctrine on the one hand, and arbitral reasoning on the other. Although both subcontracting and successorship disputes present union challenges to entrepreneurial control, both the Board and the courts treat subcon-

62. This conclusion is different from the one arrived at by the student author of the Comment. *Compare* Lynch, *supra* note 1, at 327-34 *with* Comment, *Deferral Policy, supra* note 8.

63. Implicit in this argument is an issue as to why a union should be permitted to waive an individual employee's Section 7 rights through collective bargaining without the Board questioning whether the waiver is consistent with statutory policy if the Board does not defer to waiver of the same right when the union agrees to settle an unfair labor practice charge in the context of a specific dispute. To permit contractual waivers while opposing deferral to union waivers (settlements) in specific disputes appears to be inconsistent. Of course, some employee statutory rights that are representational reinforcing may not be waived. *See* Lynch, *supra* note 1, at 296 nn.313-14. Which rights should be treated as nonwaivable by a union is a difficult issue not addressed here. The crux of the argument made here is to explain why a union may waive a statutory right through a collective bargaining agreement, but not through the settlement of a specific dispute.

Waivers in collective bargaining agreements are much more visible to all union members than are waivers in grievance negotiations. As long as the statutory requirement that contract waivers be "clear and unmistakable" is enforced, the membership will be aware of the waiver when they read the agreement. *See* Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983). Thus, contractual waivers of Section 7 rights will have to be justified to affected employees by the union in the light of what the bargaining unit obtained in exchange. If a majority of the bargaining unit members opposes the waiver, it is not likely to be included in an agreement. In addition, permitting the parties to define the scope of employee protections by agreement can increase predictability between the parties regarding protected employee activity when Board decisions are unclear regarding the scope of protected employee actions under Section 7. It is imperative, however, that the validity of the waiver be decided by the Board and not by an arbitrator in order to avoid the erosion of the requirement of a clear and unmistakable waiver.

The bargaining unit's membership is not in as good a position to police the settlements of individual employees' unfair labor practice charges. In addition, the members are not adversely affected by the waiver of a specific employee's statutory rights in the same way that they are affected when the agreement waives a statutory right of all unit members. Thus, the Board should look more closely at the settlement of a charge when the affected employee objects and not simply defer to the settlement between the union and the employer.

64. *See* Comment, *Arbitral Treatment of Subcontracting, supra* note 4.

65. Comment, *Successorship Doctrine, supra* note 4.

tracting differently from the sale of a business. Management's discretion to sell a business for any reason is much more protected from union pressure than are subcontracting decisions. The decision to sell is a permissive subject of bargaining; contract clauses which obligate an employer to sell only to a purchaser who will recognize the union and who will agree to be bound by the collective bargaining agreement are given little effect by courts, other than to force the seller to arbitrate.[66] The core value informing judicial decisions dealing with successorship clauses is the protection of capital mobility.[67]

In contrast, subcontracting is generally treated as a mandatory subject of bargaining.[68] The parties are encouraged to bargain over the subject by incorporating a clause which defines limitations on the employer's discretion to subcontract unit work.[69] Recent Board doctrine, however, takes a strong management rights position and suggests that it is not an unfair labor practice for an employer to subcontract unit work while an agreement is in effect unless either the employer fails to bargain prior to subcontracting or there is an explicit clause in the agreement restricting employer discretion.[70] The underlying policy seeks to protect a union's bargaining entitlement regarding decisions that influence job security when the principal factor in the subcontracting decision is the cost of labor, but the policy otherwise seeks to conserve management's discretion to act unilaterally, even during the term of an agreement.[71]

The Board's shift toward a stronger management rights position appears to have had little impact on the reasoning of arbitrators in disputes over subcontracting.[72] By comparison, court decisions establishing the statutory and contract obligations of sellers and purchasers have played a substantial role in arbitrations over the breach of a contract clause that obligates an employer to sell or assign its business only to a successor who will assume the collective bargaining agreement.[73] Differences in the way the parties' relationship influences arbitral reasoning in each type of dispute seem to account for the

66. *See id.* at 411-17.

67. *See id.* at 413-17.

68. *See* Comment, *Arbitral Treatment of Subcontracting, supra* note 4, at 376-78.

69. *See id.* at 372 & n.8.

70. *See id.* at 385; *see also* Lynch, *supra* note 1, at 276-84.

71. *See* Comment, *Arbitral Treatment of Subcontracting, supra* note 4, at 381-85.

72. *See id.* at 386 n.105 (describing the way in which arbitrators cite to court opinions to demonstrate the importance of subcontracting while paying little attention to Board opinions as precedent for a strong management rights position).

73. *See* Comment, *Successorship Doctrine, supra* note 4, at 420-36 (describing the way in which arbitrators use court doctrine to determine if a purchaser is a successor within the meaning of a collective bargaining agreement's successor clause).

varying impact of the two types of public law decisions. Subcontracting disputes, which arise during the terms of collective agreements, normally do not involve a complete breakdown in the ongoing relationship between the parties. In comparison, an arbitration involving the seller of a business normally occurs in the midst of a breakdown, so that unless a union is able to compel arbitration prior to the completion of the sale, the seller's former employees will either be working for the purchaser or seeking other employment. Arbitrations involving purchasers, however, occur when a union is seeking to establish a new workplace relationship with the purchaser. In each of the three arbitration settings, the impact of public law doctrine varies.

Arbitrations over subcontracting usually involve a normal type of arbitration setting because they occur in the context of an ongoing relationship. As neutral adjudicators selected by both parties, most arbitrators are willing to imply some constraints on subcontracting even when a contract is silent. Moreover, the process of selecting arbitrators makes it unlikely that an arbitrator would adopt a strong management rights position as the starting point for resolving a subcontracting dispute. Unions simply are not going to select an arbitrator who is known for approaching a subcontracting dispute from the type of general rule that the Board set forth in *Milwaukee Spring Division of Illinois Coil Spring Co. (Milwaukee Spring II).*[74] In order to be acceptable to both parties, arbitrators therefore tend to justify their decisions by reference to the parties' understanding.[75] They will thus assume that the wage and recognition clauses embody some implied limits on subcontracting when employees are on layoff or when employees would be laid off due to the subcontracting.[76] When arbitrators seek to resolve disputes within the bounds of the parties' relationship, their reasoning inevitably looks more like the dissent's opinion in *Milwaukee Spring II.*[77]

This does not suggest that the same concerns that led the Board to take a strong management rights position do not influence arbitrators. As *Arbitral Treatment of Subcontracting* demonstrates, arbitrators are quite sensitive to employer arguments that justify

74. Milwaukee Spring Div. of Ill. Coil Spring Co., 268 N.L.R.B. 601 (1984) (*Milwaukee Spring II*) (Unless there is an explicit clause in the collective bargaining agreement restricting transfers of bargaining unit work, an employer is free to transfer such work during the term of an agreement after bargaining to impasse.), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985).

75. *See* Lynch, *supra* note 1, at 328-29.

76. *See* Comment, *Arbitral Treatment of Subcontracting, supra* note 4, at 386-89 (analyzing the factors that arbitrators consider in establishing implied contract limits on management's discretion to subcontract bargaining unit work).

77. *See Milwaukee Spring II*, 268 N.L.R.B. at 605-12 (Zimmerman, Member, dissenting).

subcontracting based on claims of efficiency or the need to reorganize production methods in order to reduce costs.[78] Moreover, management, like unions, will not select arbitrators who have failed to give substantial weight to efficiency considerations when justifying their awards. What the Comment does show is the way in which arbitrators reason from principles that occupy a middle ground acceptable to both parties and then resolve specific cases by balancing a set of factors that include the parties' working relationship, the contract language, and past practices.[79]

In contrast, an arbitration against the seller of a business for breach of a successor clause involves a totally different set of circumstances. Once the arbitration ends, there will not normally be any ongoing relationship between the parties to the dispute. In this type of dispute, the arbitrator is not part of a system of private ordering structured to help the parties maintain productivity while resolving their problems. Instead, the arbitrator is more like a judge who deals with the problem of allocating damages after a total breakdown in a contractual relationship. It is not surprising that arbitrators in this situation turn to Board and court decisions, as well as former arbitration opinons dealing with similar disputes between other parties, to provide the principles that justify their awards.[80]

Federal common law concerned with enforcing collective bargaining agreements against successors protects capital mobility by refusing to bind a successor to the seller's collective agreement.[81] Board doctrine is equally protective of a successor's discretion to set wages and working conditions, except for the obligation to bargain with the union if a majority of the successor's employees were employees of the seller.[82] Arbitrators, in turn, rely on the definition of a successor under these two bodies of law in order to interpret successor clauses narrowly. To prevail, a union must show that the parties understood the implications of the clause when they agreed to restrict the management's discretion to sell the company only to a purchaser who would assume any existing collective agreement.[83] Even if a union does prevail, however, the arbitrator may be hesitant to award substantial damages to the union.

In addition, because arbitrators rely heavily on court doctrine and Board decisions in this area, courts are more likely to review

78. *See* Comment, *Arbitral Treatment of Subcontracting, supra* note 4, at 390-91.
79. *Id.* at 386-89.
80. *See* Comment, *Successorship Doctrine, supra* note 4, at 436-38.
81. *See id.* at 413-16.
82. *See id.* at 407-10, 413 n.69.
83. *See, e.g., id.* at 420-28.

awards closely for any error of law in the way in which arbitrators apply public law doctrine to interpret the parties' agreement.[84] Arbitrators know that a meaningful remedy awarded to a union will be challenged in court by the employer. There is less justification for courts to be deferential to arbitrators when the parties no longer have ongoing working relationships. Therefore, this threat of a higher standard of judicial review encourages arbitrators to adopt the principles underlying the successor doctrine that are embodied in federal common law.

In the third context, arbitrations against successors, the parties are in the process of establishing a relationship. This type of arbitration would not normally occur unless a successor voluntarily submitted to an arbitrator's jurisdiction; federal courts will rarely compel a successor to arbitrate.[85] Thus, arbitration will only occur if the new employer is seeking to use arbitration in order to resolve a problem that has its origins in the employees' relationship with their former employer. The successor, however, would not be using arbitration to deal with the problem unless it had retained at least a substantial segment of the predecessor's employees and wished to resolve a problem grounded in the predecessor's agreement, or it had assumed that agreement. Consequently, the arbitrator is again in a normal setting, dealing with the formation of a new ongoing relationship. The arbitrator will tend to interpret obligations arising out of the former agreement from a perspective that strikes a balance between vested employee expectations and the successor's freedom to establish new working conditions. In this situation, principles of public law successor doctrine play less of a role than they would in arbitrations against predecessors due to the change in the contextual nature of the dispute.[86]

In summary, the two Comments demonstrate that arbitrators share the tendency of the Board and the courts to protect economic efficiency and capital mobility. Arbitrators also tend, however, to avoid strong management rights positions as the starting place for their reasoning if the arbitration is part of an ongoing process of dispute resolution within a particular bargaining unit. Instead, they reason from principles which occupy the middle ground between labor and management. As the context of arbitration changes and arbitrators occupy a position more like that of judges confronted with a

84. *See, e.g.*, Hardin's Bakery, Inc. v. United Bakery & Confectionery Workers Union, Local 441, 877 F.2d 1541 (11th Cir. 1989).

85. *Compare* Comment, *Successorship Doctrine*, *supra* note 4, at 405-07 *with id.* at 411-12.

86. *See id.* at 428-36.

breakdown in the relationship between parties, there is increased reliance on public law doctrine.

Given the recent developments in Board and court doctrine in favor of a strong management rights position, unions may well find arbitration a more favorable forum for disputes over work preservation than the Board or the courts. Arbitrators share values similar to those of judges and Board members, and they may thus rule the same way; an arbitrator, however, is more likely to approach the dispute with an assumption of implied limits on management rights than is the NLRB.[87] Nonetheless, when public law doctrine does influence an arbitrator's interpretation of an agreement, such as when a successor clause is involved, the arbitrator normally does not challenge the substance of that doctrine because of the heightened standards of judicial review.[88] Thus, unions face a tension between selecting an arbitral forum that is more likely to rule in their favor in a specific work preservation dispute, and a public forum where they can seek incremental changes in the legal framework governing collective bargaining through the processing of disputes that raise questions about the assumptions underlying the framework.

V. EMPLOYEE STATUTORY ENTITLEMENTS AND ARBITRATION

Selective Discipline,[89] which analyzed the validity of more severe sanctions for union leaders, and *Weingarten Right*,[90] which examined an employee's right to have a union representative present at a disciplinary interview, provide additional examples of the way that a forum's context influences outcomes. In both areas, the NLRB and the courts have historically struggled with inherent tensions among statutory values as they have formulated the scope of statutory protections for union officials fulfilling their leadership roles. They have also struggled to define the statutory right of employees to demand procedural due process protections in disciplinary interviews. Because disputes in both areas are common, the Board needed to develop guidelines that would provide some predictability with regard to the respective statutory rights and obligations of labor and management.

In contrast, arbitrators are concerned primarily with predictability between the parties to a specific agreement. Arbitrators approach the discipline of union leaders from the perspective of whether there

87. *See* Lynch, *supra* note 1, at 328-31.
88. *See supra* note 84 and accompanying text.
89. Comment, *Selective Discipline*, *supra* note 4.
90. Comment, *Weingarten Right*, *supra* note 4.

was "just cause" for the discipline under the specific circumstances. In the context of a given situation, an arbitrator will balance the need for employer control over workplace discipline and the integrity of contract obligations against the obligation of the employer to treat employees equally.[91] Similarly, in disputes over employer investigatory interviews, arbitrators balance the employer's need to learn the facts of an incident against the need to maintain procedures that would promote employee perceptions of fairness and due process in the way discipline is determined.[92] As the Board and the courts refined the statutory scope of these Section 7 entitlements, arbitrators adjusted their approach to accommodate the changes, but they filtered the impact of these changes by making them an integral part of the parties' expectations.

For example, both the Board and arbitrators initially upheld the right of an employer to sanction a union official more severely than other employees committing the same basic offense.[93] In its decisions, however, the Board struggled with the tension between protecting the internal political autonomy of unions to decide how their leaders should deal with work stoppages in violation of no-strike clauses, and enhancing industrial peace by encouraging union leaders, under the threat of discipline by the employer, to protect the integrity of no-strike pledges.[94] As the Board's decisions evolved toward a general rule that was more protective of union autonomy, the Supreme Court issued a ruling in *Metropolitan Edison Co. v. NLRB*,[95] that mediated the conflict between the two policies. The Court affirmed the Board's effort to protect union autonomy by granting union officials an entitlement not to be differentially sanctioned, but at the same time it used the contractual nature of the parties' relationship to highlight the ability of management to purchase a contract entitlement allowing it to differentially sanction union officials.[96]

In its analysis of arbitral awards in disputes involving differential sanctions, *Selective Discipline* demonstrates the way in which the traditional concern of arbitrators with maintaining productivity, management's right to run its business, the integrity of the parties' bar-

91. Arbitrators normally strike this balance in favor of maintaining productivity. *See infra* note 97 and accompanying text.

92. Because following fair investigative procedures ultimately provided benefits for management by controlling supervisors conducting investigations and for employees by assuring fair procedures, arbitrators read the essential requirements of procedural due process into the meaning of just cause. *See infra* note 104.

93. *See* Comment, *Selective Discipline, supra* note 4, at 449-50 nn.34-38.

94. *See id.*

95. 460 U.S. 693 (1983).

96. *Id.* at 704-07; *see* Comment, *Selective Discipline, supra* note 4, at 444-45.

gain, and deference to accepted industrial practices has led most arbitrators to uphold more severe sanctions for union leaders.[97] Union autonomy within a specific bargaining unit in which the union was already strong enough to confront management by violating a no-strike clause was not a major concern of arbitrators. Once the Supreme Court settled the statutory entitlement with its decision in *Metropolitan Edison,* arbitrators adjusted. They simply made the union leaders' entitlement not to be more severely sanctioned the starting point for their analysis. Thus, the focus of arbitrators shifted from determining whether the entitlement existed to interpreting the contract and bargaining history in light of traditional concerns in order to determine if the entitlement had been waived through a no-strike clause.[98]

The Comment concluded that the contractual definition of the scope of the protection for union leaders makes arbitration the appropriate forum in which to resolve these disputes because the outcome will turn on the language of the contract and the understanding of the parties within each bargaining unit, as well as because keeping the disputes within specific bargaining units will reinforce industrial self-government.[99] My conclusions are to the contrary.[100] In order to protect the statutory policy of union autonomy, disputes over the waiver of the entitlement in the collective bargaining agreement should not be deferred to arbitration, but should instead be determined by the NLRB.[101] Arbitrators are less likely than the Board to apply the *Metropolitan Edison* standard of an explicit waiver because the requirement of an explicit waiver reflects a set of policy concerns that are external to the working relationships of the parties. Arbitrators are more likely to emphasize concerns internal to the bargaining unit when they interpret the agreement in order to decide the waiver issue. The statutory policy of protecting internal union autonomy is less central to an arbitrator's reasoning than it is to the reasoning of the NLRB.[102]

In contrast, *Weingarten Right* illustrated how the characteristics of arbitration could lead to an outcome more favorable to an individual employee seeking to invoke a Section 7 statutory entitlement than would be the case if the issue were resolved before the NLRB.[103] In

97. *See* Comment, *Selective Discipline, supra* note 4, at 453-59.
98. *See id.* at 461-62.
99. *See id.* at 465-66.
100. *See* Lynch, *supra* note 1, at 334-39.
101. *See id.* at 335-36.
102. *See id.*
103. *Compare* Comment, *Weingarten Right, supra* note 4, at 477-80 *with id.* at 482-87.

confronting what constitutes just cause, arbitrators tend to avoid second guessing the substance of management's decision to discipline, other than to ask whether the discipline was too severe given the nature of the rule violation. Instead, arbitrators focus on whether the rule was reasonable, whether employees were aware of the rule, and whether the investigation was fair.[104] These principles are aimed at correcting the way in which supervisors proceed in deciding whether to discipline so that the eventual decisions are more likely to be accepted by employees as fair under the circumstances. An employee's right to have a union official present during an investigatory interview is a logical extension of these concerns. Employees are more likely to accept the investigative process as fair if their representative is present. Moreover, the union is informed so that subsequent grievance procedures are more likely to resolve the dispute short of arbitration, and the presence of the union representative helps to assure that the supervisor conducting the investigation will proceed in accordance with accepted procedures.

Arbitrators initially struggled with the tension between deterring employee insubordination in the context of a disciplinary investigation and ensuring industrial due process.[105] Once the Supreme Court found the entitlement in Section 7,[106] arbitrators were more willing than the NLRB to grant a meaningful remedy to protect the entitlement.[107] Because the Board now limits its remedy to ordering an employer to cease and desist from refusing union representation at disciplinary interviews—unless the employee was disciplined for insubordination based on the employee's demand that a union representative be present during the interview—rather than ordering reinstatement and back pay for the employee whose procedural rights were violated, there is an incentive for unions to arbitrate these dis-

104. The traditional questions arbitrators ask in determining just cause for discipline are: (1) Did the company warn employees of the rule and possible discipline for its violation? (2) Is the rule reasonably related to the safe and efficient operation of the business? (3) Did management investigate the rule violation before deciding to discipline the employee? (4) Was the investigation fair and objective? (5) Was there sufficient evidence of the rule violation at the time management made the decision to discipline? (6) Has the rule been applied in an even-handed way to all employees? (7) Was the discipline that was administered reasonable in light of the rule violation and the employee's work record? *See* Grief Bros. Cooperage Corp., 42 Lab. Arb. (BNA) 555 (1964) (Daugherty, Arb.). The American Arbitration Association has accepted Arbitrator Daugherty's tests for determining just cause in discipline cases. *See* Indianapolis Rubber Co., 79 Lab. Arb. (BNA) 529, 534 (1982) (Gibson, Arb.).

105. *See* Comment, *Weingarten Right, supra* note 4, at 470-76.

106. *See* NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

107. For a description of the evolution of Board remedies subsequent to the Court's decision in *Weingarten*, see Comment, *Weingarten Right, supra* note 4, at 477-79. For arbitral remedies after *Weingarten*, see *id.* at 482-87.

putes instead of taking them to the Board.[108] In contrast, an arbitrator is more likely to seek a middle ground between the procedural violation and the underlying basis for discipline by giving the employee a limited remedy such as reinstatement without back pay.[109]

Given that arbitrators will tend to examine carefully the relationship between the decision to discipline and the *Weingarten* violation, a union that files an unfair labor practice charge over a *Weingarten* violation is seeking Board intervention for reasons that go beyond the dispute over discipline. If a regional director finds an evidentiary basis for the charge, deferral is inappropriate.[110] The dispute before the Board is really over the empowerment of workers reflected in their right to have a union representative present during the interview and protecting the union's voice in disciplinary procedures. Arbitration is an appropriate forum to challenge the discipline, but not to redress the statutory charges. Therefore, the NLRB should not defer a *Weingarten*-based unfair labor practice charge on the grounds that the union may challenge disciplinary just cause in arbitration.

VI. UNSETTLED ENTITLEMENTS IN ARBITRATION

Drug Testing[111] compared the reasoning of arbitrators in disputes over employer-imposed drug testing programs with fourth amendment jurisprudence resolving disputes over drug testing by public employers. Drug testing was selected as a topic for study because it illustrates how arbitrators deal with unsettled entitlements that the parties often do not discuss during bargaining and that collective bargaining agreements do not address.[112] In most controversies over management's discretion to unilaterally implement a drug testing program under a management rights clause, the arbitrator weighs management's right to impose reasonable workplace rules to foster productivity and to protect job safety against the employees' privacy interests and normal entitlement not to have employers regulate off-the-job conduct unrelated to job performance.[113]

Drug testing presents an interesting dilemma for arbitrators. If they justify their awards within the normal parameters of arbitral reasoning, the central issues will be whether the employer had reasonable suspicion to believe that the tested employee was under the influence

108. *See id.* at 477-79, 482-87.

109. *See id.* at 485-87.

110. *See* Lynch, *supra* note 1, at 335-36 (proposing a standard for deferral that would not include the deferral of a *Weingarten* violation).

111. *See* Comment, *Drug Testing, supra* note 4.

112. For a discussion of drug testing as an unsettled entitlement, see *id.* at 489-90.

113. *See id.* at 532-36.

of drugs, whether there was an accident or other work related incident that would justify testing in the absence of individualized suspicion, and whether the employer can produce evidence of substantial interference with productivity or job safety thereby justifying the testing of all employees irrespective of individual suspicion.[114] Under these traditional parameters, however, it would be difficult for an arbitrator to uphold a testing program aimed at demonstrating to the public that the employees in question are not using drugs.

Determining the reasonableness of the rule in terms of job safety, productivity, and individualized suspicion fits within the normal framework for examining just cause for discipline.[115] Random testing and programs designed to test all employees at the time of an annual physical, however, do not fit within this framework. In these circumstances, the dispute is not over the testing and discipline of a specific employee; instead, the dispute is over a program of testing that will intrude on the privacy of all employees and that will condition their continued employment on the way in which they spend their free time. In arbitration, an employer would normally have to make a substantial showing of the relationship between the drug testing rule and concerns over productivity and safety in the particular bargaining unit before the testing program would be upheld as a reasonable exercise of management's rights.[116] In contrast, fourth amendment jurisprudence permits drug testing without individualized suspicion under a balancing test: "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."[117] The Comment explored the impact of the fourth amendment balancing test on the normal "job-related" test of arbitrators and concluded that the constitutional decisions of the federal courts are having a major impact on the reasoning of arbitrators.[118]

For example, the types of industries where arbitrators have upheld testing, not based on individualized suspicion, directly parallel the categories where federal courts have permitted similar testing.[119] These categories include highly regulated industries reflecting general societal concerns over the product or service and industries or services

114. *See id.* at 523-25.
115. For the framework used by arbitrators to determine just cause, see *supra* note 104.
116. *See, e.g.*, Comment, *Drug Testing, supra* note 4, at 525-29.
117. Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1417 (1989).
118. *See* Comment, *Drug Testing, supra* note 4, at 535-38.
119. *See id.* at 525-29.

which pose a threat to the safety of persons or property.[120] This parallel result is not surprising because arbitrators tend to incorporate broader based societal values into their notions of industrial justice, a process of incorporation which is aptly illustrated by the integration of procedural due process concepts into the definition of "just cause."[121] We can expect, therefore, that the scope of testing by public employers that is held to be permissible under the fourth amendment will be found to be a reasonable exercise of management rights by arbitrators unless unions and employers agree on programs that are more limiting.[122]

There is, however, one type of justification for drug testing which courts have accepted but which arbitrators may view with more skepticism. Following *National Treasury Employees Union v. Von Rabb*,[123] courts are using three principal justifications for testing: (a) safety to fellow employees and the public;[124] (b) access to sensitive information;[125] and (c) public acceptance of the integrity of the workforce.[126] The first two justifications are consistent with the type

120. *See id.* at 525-28.

121. *See supra* note 104 and accompanying text.

122. A union may also agree with a private employer to allow a drug testing program that goes further than would be permitted in the testing of public employees under the fourth amendment, such as a program that randomly tests employees in an industry that is not highly regulated and that does not threaten the safety of third persons. One interesting issue not yet addressed in the public sector cases is whether unions may waive individual employees' fourth amendment rights by agreeing to drug testing plans that go further in testing than would have been permitted under court decisions interpreting the fourth amendment. The protection of individual statutory rights independent of the NLRA from a collective waiver would suggest that individual constitutional rights cannot be waived by unions. *See, e.g.*, Lynch, *supra* note 1, at 315-16.

123. 109 S. Ct. 1384 (1989).

124. *See* National Fed'n of Fed. Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989). The court relied on National Treasury Employees v. Von Raab, 109 S. Ct. 1984 (1989), and Skinner v. Railway Labor Executives' Association, 109 S. Ct. 1402 (1989), to uphold random testing of civilian employees of the Army, who were engaged in some aspect of aviation, on the ground of safety. *Cheney*, 884 F.2d at 610-11. The court also upheld the random testing of armed law enforcement personnel on the same grounds. *Id.* at 612-13. In the case of civilian employees engaged in chemical and nuclear safety positions, the court remanded for additional evidence on the tasks of different groups of employees in order to determine if the testing was reasonably based on a safety justification. *Id.* at 611; *see also* Harmon v. Thornburgh, 878 F.2d 484, 491 (D.C. Cir. 1989) (accepting public safety as a legitimate governmental interest to justify drug testing, but rejecting its application to Justice Department personnel who are not armed); Comment, *Drug Testing*, *supra* note 4, at 504-09.

125. *See Harmon*, 878 F.2d at 490-91 (Relying on *Von Raab*, the court accepted access to "truly sensitive" information as a justification for the random testing of persons with access to top secret national security information, but it also stated that not all federal prosecutors with access to grand jury proceedings fall within that class.); Comment, *Drug Testing*, *supra* note 4, at 504-08.

126. *See Cheney*, 884 F.2d at 613-15 (The court accepted the need for integrity and confidence in the employee as a justification for the Army to randomly test civilian drug

of issues an arbitrator would normally consider under a management rights clause.[127] The integrity issue, however, is more closely linked to the nature of a government service than to the nature of a privately provided service. Without some evidence to demonstrate that drug use does in fact impact on the quality of an employer's product, arbitrators may be less inclined than courts to accept testing based solely on the claim that the public must have confidence in the employees who perform certain tasks, such as customs officials involved in drug interdiction,[128] drug counselors,[129] or justice department attorneys trying drug cases.[130]

If arbitrators do define the scope of an employer's entitlement so that the employer may unilaterally impose testing consistent with fourth amendment jurisprudence, unions will have a difficult time bargaining for contract clauses that are more protective of employee privacy rights. Drug testing is not an issue about which employees share a common view. Some employees will strongly object to annual or random testing, while others may have a distinctly different view that is more influenced by overriding societal concerns about eradicating drug use. Given this potential for disparate views among employees, it is unlikely that a union would strike in opposition to a proposed testing program that has been accepted by the courts for public sector employees. Moreover, unions will feel pressured to agree to what the federal courts have found to be permissible under the fourth amendment because arbitrators are likely to follow the courts' lead in setting entitlements in the area of drug testing. Consequently, the decisions of federal courts and arbitrators are likely to determine the scope of drug testing, rather than collective bargaining.

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counselors, but not laboratory workers or persons who handle testing specimens in the chain of custody.); *Harmon*, 878 F.2d at 490-91 (Relying on *Von Raab*, the court accepted integrity as a justification for random testing in some circumstances and conceded, arguendo, that the justification would apply to Justice Department prosecutors with substantial responsibility for the prosecution of drug offenders, but not to all prosecutors.); Comment, *Drug Testing, supra* note 4, at 503-06.

127. *See* Comment, *Drug Testing, supra* note 4, at 520-28 (analyzing the factors that arbitrators consider in deciding if testing is reasonable in the context of a specific bargaining unit).

128. *See Von Raab*, 109 S. Ct. at 1397-98 (allowing testing of customs officials involved in drug interdiction).

129. *See Cheney*, 884 F.2d at 614 (permitting random testing of drug counselors).

130. *See Harmon*, 878 F.2d at 490 ("It seems quite possible that the Department might constitutionally fashion a random drug testing program for all DOJ [Department of Justice] employees having substantial responsibility for the prosecution of federal drug offenders.") (footnote omitted).

VII. CONCLUSION

There are two patterns which emerge from the student Comments in this Special Topics issue. First, when a union is challenging the scope of an employer's entitlement because there is a gap in a collective bargaining agreement or a clause limiting management discretion, the union is more likely to obtain a favorable outcome from arbitration than from the Board because recent Board and court opinions have taken a strong managment rights position.[131] Arbitrators, on the other hand, tend to analyze such disputes in the light of principles that incorporate implied limits on management rights. In contrast, when a dispute involves the claim of an employee statutory right under Section 7, the employee is more likely to obtain a favorable result before the Board than before an arbitrator if the statutory policy supporting the right is not incorporated as a matter of course within arbitral values. For example, although the protection of union autonomy is not a value that is integral to the system of administering collective bargaining agreements, fair procedures in the conduct of disciplinary investigations are an integral part of that system.[132]

These observations on the strategic forum shopping choices of unions are conditioned by recent substantive doctrinal developments favoring managerial discretion and control over the workplace under Board and court law. If *Milwaukee Spring Division of Illinois Coil Spring Co. (Milwaukee Spring I)*[133] were still the Board's position or if the Board had not retreated from the original reinstatement remedy for *Weingarten* violations,[134] the most likely forum for a favorable union result would be the Board and not an arbitrator. The more Board and court doctrines favor employers, however, the more likely it will be that unions will turn to arbitrators to resolve workplace disputes involving both statutory and contract entitlements. Although a union's decision to arbitrate may be rational in the context of a specific dispute, the consequence of turning to arbitration is that public law doctrines favoring management will be reinforced. Arbitrators reason in the shadow of these doctrines, and, as an integral part of the system of dispute processing under collective bargaining agreements, arbitrators are not in a position to challenge the underlying assumptions of the governing legal framework.[135] Thus, unions turn away

131. *See supra* notes 65-88 and accompanying text.

132. *See supra* notes 89-110 and accompanying text.

133. 265 N.L.R.B. 206 (1982), *rev'd on reh'g*, 268 N.L.R.B. 601 (1984) (*Milwaukee Spring II*), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985).

134. *See Weingarten Right, supra* note 4, at 477-78.

135. *See* Lynch, *supra* note 1, at 327-31.

from seeking a more favorable set of legal principles to govern the structure of collective bargaining and instead focus their efforts on specific gains through negotiations and dispute processing within particular bargaining units. The potential contribution of dispute processing to incremental changes in the ideology governing workplace relationships is bifurcated and limited in its impact.[136]

These observations support my argument that the Board should narrow the deferral doctrine.[137] If a union makes the choice to take a dispute to the Board in addition to, or in lieu of, arbitration, the union seeks to resolve the dispute in light of policies embodied in the NLRA. The union's goal is to encourage policies that foster solidarity among workers and that enhance the capacity of unions to mobilize support across bargaining unit lines for shared concerns of employees. These policies are external to particularized systems of private ordering. As long as a union has an arguable claim that issues of statutory policy are implicated in a dispute, the employer should not have the option to avoid confronting the policy issues by obtaining deferral to arbitration. Otherwise, the disputes and the implications of the way in which the disputes are resolved are submerged within the system of private ordering. The value conflicts implicit in the disputes become less visible and are not subjected to public debate over the scope of workers' rights. The free contract ideology underlying private ordering should not be used to justify the resolution of disputes over statutory policy by arbitrators who make decisions in accordance with their assumptions about the appropriate status relationship between employees and management.

136. *See id.* at 337-39.
137. *See id.* at 334-39.